WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EBERARDO RAMOS, *Applicant*

vs.

SUNSTONE CONSTRUCTION, INC.; REDWOOD FIRE AND CASUALTY INSURANCE COMPANY, adjusted by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ10405282
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the November 30, 2021 Amended Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a construction foreman on November 30, 2015, sustained industrial injury to his lumbar spine and nervous and digestive systems, and did not sustain industrial injury to his legs. The WCJ found in relevant part that applicant sustained 45 percent permanent partial disability.

Applicant contends that the vocational reports of applicant's vocational expert rebut the 2005 Permanent Disability Rating Schedule (PDRS) and establish that applicant is permanently and totally disabled.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been substituted in her place.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings.

FACTS

Applicant claimed injury to his lumbar spine, nervous system, legs, and digestive system, while employed as a foreman by defendant Sunstone Construction on November 30, 2015. Defendant admits injury to the lumbar spine and nervous system, and disputes injury to the legs and digestive system.

The medical-legal and procedural history are described in the WCJ's Opinion on Decision as follows:

> This case arises out of an admitted injury, on November 30, 2015, to the low back and nervous system of a 33-year-old construction foreman who was in the process, with a coworker, was in the process of bending a four-foot length of rebar when it snapped, sending both to the ground. Applicant reported the immediate onset of low back pain. Although he did not see a physician immediately, his pain failed to subside and he began treating for his injury within a few weeks, after which he was placed on light duty. According to his testimony, applicant looked over plans, performed supervisory tasks, perused jobsites and operated a variety of machines in a seated position. That continued for just over a year after the injury, until his employer terminated him, citing communication problems. Mr. Ramos disagrees with that rationale, given his tenure of roughly 16 years with the company, with no such problems reported in the past; he has filed a petition alleging that his termination violates section 132a.
>
> Applicant has continued to receive medical care since 2015. A lumbar MRI reportedly showed a disc protrusion at L5-S1. Back surgery has not been performed or recommended.
>
> The parties have engaged a qualified medical evaluator (QME), Diane Michael, D.C., whose four reports (two comprehensive evaluations and two supplemental reports) are in evidence. In her first evaluation, dated September 16, 2016, Dr. Michael defers an assessment of permanent impairment for reasons not stated. In that of October 6, 2017, the QME assigns a permanent impairment rating using the range-of-motion (ROM) method, with additional impairment for sensory and motor deficits and a specific spine disorder. In deposition testimony taken January 23, 2019, Dr. Michael explained that she believed the ROM method to be appropriate in this case because of the impact of applicant's disc herniation on the nerve roots (L5 and S1) immediately above and below that disc.

> The effect of applicant's back injury has included an emotional response, and he has been diagnosed with depression and anxiety related to that injury. This is without controversy.
>
> Both parties employed vocational evaluators, Jeff Malmuth for Mr. Ramos and Emily Tincher for defendant. In his report of August 28, 2018, Mr. Malmuth concludes that applicant has suffered a 63% loss of his "capacity to meet occupational demands," retaining some ability to engage in work but with an "impaired" amenability to vocational rehabilitation. Then, in a supplemental report dated April 29, 2019, this expert finds that Mr. Ramos is permanently incapacitated from employment. By contrast, Ms. Tincher, in brief summation, concludes, in reports dated September 3, 2019, and August 4, 2021, that applicant is able to benefit from rehabilitation, which is to say he remains employable.

(Opinion on Decision, at pp. 3-4.)

On October 4, 2021, the parties proceeded to trial and framed for decision the issues of injured body parts, permanent disability, apportionment, attorney's fees, and defendant's claim for overpayment of temporary total disability indemnity. (Minutes of Hearing & Summary of Evidence (Minutes), dated October 4, 2021, at p. 2:44.) The WCJ heard testimony from applicant and ordered the matter submitted for decision.

On December 1, 2021, the WCJ issued his F&A, determining in relevant part that applicant's injuries resulted in 45 percent permanent partial disability. (Finding of Fact No. 4.) The WCJ's Opinion on Decision observed that applicant sought to rebut the presumptively correct PDRS through vocational evidence prepared by applicant's expert Mr. Malmuth, but that the WCJ did not find the evidence to be persuasive. The WCJ opined:

> In this instance, I have not found the rebuttal evidence persuasive. In part, this is because of the essential inconsistency between the conclusions reached in Mr. Malmuth's initial comprehensive report and his next supplemental report, as pointed out in defendant's very capable trial brief. In part, it is also because the leap from an impairment rating in the mid-twenties (or less, under the DRE method) and permanent, total disability may represent a bridge too far. I did find Mr. Ramos's testimony to be credible, but I do not find it, coupled with his vocational expert's reports, so compelling as to overcome the conclusions of the medical expert employed in this case. The result is an award of permanent disability derived from those QME reports.

(Opinion on Decision, at p. 6.)

Applicant's Petition contends the vocational evidence supports rebuttal of the PDRS. Applicant observes that Mr. Malmuth performed an individualized assessment of applicant and interviewed applicant via Skype. (Petition, at p. 6:13.) Applicant notes that his credible testimony regarding "daily pain levels, depression and anxiety, functional limitations, and five years removed from the labor market, clearly supports a finding that he is unemployable, and 100% permanently disabled." (*Ibid*.) Applicant disputes the WCJ's determination of an "essential inconsistency" between Mr. Malmuth's initial report, wherein applicant's ability to benefit from vocational rehabilitation was "substantially impaired," and Mr. Malmuth's subsequent reporting finding that "applicant is in fact non-amenable for vocational rehabilitation, and has sustained a total loss of earning capacity." Applicant contends the change in opinion was premised on "additional individualized vocational factors not previously considered," and that the reporting reflected the vocational expert's further consideration of applicant's feasibility for vocational retraining. (*Id.* at p. 7:9.) In addition, applicant directs our attention to various Workers' Compensation Appeals Board panel decisions in which the vocational evidence supported a finding of permanent and total disability notwithstanding rated impairment levels of 50 percent and under. (*Id.* at p. 8:9.)

Defendant's Answer observes that applicant's vocational expert initially issued reporting finding applicant retained the ability to engage in the open labor market. In his August 28, 2019 report, Mr. Malmuth opined that applicant lost 74 percent of his access to the labor market, but that applicant would nonetheless "be able to avail himself of simple task oriented jobs within his residual pre-injury occupational base." (Answer, at p. 5:12.) However, in his April 29, 2019, report, Mr. Malmuth "does an about-face and concludes the Applicant is not amenable to rehabilitation and is unemployable," without citation to supporting evidence or adequate explanation for the change in conclusion. (*Id.* at p. 6:2.) Defendant maintains that to the extent that the expert has changed his opinions regarding vocational feasibility, the change is not reasonably supported by evidence. Defendant further observes that the reporting of Mr. Malmuth references nonindustrial body parts in his vocational rehabilitation analysis, that the reporting is internally inconsistent, and that applicant's prior injuries are subject to a "vocational apportionment" analysis. (*Id.* at p. 8:15.) Accordingly, the aggregate reporting of Mr. Malmuth does not constitute substantial evidence.

The WCJ's Report observes that applicant's petition appears to conflate percentages of impairment with percentages of permanent disability, and that in any event, "[t]he single piece of

evidence reviewed in Mr. Malmuth's second report, in which he departed from that opinion to reach the conclusion that applicant was unemployable, was a medical report by a treating physician, Dr. Massey, that describes applicant's activity level as increased from earlier and his pain, without medications, as (self-reported) three out of ten … It bears remembering that Mr. Ramos was working full-time, after his injury, for about a year until he was terminated." (Report, at pp. 4-5.) Accordingly, the WCJ remains "unpersuaded that [applicant] has successfully rebutted the scheduled permanent disability rating." (*Ibid*.)

DISCUSSION

The WCJ's award of permanent partial disability is based on the scheduled rating of the October 6, 2017, reporting of QME Dr. Michael. (Recommended Rating Instructions, dated October 4, 2021, at p. 1.) Applicant contends the vocational evidence rebuts his scheduled rating and supports a finding of permanent and total disability. (Petition, at p. 6:7.)

In *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30I] (Appeals Board en banc) (*Nunes I*), we held that Labor Code section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, but that the Labor Code makes no statutory provision for "vocational apportionment."

We further held that vocational evidence may be used to address issues relevant to the determination of permanent disability. While the Permanent Disability Rating Schedule (PDRS) is presumptively correct (see *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (2010) 187 Cal.App.4th 808, 826 [75 Cal.Comp.Cases 837]), "a rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning capacity is greater than that reflected in the PDRS." (*Nunes I, supra*, 88 Cal.Comp.Cases at p. 749.) Among the methods described for challenging a rating obtained under the PDRS was establishing that "the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating." (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624] (*Ogilvie*).) Our opinion in *Nunes I* made clear that "[t]he same considerations used to evaluate whether a medical expert's opinion constitutes substantial evidence are equally applicable to vocational reporting … [i]n order to constitute substantial evidence, a vocational expert's opinion

must detail the history and evidence in support of its conclusions, as well as 'how and why' any specific condition or factor is causing permanent disability." (*Id.* at p. 751.)

We also observed that while vocational evidence may be used to rebut the PDRS, such vocational evidence must nonetheless address apportionment and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. (*Id.* at pp. 743-744.) Examples of impermissible vocational evidence included assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions, or was able to adequately perform their job, or suffered no wage loss prior to the current industrial injury. (*Id.* at p. 754.) Accordingly, we concluded:

> Therefore, an analysis of whether there are valid sources of apportionment is still required even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury.

(*Ibid*.)

The applicant in *Nunes* filed a Petition for Reconsideration of our en banc decision, and on August 29, 2023, we issued our decision *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. P.D. LEXIS 46] (Appeals Board en banc) (*Nunes II*). Therein, we held that the validity of an apportionment analysis described by an evaluating physician is "not assumed and must be carefully weighed and determined by the WCJ." (*Id.* at p. 897.) We provided various examples of when an applicant might be entitled to an unapportioned award based on vocational evidence, such as when "the WCJ determines that no evaluating physician has identified valid legal apportionment," or when "the evaluating physician has carefully considered factors of apportionment, but has nonetheless determined that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability." (*Id.* at p. 898.) However, "when an evaluating physician identifies a valid basis for apportionment, such apportionment must be considered as part of any determination of permanent disability, including a vocational expert's evaluation of an injured worker's feasibility for vocational retraining." (*Id.* at p. 899.) Accordingly, we affirmed our decision in *Nunes I* that the vocational reporting in evidence did not meet the

minimum standards necessary to be considered substantial vocational reporting, and that principles of due process required development of the record.

It is well established that any decision, award or order of the Appeals Board must be supported by substantial evidence in light of a review of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) Moreover, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) Accordingly, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record…the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Ibid*.)

Here, we believe a final determination with respect to applicant's levels of permanent disability and factors of apportionment must be supported by substantial evidence in light of a review of the entire record. (*Lamb, supra,* 11 Cal.3d at p. 281.) We observe that insofar as the parties dispute the relative weight to be accorded to the vocational expert reporting in evidence, the vocational evidence in the record was adduced prior to our en banc decisions in *Nunes I* and *Nunes II*.

Accordingly, and following our independent review of the record[2] occasioned by applicant's Petition, we conclude that development of the record is consistent with principles of due process of law, and that allowing the evaluating physicians and/or vocational experts to supplement the record will provide the parties and the WCJ with a full and complete basis upon which to adjudicate the issues of permanent disability.

Accordingly, we will rescind the F&A and return this matter to the trial level for development of the record to include supplemental medical and/or vocational reporting, and for further proceedings and decision by the WCJ.

[2] We observe that insofar as a decision of the WCJ "must be based on admitted evidence in the record," the record of proceedings must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Bd. en banc).) Accordingly, the WCJ should ensure that all exhibits admitted in evidence are entered in EAMS with the appropriate exhibit designations. Here, it appears that some exhibits that were admitted at trial on October 4, 2021 may be missing in EAMS.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 30, 2021 Amended Findings and Award is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 26, 2026

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

EBERARDO RAMOS
KNOPP PISTIOLAS
FINNEGAN, MARKS, DESMOND & JONES

SAR/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*