WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PRISCILLA SILVA, *Applicant*

vs.

THE CALIFORNIA AUTISM FOUNDATION, INC.; CYPRESS INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ8973029
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings, Award & Orders (FA&O) issued on January 20, 2026, by the workers' compensation judge (WCJ). The WCJ found, in pertinent part, that applicant sustained injury arising out of and in the course of employment to her head, cervical spine, left shoulder, left elbow, left hand, psyche, and in the form of headaches resulting in 100% permanent disability without apportionment.

Defendant contends that the evidence does not justify the findings of 100% disability based on the medical reporting of Panel Qualified Medical Evaluators (PQME) Andrew Goldstein, M.D., Daniel Shalom, M.D., and Jed Sussman, Ph.D., arguing that applicant's vocational expert, Thomas Linder, M.S., improperly applied the work restrictions and ignored PQME Dr. Sussman's finding of 20% nonindustrial apportionment. Defendant also contends the WCJ erred in deciding the case under *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587] (*LeBoeuf*) without first conducting a proper rating analysis under the Permanent Disability Rating Schedule (PDRS) or an analysis under *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc) (*Vigil*). Furthermore, defendant relies on the reports of its vocational expert, Emily Tincher, M.S., as well as sub rosa video evidence (Def. Ex. I)[1] depicting applicant's volunteer activities at a haunted house, to argue that she remains amenable to vocational rehabilitation.

[1] We note in the Report and Recommendation on Petition for Reconsideration that the WCJ would provide a written summary of the sub rosa video, draft and serve a supplemental summary of evidence. (Report, p. 10.) However, we found no such summary in FileNet.

Alternatively, defendant argues that, if the medical-legal reporting regarding work restrictions and their direct relationship regarding vocational amenability was unclear, the WCJ had a duty to develop the medical record rather than allow a vocational expert to make independent medical determinations.

We have received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations in the Petition and defendant's Answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will affirm the WCJ's January 20, 2026 decision.

BACKGROUND

The parties stipulated that applicant, while employed on February 28, 2013 as a training coordinator, sustained an industrial injury to her head, cervical spine, left shoulder, left elbow, left hand and in the form of headaches and claims to have sustained industrial injury to her psyche and digestive system. (Minutes of Hearing and Summary of Evidence (MOH/SOE, 10/23/2025, 2:1-9.)

The primary issue the parties sought the WCJ to adjudicate was permanent disability. (MOH/SOE, 10/23/2025, p. 3:4-8.)

The parties jointly submitted into evidence the PQME reports of Dr. Goldstein (Joint Ex. 101), Dr. Shalom (Joint Ex. 102), and Dr. Sussman. (Joint Ex. 103.) Applicant and Defendant submitted into evidence vocational expert reports of Mr. Linder (App. Ex. 1) and Ms. Tincher (Def. Ex. H), respectively.

Applicant testified as follows:

On February 28, 2013, she rendered assistance for an agitated 20-year-old male client who stood approximately 6 feet 3 inches tall and weighed over 300 pounds. As she escorted the client down a narrow hallway, he suddenly struck her over the head with his fist and a portable compact disc player. The blow caused her to briefly lose consciousness, fall to the ground, and vomit (MOH/SOE, 10/23/2025, 7:15-18.) Following the assault, applicant drove herself to Richmond Urgent Care to treat with Lawrence Piazza, M.D., for immediate medical attention. (MOH/SOE, 10/23/2025, 7:19-21.)

Approximately three years after her injury, she underwent a cervical spine fusion at C4-C5. Her surgery proved unsuccessful, as it failed to decrease her pain or headache frequency. (MOH/SOE, 10/23/2025, 8:1-4.) Other physicians recommended surgeries for her left shoulder, left elbow, and bilateral carpal tunnel syndrome, but defendant's workers' compensation carrier denied authorization for these procedures. (MOH/SOE, 10/23/2025, 8:5-9; 9:7-8.) Applicant received psychiatric treatment to address her depression, which allowed her to express her emotions but did not alleviate her physical pain. (MOH/SOE, 10/23/2025, 9:13-18.) She currently takes no prescription medications for her headaches or neck pain, noting that over-the-counter medications proved ineffective and a previous Gabapentin prescription caused stomach bleeding. (MOH/SOE, 10/23/2025, 8:14-16; 15:20-23.)

Applicant experiences constant neck, left shoulder, and left elbow pain, accompanied by numbness radiating into her left hand. (MOH/SOE, 10/23/2025, 8:20-22; 8:25 to 9:1-4.) She suffers from intense headaches three to four times a week that require her to seek a quiet, dark environment to mitigate the symptoms. (MOH/SOE, 10/23/2025, 8:13-14, 8:17-19.) Orthopedic PQME Dr. Goldstein outlined strict work restrictions, instructing applicant to avoid lifting more than five pounds with her left upper extremity, performing work above the horizontal level, rotating her neck excessively, or engaging in repetitive flexion and extension of her left elbow and wrist. (MOH/SOE, 10/23/2025, 11:13-23.) Neurologic PQME Dr. Shalom corroborated her limitations, noting she might require accommodations to leave work or lie down unpredictably due to her headaches. (MOH/SOE, 10/23/2025, 11:24-25 to 12:1-4.) Applicant's vocational expert Mr. Linder stated that applicant barely used her left hand and relied on it primarily for support. (MOH/SOE, 10/23/2025, 19:2-8, 24:20-21.) Conversely, defendant's vocational expert Ms. Tincher suggested applicant could take college courses or work in a receptionist role. (MOH/SOE, 10/23/2025, 14:17-19.) Applicant disputed her ability to return to the workforce or school, citing severe cognitive difficulties, an inability to focus, memory deficits, and intense pain triggered by repetitive activities and computer use. (MOH/SOE, 10/23/2025, 14:19-22, 15:1-3). Sub rosa videos showed applicant driving, completing errands, and participating in a haunted house event. She explained her haunted house involvement consisted of unpaid, voluntary support for her partner, emphasizing she controlled her own schedule, avoided physical labor, and left the premises whenever her pain or anxiety escalated. (MOH/SOE, 10/23/2025, 12:5-17, 13:7-13.) Ultimately, she stated that she had not returned to work since the incident, was receiving Social Security Disability benefits,

and believed her progressively worsening condition completely precludes her from maintaining employment. (MOH/SOE, 10/23/2025, 11:12-13, 15:24-25 to 16:1-2.)

In his report dated February 3, 2020, PQME Dr. Goldstein, after evaluating applicant in the field of orthopedic medicine, noted that applicant's cervical spine MRIs demonstrated multilevel degenerative disc disease with persistent abnormalities at C5-C6, C6-C7, and C7-T1. (Joint Ex. 101, February 3, 2020, pp. 3.) The September 2, 2014 MRI showed a mildly congenitally narrowed spinal canal, with the anteroposterior diameter reduced to approximately 9 mm at C5-C6, C6-C7, and C7-T1 due to posterior disc bulging and posterior osteophytic ridging, resulting in neuroforaminal narrowing at those levels. (*Id.* at p. 11.) Subsequent clinical evaluations documented chronic cervical strain and chronic left C6-C7 radiculopathy. (*Id.* at p. 3.) A follow-up cervical MRI on August 1, 2016 demonstrated persistent pathology, including annular bulging at C5-C6 causing moderate spinal canal stenosis and bilateral neuroforaminal stenosis, essentially unchanged from the 2014 study, as well as a mild annular bulge at C6-C7 with moderate bilateral foraminal stenosis, greater on the left. (*Id.* at p. 19.) Due to the ongoing cervical stenosis and radiculopathy, applicant underwent an anterior cervical decompression, fixation, and fusion at C5-C6 and C6-C7 on October 3, 2016 by Santi Rao, M.D. (*Id.* at p. 4.)

The December 2, 2015 MRI of the left shoulder revealed focally severe distal supraspinatus tendinopathy without evidence of muscle atrophy. Additional findings included mild anterior downward sloping of the acromion, moderate degenerative and hypertrophic changes of the acromioclavicular joint, prominence of the coracoacromial ligament, and mild anterolateral subacromial spurring. These structural abnormalities contributed to narrowing of the acromial and supraspinatus outlet and were consistent with probable shoulder impingement syndrome. (*Id.* at pp. 4, 15.)

In his reevaluation report dated November 5, 2020, PQME Dr. Goldstein diagnosed applicant with status post cervical fusion, left cubital and carpal tunnel syndromes, and deemed her permanent and stationary. (Joint Ex. 101, November 5, 2020, p. 27.)

In his reevaluation report dated February 6, 2023, PQME Dr. Goldstein, for the cervical spine, assessed 15% whole person impairment (WPI) without apportionment utilizing the range of motion (ROM) method rather than the diagnosis-related estimate method after identifying an alternation to motion segment integrity due to a multi-level surgical fusion at C5-C6 and C6-7. Using the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), for flexion and extension,

he measured 30° for flexion (2% WPI) and 20° for extension (4% WPI). (AMA Guides, Table 15-12, p. 418.) For lateral bending measurements, he measured 30° on the right (1% WPI) and 30° on the left (1% WPI). (AMA Guides, Table 15-13, p. 420.) For rotation, he assessed 30° on the right (3% WPI) and 20° on the left (4% WPI) (AMA Guides, Table 15-14, p. 421) summing these individual deficits together for a subtotal of 15% WPI. For the spinal disorder, PQME Dr. Goldstein assessed an additional 9% WPI based on surgically treated disc lesions, finding that applicant exhibited residual medically documented pain and rigidity. (AMA Guides, Table 15-7, II (E), p. 404.) PQME Dr. Goldstein added 2% WPI for pain due to applicant's left lateral epicondylitis and carpal tunnel. (AMA Guides, Table 13-22, p. 343.) (Joint Ex. 101, February 6, 2023, at pp. 11-12.)

For the left shoulder, PQME Dr. Goldstein recorded flexion of 85° for 7% upper extremity (UE) impairment (4% WPI), and extension of 25° for 2% UE impairment (1% WPI). (AMA Guides, Figure 16-40, p. 476, Table 16-3, p. 439.) He recorded abduction of 85° for 4% UE impairment (2% WPI), and adduction of 25° (1% WPI). (AMA Guides, Figure 16-43, p. 477, Table 16-3, p. 439.) Finally, he recorded external rotation of 25° (1% WPI) for 1% UE impairment (1% WPI), (AMA Guides, Figure 16-46, p. 479, Table 16-3, p. 439). Adding these individual regional deficits summed to left shoulder impairment of 9% WPI. (*Id.* at p. 12.)

Finding a synergistic effect between the cervical spine and left shoulder conditions, PQME Dr. Goldstein opined that adding rather than combining by Combined Values Chart (CVC) resulting in a 35% WPI without apportionment is appropriate. (*Ibid.*)

Regarding work restrictions, PQME Dr. Goldstein precluded applicant from lifting more than five pounds with the left upper extremity and from performing work above the horizontal with the same extremity. She received further restrictions from tasks necessitating excessive neck rotation and from repetitive flexion and extension of the left elbow and left wrist. (*Ibid.*)

In his supplemental report dated May 8, 2023, PQME Dr. Goldstein did not change his opinion after reviewing sub rosa video of applicant and the vocational report of Ms. Tincher dated November 7, 2021. (Joint Ex. 101, May 8, 2023, pp. 2-3.)

In his report dated June 24, 2019, PQME Dr. Shalom, after evaluating applicant in the field of neurology, documented her cervicogenic migraine headaches, neck pain, and left shoulder internal derangement. (Joint Ex. 102, June 24, 2019, p. 1.) PQME Dr. Shalom noted that applicant then reported lifting limitations of two to three pounds, walking limitations of one to two blocks, and sitting or standing limitations of 15 minutes. (*Id.* at p. 3.) In his February 14, 2023, report,

PQME Dr. Shalom evaluated applicant again and noted that, while she still reported constant low-grade occipital headaches and migrainous episodes, her daily functional capabilities included lifting less than 5 pounds, walking for 15 to 20 minutes, and limited sitting. Regarding activities of daily living (ADLs), PQME Dr. Shalom observed that applicant no longer engaged in kayaking, swimming, or gym activities and had trouble with prolonged driving and reading. (Joint Ex. 102, February 14, 2023, p. 2-3.) PQME Dr. Shalom assessed for applicant's headaches 7% WPI without apportionment based on Class 1 impairment of the Cranial Nerve V (AMA Guides, Table 13-11, p. 331) but opined that she may have to stop or leave work because of either headaches, effects of medication, or a combination. (*Id.* at pp. 5-6.) In his March 23, 2023 supplemental report, PQME Dr. Shalom's opinion did not change after reviewing sub rosa video of applicant. (Joint Ex. 102, March 23, 2023, p. 3.) However, in his May 1, 2023 supplemental report, after further record review, he reduces the impairment from 7% WPI to 5% WPI. (Joint Ex. 102, May 1, 2023, p. 4.)

In his July 20, 2016 report, PQME Dr. Sussman, after evaluating applicant in the field of psychology, noted she sustained a physical assault at work resulting in severe anxiety and a diminishment of short-term memory. (Joint Ex. 103, July 20, 2016, pp. 2-3.) Applicant described significant impairments in ADLs where basic chores such as vacuuming or shopping left her depleted and required her to sleep. (*Id.* at p. 4.) PQME Dr. Sussman diagnosed her with an anxiety disorder and a pain disorder. (*Id.* at p. 7.)

During the June 10, 2023 evaluation, PQME Dr. Sussman observed applicant exhibiting a constricted range of emotion and a profoundly depressed mood following the end of a long-term relationship and a relocation to Nevada. (Joint Ex. 103, June 10, 2023, pp. 5-6.) Applicant reported a highly inhibited lifestyle characterized by an inability to clean her home and an avoidance of social interaction due to severe panic attacks. (*Id.* at p. 9.) PQME Dr. Sussman diagnosed applicant with a Pain Disorder Associated with Both Psychological Factors and a General Medical Condition along with Panic Disorder with Agoraphobia and a Major Depressive Episode. (*Id.* at p. 59.) PQME Dr. Sussman found applicant reached maximum medical improvement and assigned a Global Assessment of Functioning (GAF) score of 58 or 18% WPI. (*Id.* at p. 60, 62.) PQME Dr. Sussman apportioned 80% of applicant's psychological permanent disability to the February 28, 2013 injury while attributing the remaining 20% to nonindustrial familial stressors comprising 10% to anxiety and anticipated loss of her father and 10% to sadness from her deceased

mother. PQME Dr. Sussman concluded that the anxiety and fear of people render it improbable for applicant to work in the mainstream labor market in an unrestricted capacity. PQME Dr. Sussman also determined that there was a synergistic effect between applicant's physical pain and depression making addition of the WPIs more appropriate than the CVC because both induce within her inhibition and restriction. (*Id.* at p. 63.)

In his report on February 1, 2021, Mr. Linder, after evaluating applicant for vocational feasibility, documented that she possessed a high school diploma and completed a nine-month part time personal trainer course. Vocationally, applicant worked previously as a retail salesperson, bank teller, receptionist, physical therapy assistant, veterinary assistant, physical therapy office manager, staff assistant, and nonprofit program director. (App. Ex. 1, February 1, 2021, p. 6.)

Mr. Linder administered the Standard Progressive Matrices test where applicant scored in the 19th percentile based on 1966 chronological age norms and the 15th percentile using 1993 norms indicating a low average ability to learn new complex information. (*Id.* at p. 8.) The Wide Range Achievement Test demonstrated applicant reads at a college level. Mr. Linder noted applicant could not complete the math portion or the Minnesota Clerical Test due to severe migraine headaches and extreme pain levels. (*Id.* at p. 9.) Mr. Linder observed that applicant's pain and physical restrictions interfered with her ability to take the paper and pencil tests. (*Id.* at p. 10.) Regarding physical and mental work activities, Mr. Linder observed that applicant cannot lift more than 10 pounds on her right side and has minimal strength in her left dominant hand. She cannot pinch, grasp, or perform fine motor activities with her left hand and typing causes her fingers to go numb. Mentally constant headaches severely limit her ability to look at computer screens and panic attacks restrict her social interactions. (*Id.* at pp. 4-5.)

With respect to employability, Mr. Linder explained that applicant demonstrated minimal physical tolerance for sub-sedentary activities like sitting and talking as well as taking paper and pencil tests. (*Id.* at p. 8.) Based on the medical opinions from PQME Dr. Shalom regarding unpredictable headaches and PQME Dr. Goldstein regarding severe orthopedic restrictions, Mr. Linder concluded applicant could not maintain competitive employment and, based on the opinions of PQME Dr. Shalom and PQME Dr. Goldstein, her total loss of future earnings directly resulted from the February 18, 2013 injury. (*Id.* at pp. 17-18.)

In his supplemental report on December 29, 2023, Mr. Linder reviewed updated work restrictions including PQME Dr. Goldstein limiting applicant to lifting no more than five pounds

with the left upper extremity. Additionally Mr. Linder incorporated PQME Dr. Sussman's finding of severe psychological impairments including panic disorder and major depression. (Joint Ex. 101, December 29, 2023, p. 2.) Mr. Linder concluded that the orthopedic and neurologic restrictions alone preclude applicant from any work and, adding the psychological restrictions, makes it clear, notwithstanding 20% nonindustrial psychological apportionment, she is incapable of returning to the open labor market. Mr. Linder determined applicant is not amenable to vocational rehabilitation and experiences a 100% diminished future earning capacity directly resulting from February 18, 2013 injury rendering her uncompetitive for any work. (*Id.* at p. 4.)

In her report dated November 7, 2021, Ms. Tinder, after evaluating applicant for vocational feasibility, stated that applicant demonstrated normal cognitive functioning with a Montreal Cognitive Assessment score of 26 and a 50th percentile demonstrating average learning ability on the Raven's Progressive Matrices. Educational testing indicated reading and spelling skills at a 12th grade level which Ms. Tincher concluded demonstrates readiness for college coursework or vocational training. (Def. Ex. H, November 7, 2021, pp. 15-16.) Reviewing physical capabilities and ADLs, Ms. Tincher noted applicant manages personal grooming, performs light laundry, shops independently on occasion, and utilizes a smartphone for communication. (*Id.* at pp. 11, 14, 40.)

Ms. Tincher reviewed PQME Dr. Goldstein's prophylactic restrictions of no lifting more than five pounds with the left upper extremity, no repetitive work above the horizontal plane with the left upper extremity, no excessive neck rotation, and no repetitive flexion or extension of the left elbow or wrist. In addition, Ms. Tincher reviewed PQME Dr. Shalom's work preclusions for headaches comprising needing to stop or leave work. Ms. Tincher also reviewed findings from pain management physician PQME Christopher Chen, M.D., precluding lifting, pushing, or pulling more than 10 pounds. (*Id.* at p. 28.) Ms. Tincher concluded that applicant is amenable to vocational rehabilitation because available jobs fall within her physical and cognitive capacities. (*Id.* at p. 32.) Ms. Tincher substantiated her conclusion by noting that applicant could manage headache symptoms through reasonable accommodations allowing intermittent time off without interfering with essential job functions. Furthermore, Ms. Tincher emphasized that applicant possesses average intelligence and academic readiness for college or vocational training. Ms. Tincher highlighted that applicant demonstrated advanced vocational skills equivalent to a college degree and familiarity with voice activated software. (*Id.* at p. 33.) Finally, Ms. Tincher reasoned that applicant could utilize

work-at-home opportunities, which would allow flexible positioning and eliminate face-to-face interactions with the public. (*Id.* at p. 34.)

In her supplemental report dated December 15, 2021, Ms. Tincher reviewed sub rosa video surveillance of applicant from December 6, 2017 to April 7, 2021 to assess her physical capabilities. Ms. Tincher recorded observations of applicant driving independently, walking without apparent limitation, carrying light items, and reaching overhead to close a vehicle hatchback with her right arm. Ms. Tincher determined that applicant did not display severe pain behaviors, neck stiffness, or lack of cervical mobility. (Def. Ex. H, December 15, 2021, p. 6.) Ms. Tincher concluded that the sub rosa video evidence remained consistent with the medically specified physical work restrictions and affirmed her prior opinion establishing the feasibility of applicant for vocational rehabilitation. (*Id.* at p. 7.)

In her supplemental report dated March 5, 2025, Ms. Tincher reviewed the June 10, 2023 psychological evaluation by PQME Dr. Sussman, which diagnosed pain disorder, panic disorder with agoraphobia, and a major depressive episode. (Def. Ex. H, March 5, 2025, p. 2.) PQME Dr. Sussman apportioned 20% of the psychological permanent disability to nonindustrial factors—specifically assigning 10% to the anticipated loss of her father and 10% to the loss of her mother, deeming a return to work improbable due to anxiety. (*Id.* at p. 3.) Ms. Tincher noted that other nonindustrial life stressors, such as marital loss and relocation, produced a synergistic effect that reduced applicant's ability to participate in rehabilitation. (*Id.* at p. 12.) However, Ms. Tincher opined that omitting these nonindustrial factors and applying the 20% apportionment adjusts applicant's GAF score to a mild impairment level, resulting in no psychological barrier to vocational rehabilitation. (*Id.* at pp. 12-13.)

In her supplemental report dated March 5, 2025, Ms. Tincher reviewed PQME Dr. Sussman's June 10, 2023 report diagnosing pain disorder, panic disorder, and major depression. (Def. Ex. H, March 5, 2025, p. 2.) PQME Dr. Sussman apportioned 20% of the psychological permanent disability to nonindustrial factors such as family illness and relationship loss and deemed return to work improbable due to anxiety. (*Id.* at p. 3.) However, she criticized the apportionment analysis as illogical and inconsistent with the medical records. (*Id.* at pp. 10, 11-12.) Nonetheless, Ms. Tincher concluded that the 20% nonindustrial psychological apportionment and nonindustrial life stressors created a synergistic barrier to rehabilitation. (*Id.* at pp. 11-12.) Ms. Tincher opined that extracting these nonindustrial factors result in no ratable impairment and no psychological barrier to vocational rehabilitation. (*Id.* at pp. 12-13.)

In her supplemental report dated August 15, 2025, Ms. Tincher opined that Mr. Linder's December 29, 2023 vocational report failed to apply correctly the 20% psychological apportionment to his vocational analysis. Ms. Tincher concluded that applicant remains physically able to work in entry-level jobs with minimal lifting, and applying the 20% nonindustrial apportionment to her mental limitations increases applicant's ability to benefit from vocational rehabilitation. (Def. Ex. H, August 15, 2025, p. 3.)

On January 20, 2026, the WCJ issued his FA&O that applicant sustained injury arising out of and in the course of employment to her head, cervical spine, left shoulder, left elbow, left hand, psyche, and in the form of headaches resulting in 100% permanent disability without apportionment. In the Opinion on Decision, the WCJ relied on the vocational reporting of Mr. Linder finding applicant unable to obtain employment in the open labor market and rejected the 20% nonindustrial apportionment per PQME Dr. Sussman. (Opinion on Decision, pp. 9-17.)

It is from this FA&O that defendant seeks reconsideration.

DISCUSSION

I.

Former Labor Code section 5909[2] provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, the Legislature PQMEnded section 5909 to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under current section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days after the district office transmits the case to the Appeals Board. Otherwise, the

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

petition stands denied by operation of law. Section 5909(b) requires the trial judge to notify the parties and the Appeals Board upon transmission. It further provides that service of the Report and Recommendation under section 5900(b) satisfies this notice requirement.

The Electronic Adjudication Management System (EAMS) reflects transmission through the Case Events entry labeled "Sent to Recon," with the additional notation "The case is sent to the Recon board."

Here, according to Case Events, the district office transmitted this case to the Appeals Board on March 27, 2026, and 60 days from the date of transmission is May 26, 2026. This decision issues on May 26, 2026, so that we have timely acted on the petition as required by section 5909(a).

Here, the proof of service for the Report demonstrated service and transmission to the Appeals Board on March 27, 2026. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on March 27, 2026.

II.

Permanent disability refers to the lasting, irreversible effects of an injury. It includes conditions that impair earning capacity, limit the normal use of a body part, or create a competitive disadvantage in the labor market. Permanent disability payments compensate workers for both physical loss and the reduction, partial or total, of their future earning potential. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565].)

An employee may challenge the scheduled permanent disability rating by proving a calculation error or an omission of medical complications, or that the injury prevents rehabilitation and causes a greater loss of future earning capacity than the PDRS reflects. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1277 [76 Cal.Comp.Cases 624].) With respect to vocational evidence, where an employee's work restrictions due to industrial factors cause the loss of their ability to compete for jobs on the open labor market, this would result in a total loss of earning capacity and permanent total disability. (*Contra Costa County v. Workers' Comp. Appeals Board* (*Dahl*) (2015) 240 Cal.App.4th 746, 757 [80 Cal.Comp.Cases 1119]; *LeBouef, supra*,

34 Cal.3d at pp. 245-246; *Soormi v. Foster Farms* [2023 Cal. Wrk. Comp. P.D. LEXIS 170, *11-12] citing *Wilson v. Kohls Dep't Store* [2021 Cal. Wrk. Comp. P.D. LEXIS 322, *20–23.].)[3]

In *LeBoeuf*, the Supreme Court applied a standard of labor market reality stating that, "A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability." (*LeBouef, supra* 34 Cal.3d at pp. 245-246.) The court concluded, "This is to ensure that the permanent disability rating upon which an award is based accurately reflects both the permanent medical and vocational disabilities." (*Id.* at p. 243.)

Accordingly, to rebut the PDRS and establish permanent total disability, applicant must prove the following:

1) Applicant has received a work restriction(s), which requires substantial medical evidence.
2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires vocational expert evidence.
3) The work restriction(s) precludes applicant from competing on the open labor market, which requires vocational expert evidence.
4) The cause of the work restriction(s) is 100% industrial, which requires substantial medical evidence.

(*Valdovinos v. Universal Site Services, Inc.* [2025 Cal. Wrk. Comp. P.D. LEXIS 76, *14]; *Fiore v. Los Angeles Community College District* [2024 Cal. Wrk. Comp. P.D. LEXIS 297, *16-17].)

In *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court concluded that impairments "are generally combined" using the CVC, but the "scheduled rating [under the CVC] is not absolute" and other methodologies may be used to calculate permanent disability. (*Id.* at pp. 613-614.)

For example, in *Athens Administrators v. Workers' Comp. Appeals. Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied), the Appeals Board concluded that impairments resulting from

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

a cumulative injury to the bilateral hips can be added together where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating of the level of disability than the rating that results from using the CVC. (See *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ denied) [requires following a physician's opinion as to the most accurate rating method if they provide a reasonably articulated medical basis for doing so and does not require use of the term "synergistic"].)

In *Vigil*, the Appeals Board held that an injured employee may rebut the CVC under the PDRS and combine impairments upon establishing the impact of each impairment on ADLs. To do so, the employee must demonstrate either that the rated body parts affect separate and distinct ADLs with no overlap, or that any overlap in the affected ADLs results in an increased or amplified overall functional impact. The Appeals Board explained that medical expertise is required:

> In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the *medical evidence* demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.

(*Vigil, supra,* 89 Cal.Comp.Cases at p. 692, italics added.)

Finally, the law requires the Appeals Board to base its decisions on substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, a medical or vocational opinion must state its conclusions in terms of reasonable probability, avoid speculation, rely on pertinent facts and an adequate examination and history, and explain the reasoning supporting its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Medical and vocational reports do not constitute substantial evidence when they contain known errors or rely on facts that are no longer germane, inadequate medical histories or examinations, or incorrect legal theories. Likewise, a medical or vocational opinion cannot support the Appeals Board's findings if it rests on surmise, speculation, conjecture, or guesswork. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Accordingly, the Appeals Board may reweigh the evidence and reach a decision different from the WCJ's determination when other

evidence of substantial probative value supports a contrary conclusion. (*Lamb*, *supra*, 11 Cal.3d at p. 281; *Garza*, *supra*, 3 Cal.2d at pp. 318-319.)

Here, in evaluating the permanent disability rating methodology, PQME Dr. Goldstein's conclusion that adding rather than the CVC to aggregate the cervical spine and left shoulder impairments is more accurate fails to constitute substantial medical evidence. Under *Vigil*, an evaluating physician may rebut the CVC only by articulating how the rated body parts affect separate and distinct ADLs or how overlapping ADLs result in an amplified overall functional impact. An employee must present evidence explaining the specific impact the impairments have upon their ADLs to justify departing from the CVC table. Unfortunately, PQME Dr. Goldstein merely posits a "synergistic effect" between the cervical spine and the left shoulder to justify adding the impairments to reach 35% WPI. However, this conclusory assertion rests on guesswork and fails to explain explicitly the supporting reasoning to constitute substantial evidence. Because PQME Dr. Goldstein fails to detail the specific impact upon applicant's ADLs or document the functional absence of overlap required to rebut the schedule, his methodology does not comport with the evidentiary standards we require under *Vigil*.

In addition, we also find PQME Dr. Sussman's opinion to add the physical pain and psychological WPIs to be similarly flawed. While he also finds a "synergistic effect," based merely on inhibition and restriction, he failed to provide any further specificity regarding its impact on applicant's ADLs. Therefore, we must also find his opinion unpersuasive.

However, the vocational reporting of Mr. Linder constitutes substantial vocational evidence supporting a finding of 100% diminished future earning capacity, proving far more persuasive and better reasoned than the reporting of Ms. Tincher. To establish permanent total disability, the evidentiary record must demonstrate that medically imposed work restrictions preclude rehabilitation and effectively remove applicant from the open labor market.

Mr. Linder grounds his vocational analysis firmly in the strict prophylactic medically driven work restrictions, relying on pertinent facts and an adequate history. Specifically, he incorporates in his findings PQME Dr. Goldstein's preclusion from lifting over five pounds with the left upper extremity, PQME Dr. Shalom's documentation of unpredictable headaches requiring applicant to stop or leave work, and PQME Dr. Sussman's findings of severe psychological impairments, including panic disorder. Applying the standard of labor market reality, Mr. Linder provides a logically sound, individually-centric, explanation that applicant's profound lack of physical tolerance for even sub-sedentary activities, coupled with cognitive interference from constant migraines and

an inability to navigate social interactions due to panic attacks, renders her entirely uncompetitive for any work.

Conversely, Ms. Tincher's conclusion that applicant remains amenable to vocational rehabilitation rests on flawed premises and an overly rigid application of the medical evidence. Ms. Tincher relies heavily on applicant's performance of intermittent daily activities depicted in sub rosa video surveillance, such as independent driving and light shopping, to extrapolate an ability to work. However, the capacity to perform episodic, self-paced personal errands does not equate to the ability to sustain competitive employment in the open labor market. Furthermore, Ms. Tincher dismisses the severe vocational impact of applicant's unpredictable, migraine-induced work stoppages by relying strictly on PQME Dr. Shalom's failure to assign formal work preclusions, even though she acknowledges he explicitly noted applicant might need to stop or leave work due to headaches. This strict adherence to the lack of formal prophylactic restrictions ignores the practical reality that frequent, unpredictable absences render an individual unemployable.

Most fatally, Ms. Tincher's conclusion hinges on a mathematical extraction of PQME Dr. Sussman's 20% nonindustrial psychological apportionment to argue that applicant faces no psychological barrier to vocational rehabilitation, despite acknowledging that applicant's life stressors create a "synergistic effect" that reduces her ability to participate. This reliance is inherently contradictory. Ms. Tincher herself explicitly criticizes PQME Dr. Sussman's apportionment formulation as "illogical" and "inconsistent" with the medical record, yet she ultimately adopts his 20% reduction artificially raising applicant's GAF score into the non-disabling range. Because, for the reasons discussed in paragraph III, PQME Dr. Sussman's 20% nonindustrial apportionment fails to constitute substantial medical evidence, Ms. Tincher's reliance on this defective calculation renders her derivative vocational opinion equally unpersuasive. Where Ms. Tincher minimizes the synergistic impact of applicant's orthopedic, neurologic, and psychiatric deficits to arrive at a theoretical return to work, Mr. Linder comprehensively synthesizes the actual medical preclusions to assess applicant's practical employability. Therefore, Mr. Linder's well-reasoned opinion justifies the finding of 100% permanent disability.

III.

Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors, to allocate legal responsibility fairly. (*Brodie v. Workers' Comp. Appeals Bd.* (2007)

40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 911 [70 Cal.Comp.Cases 787.].)

To comply with section 4663, a physician must do more than simply state the cause of disability and assign approximate percentages of industrial and nonindustrial contribution. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687]; *Mills v. State Comp. Ins. Fund* (2025) 91 Cal.Comp.Cases 64, 68 [2025 Cal. Wrk. Comp. P.D. LEXIS 305]; *Anaya v. State Dep't of Corr.* [2022 Cal. Wrk.Comp. P.D. LEXIS 262, *23].)[4] A proper apportionment analysis requires the physician to first identify all factors contributing to applicant's permanent disability, both prior to and following the industrial injury, and then determine the approximate percentage of overall permanent disability attributable to each factor. (*Mills, supra*, 91 Cal.Comp.Cases at p. 69.)

A physician must determine apportionment based on causation, because an employer is liable solely for the portion of permanent disability directly attributable to an injury arising out of and occurring in the course of employment. (Lab. Code, §§ 4663(a) and 4664(a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc) (*Escobedo*).) Apportionment now includes pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial evidence establishing that these other factors have caused permanent disability. Pursuant to *Escobedo*, a physician's opinion must constitute reasonable medical probability, must not be speculative, rely on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of the conclusions. (*Id.* at p. 621.) That is, a physician must explain the "how and why" of their apportionment opinion and consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or condition. (*Ibid.; Benson v. Permanente Med. Group* (2007) 72 Cal.Comp.Cases 1620, 1622 (Appeals Board en banc).)

In explaining the "how and why" of apportionment to a preexisting condition, a physician must demonstrate that, even absent the industrial injury, a portion of the disability would have

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

resulted from the natural progression of the underlying condition. (See *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 454 [45 Cal.Comp.Cases 170] (*Normand*).)

Ultimately, the burden of proof to establish apportionment falls on defendant. (*Id.* at p. 456; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In other words, an employee does not have the burden of disproving apportionment while defendant remains passive. (*Alcantar v. Martinez* [2025 Cal. Wrk. Comp. P.D. LEXIS 231, *9]; *Moraido v. County of San Diego* [2024 Cal. Wrk. Comp. P.D. LEXIS 375, *13, fn. 3]; *Arias v. William Roofing Co.* [2024 Cal. Wrk. Comp. P.D. LEXIS 29. *5]; *Matias v. Naturipe Berry Growers* [2024 Cal. Wrk. Comp. P.D. LEXIS 52, *4]; *Herrera v. Maple Leaf Foods* [2018 Cal. Wrk. Comp. P.D. LEXIS 430, *15].)

With respect to vocational expert evidence, pursuant to *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc) (*Nunes I*), the Appeals Board held as follows:

1. Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."

2. Vocational evidence may address issues relevant to the determination of permanent disability.

3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

(*Id.* at pp. 743-744.)

In addition, "[v]ocational evidence may also be used to parse permanent disability caused by multiple body parts or systems" to determine if applicant's permanent total disability was related to a single body part. (*Id.* at pp. 751-752.) In other words, "a finding of permanent and total disability notwithstanding the presence of valid nonindustrial apportionment is permissible, so long as the medical and vocational evidence establishes that the permanent and total disability arises solely out of industrial conditions or factors, that is, exclusive of nonindustrial or prior industrial conditions or factors." (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894, 900 (Appeals Board en banc) (*Nunes II*); see *Pacific Compensation Insurance Co. v. Workers' Comp. Appeals Bd. (Nilsen)* (2013) 78 Cal.Comp.Cases 722, 726-727 (writ denied). ("[T]he fact that there

is apportionment of the disability as to one (or more) parts of body does not mean that the totality of purely industrial factors cannot by themselves render a worker totally disabled.")

The Appeals Board noted that it "does not require the application of invalid apportionment by the parties or by the WCJ, and in those instances where there is a significant question as to the validity of a physician's medical apportionment opinion, the vocational expert is free to offer their analysis in the alternative." (*Nunes II, supra*, 78 Cal.Comp.Cases at p. 903.)

Accordingly, to constitute substantial evidence, the opinions of both the evaluating physician and the vocational expert must set forth the history and evidentiary basis for their conclusions, including an explanation of "how and why" a condition or factor results in permanent disability. (*Nunes I*, *supra*, at p. 896.)

Here, PQME Dr. Sussman's attribution of 20% of the applicant's psychiatric permanent disability to nonindustrial familial stressors does not rise to the level of substantial medical evidence. PQME Dr. Sussman apportions 10% of the permanent disability to anxiety regarding the anticipated loss of applicant's father and 10% to sadness surrounding her deceased mother. However, PQME Dr. Sussman merely identifies life stressors without articulating how these specific familial circumstances actively contribute to a permanent occupational disability or restrict her capacity to function in the labor market. Identifying a source of grief is not legally synonymous with establishing a cause of permanent disability. Without a reasonably probable medical explanation linking the nonindustrial stressors to the actual permanent disability, PQME Dr. Sussman's 20% nonindustrial apportionment remains speculative and legally defective. Consequently, defendant has failed to meet its burden of proof to establish valid apportionment.

Conversely, Mr. Linder's vocational reporting regarding apportionment constitutes substantial evidence. Recognizing the legal deficiencies in PQME Dr. Sussman's 20% nonindustrial apportionment, Mr. Linder appropriately declined to integrate those speculative familial stressors into his vocational paradigm. Instead, he properly parsed the permanent disability, grounding his assessment entirely in the valid medical evidence that the lack of employability flows from the orthopedic and neurologic restrictions that have no apportionment to nonindustrial factors. He meticulously explained the "how and why" the purely industrial factors, specifically applicant's profound orthopedic limitations and unpredictable, industrially related migraines, independently and entirely preclude her from competing in the open labor market. By demonstrating that applicant's 100% permanent disability arises solely out of industrial conditions, exclusive of any nonindustrial factors, Mr. Linder's analysis aligns perfectly with the evidentiary standards of section 4663.

Therefore, his conclusion that 100% of applicant's diminished future earning capacity directly results from the industrial injury is persuasive, logically sound, and constitutes substantial evidence supporting an award without apportionment.

Finally, while defendant invites us to order development of the record to cure any evidentiary defects, we find no reasonable basis under the circumstances to do so.

IV.

Turning to the procedural completeness of the record, the WCJ's omission of a formal summary detailing the sub rosa video evidence does not constitute fatal error, nor does it disturb the ultimate finding of 100% permanent disability. The evidentiary value of surveillance footage typically lies in its capacity to impeach an employee's subjective complaints or to compel medical-legal evaluators to revise their clinical assessments of functional capacity. In this instance, the record establishes that the sub rosa footage achieved neither. Both orthopedic PQME Dr. Goldstein and neurologic PQME Dr. Shalom formally reviewed the sub rosa video and unequivocally maintained their stringent prophylactic work restrictions. Crucially, Ms. Tincher, whose opinion defendant relied upon, expressly conceded that the mundane activities captured on film, such as driving, walking, and carrying light items, remained entirely consistent with the physical limitations established by the medical record. Moreover, applicant provided credible, unrefuted testimony contextualizing her limited involvement at the haunted house as a self-paced, non-physical endeavor that she abandoned whenever her pain or anxiety escalated. Because the sub rosa video merely corroborated the existing medical consensus rather than contradicting it, the WCJ's failure to author a granular summary of the video is, at most, a harmless procedural oversight that does not dilute the substantial evidence supporting the 100% permanent disability award.

Accordingly, we affirm the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Award & Orders issued on January 20, 2026 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 26, 2026

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

PRISCILLA SILVA
IVANCICH & COSTIS, LLP
LAUGHLIN, FALBO, LEVY & MORESI, LLP

DLP/md

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