WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TIMOTHY SMITH, *Applicant*

vs.

UNITED PARCEL SERVICE, INC.; LIBERTY INSURANCE CORPORATION, *Defendants*

Adjudication Number: ADJ2876196 (VNO 0513063)
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings, Award & Order (FA&O) issued on April 7, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that, while employed as a loader, unloader and sorter for defendant the United Parcel Service, Inc., applicant sustained injury arising out of and in the course of his employment during the period September 26, 2000 to June 16, 2004 to his lumbar spine, testicular region, erectile dysfunction and psychiatric system causing 61% permanent disability.

Applicant contends that the WCJ erred in not relying on the vocational expert (VE) report of Laura M. Wilson, MBA, who concluded that applicant was not amenable to vocational rehabilitation. Applicant further contends that the WCJ erred in not relying on Qualified Medical Evaluator (QME) Marc Nehorayan, M.D., who concluded that the combination of psychiatric and orthopedic injuries rendered applicant permanently totally disabled, and that, based on the opinion of QME Dr. Nehorayan, defendant's VE Paul Broadus, M.A., also concluded that applicant was not amenable to vocational rehabilitation.

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

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[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

We have considered the allegations in applicant's Petition and defendant's Answer, and the contents of the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will amend the FA&O to defer the issues of permanent disability and attorney fees, including the issue of a credit against temporary or permanent disability indemnity for attorney fees (Finding of Fact 11; Award a, b), and otherwise affirm the decision.

BACKGROUND

Applicant, while employed during the period September 26, 2000 to June 16, 2004, as a loader, unloader and sorter, sustained an industrial injury to his lumbar spine, testicular region, erectile dysfunction and psychiatric system.

The parties jointly offered into evidence medical reports of Agreed Medical Evaluators (AMEs) Alvin Markovitz, M.D. (Joint Exs. AA-DD) and Jeffrey A. Berman, M.D. (Joint Exs. EE-GG). Applicant offered into evidence a QME report of Dr. Nehorayan (App. Ex. 13) and reports of VE Ms. Wilson (App. Ex. 14-16). Defendant offered into evidence a QME report of Raymond Friedman, M.D., Ph.D. (Def. Ex. D) and reports of VE Mr. Broadus (Def. Ex. E-F).

On January 13, 2022, the parties proceeded to trial. Among the issues submitted was applicant's permanent disability.

Applicant testified that, around June 14, 2004, he unloaded a 22-foot trailer containing items weighing 70 pounds or more over a three-day period. (Minutes of Hearing/Summary of Evidence (MOH/SOE), 01/13/2022, 8:15-16.) This caused his testicles to retract with subsequent low back and sciatica pain as well as occasional urinary hesitancy and erectile dysfunction. (MOH/SOE, 01/13/2022, 8:18-25.) His sciatica causes numbness in his right calf causing his knee to give out and him falling after his lumbar spine surgery involving metal fusion with screws that have loosened requiring future removal. (MOH/SOE, 01/13/2022, 9:4-6; 10:15-17; 11:9-10.) He has no feeling in his left knee. (MOH/SOE, 01/13/2022, 10:25.) He cannot care for himself or take a regular shower because it requires prolonged standing. (MOH/SOE, 01/13/2022, 9:9-10.) While showering, he needs assistance from his son, leans against the shower wall and limits the activity to two to three minutes, once or twice per week, sometimes less, causing prickling pain in the thigh. (MOH/SOE, 01/13/2022, 11:1-3, 12:2-9.) While applicant's surgery allows him now to climb and descend stairs (MOH/SOE, 01/13/2022, 9:20-22), he still has back pain with numbness in his legs when he drives more than 12 miles. (MOH/SOE, 01/13/2022, 10:21-22.)

On April 7, 2022, the WCJ issued his FA&O, awarding applicant 61% permanent disability. In the WCJ's Opinion on Decision (Opinion), he wrote as follows:

> As Dr. Markowitz so aptly advised, he stated within a reasonable medical probability, the Vocational Experts contradicted each other so succinctly so as to make either report inadequate for determining that the Applicant should be found 100% permanently disabled. It is found that his opinion is the better of these.

(Opinion, p. 2.)

Aggrieved by this decision, applicant filed his Petition for Reconsideration.

DISCUSSION

It is axiomatic that substantial evidence must support the decisions by the Appeals Board. (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 opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].)

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 the issue of whether an applicant is permanently and totally disabled must be determined through impairment ratings by application of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides) pursuant to Labor Code section 4660[2]. In addition, a finding under section 4662(b), "in accordance with the fact," does not provide a second independent path to permanent total

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

disability separate from section 4660. (*Id.* at p. 622; *Bermejo v. Jorge Castro Farms* [2019 Cal. Wrk. Comp. P.D. LEXIS 93, *18-19].)[3]

However, applicant may depart from the scheduled rating based on a VE opinion that an employee has a greater loss of future earning capacity than reflected in a scheduled rating. (*Fitzpatrick*, *supra*, *27* Cal.App.5th at pp. 613-614 and 618-620; see *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746, 758 [80 Cal.Comp.Cases 1119]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587].)

With respect to VE 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. Labor Code 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 be used to 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, as noted by the Appeals Board, "[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 related to a single body part. (*Id.* at pp. 751-752.)

Our en banc decision in *Nunes I* issued on June 22, 2023, after our Opinion and Order Granting Petition for Reconsideration dated June 13, 2022, and is mandatory authority on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236];

[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.

see also Govt. Code, § 11425.60(b).) Thus, upon return, the WCJ must apply the analysis as set forth in *Nunes I*.

Finally, where applicant seeks to rebut the PDRS and prove permanent total disability, they 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].)

Here, AME Markovitz, in his report dated October 11, 2005, after evaluating applicant, stated, "I find no evidence of subjective or objective complaints within the area of my specialty of internal medicine nor of a hernia." (Joint Ex. AA, p. 10.)

AME Dr. Markovitz, in his supplemental report dated February 27, 2013, stated that he "found no internal medicine problems at that time . . . [and] could not objectify an internal medicine problem the last time." (Joint Ex. DD, p. 7.)

AME Dr. Markovitz did not comment on any VE reports in any of his reports.

AME Dr. Berman, in his report dated June 24, 2019, after evaluating applicant, diagnosed him with status post lumbar decompression at the L4-5 and L5-S1 levels, followed by posterior spinal fusion with segmental instrumentation with probable loosening of the screws. (Joint Ex. EE, pp. 65-66.) AME Dr. Berman precluded applicant from activities falling between heavy and light work, as well as from prolonged sitting, standing and walking. (*Id.* at p. 67.) AME Dr. Berman apportioned 10% to nonindustrial factors. (*Id.* at p. 69.)

AME Dr. Berman, in his supplemental report dated October 31, 2019, clarified the work restrictions to 30 minutes of sitting, standing and walking, followed by 30 minutes that would not involve prolonged activities along with 5 to 10 minute breaks in between. (Joint Ex. GG, pp. 1-2.)

QME Dr. Nehorayan, in his report dated November 2, 2016, stated that, in November 2007, applicant underwent a failed L4-S1 fusion. (App. Ex. 13, p. 6.) However, applicant had depressive symptomatology prior to his failed surgery that worsened since then due to the loosened screws. (*Id.* at pp. 27, 29.) QME Dr. Nehorayan diagnosed applicant with a depressive disorder not otherwise

specified, pain, hypoactive sexual desire and sleep disorders resulting in a Global Assessment of Functioning of 53 equivalent to 26% whole person impairment (WPI). (*Id.* at pp. 22-23.) QME Dr. Nehorayan attributed the depressive disorder to applicant's chronic pain, physical dysfunction and limitations, sense of loss from lack of participation in previous activities and hobbies and nature and extent of his injuries given his failed fusion. (*Id.* at p. 30.) QME Dr. Nehoryan found the predominant cause of applicant's psychiatric injury was due to his physical injuries. (*Id.* at p. 32.) QME Dr. Nehoryan opined that, notwithstanding applicant's psychiatric WPI:

> [He] would not be able to participate in adequate training to be able to retrain from a psychiatric and orthopedic perspective.
>
> It is clear that the patient has continued difficulties associated with marked elevated levels of pain, which creates distractibility as well as conditions that correspond to incomplete fusion, and with the potential of screws being loose and additional possible surgical intervention in the future.
>
> He is on Social Security disability income, which by Federal standards, identifies the patient to be totally disabled, and I agree with such said assessment in light of the patient's totality of his evaluations and conditions as identified by the multiple clinicians in this case."

(*Id.* at p. 37.)

QME Dr. Nehorayan does not apportion any permanent disability to nonindustrial factors. (*Id.* at pp. 36-37.)

QME Dr. Friedman, in his report dated October 21, 2016, after evaluating applicant, diagnosed him with a major depressive disorder with pain and sleep disorders, present since 2006 (*Id.* at p. 83), predominantly caused by work and resulting in a GAF score of 54 equivalent to 24% WPI. (Def. Ex. D, at pp. 83, 86.) QME Dr. Friedman apportioned 10% permanent disability to nonindustrial factors. (*Id.* at p. 92.)

VE Ms. Wilson, in her report dated March 23, 2017, after evaluating applicant, stated that, since his industrial injury, he is in constant pain, only able to sit for 20 minutes, stand for 10 minutes, and walk only for two blocks. (App. Ex. 14 at pp. 23-24.) He has only three hours of broken sleep per night. (*Id.* at p. 26.) As a result, he cannot physically function five days out of a five-day workweek. (*Id.* at p. 27.) VE Ms. Wilson relied on the work restrictions from QME Dr. Howard (*Id.* at pp. 7-8) and, utilizing the combined values chart (CVC), opined that applicant "with his

multiple impairments would be unable to sustain productive and competitive gainful employment and therefore, he is unable to compete in the open labor market and does not have any future earning capacity." (*Id.* at pp. 28-29.) With respect to apportionment, after reviewing the various AMEs and QMEs, she found no reasonable basis for apportionment. (*Id.* at pp. 21-22.)

VE Ms. Wilson, in her report dated March 24, 2020, after considering the updated work restrictions from AME Dr. Berman, did not change her prior opinion. (App. Ex. 16, pp. 6-7, 15.)

VE Mr. Broadus, in his report dated January 18, 2020, after evaluating applicant, stated, "even with his industrial injuries, he is able to benefit from vocational rehabilitation, including any retraining or employment in the open labor market . . . [unless] the opinions of Dr. Nehorayan are utilized, in that case Mr. Smith would not be amenable to rehabilitation." (Def. Ex. E, pp. 28-29.)

"[I]n order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process," the WCJ and the Appeals Board both have a duty to further develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701 and 5906; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).) Indeed, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases," and is therefore "clearly permitted" to admit evidence even after the discovery cut-off under section 5502(d)(3). (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264].) "[A]llowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims" and militates in favor of our presuming the continued vitality of sections 5701 and 5906, absent a clear legislative intention to the contrary. (*Tyler*, *supra*, 56 Cal.App.4th at p. 394.) An adequately developed record affords all parties due process of law and further provides for meaningful review by the Appeals Board of a WCJ's decision. (*Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]; *Hernandez v. Staff Leasing* (2011) 76 Cal.Comp.Cases 343, 346-347 (Appeals Board Significant Panel Decision).)

Following our independent review of the record, we do not accept as persuasive QME Dr. Nehoryan's medical opinion, when considered alone, that applicant's vocational nonfeasibility based on his orthopedic and psychiatric limitations rendered him permanently totally disabled in light of the dictates of *Fitzpatrick*. In addition, VE Mr. Broadus apparently rendered his

conclusion tentatively based on QME Dr. Nehoryan's opinion on permanent total disability, which we cannot find independently persuasive. (See *Moore v. City of Los Angeles* [2020 Cal. Wrk. Comp. P.D. LEXIS 204] (AME finding permanent total disability despite AMA Guides finding otherwise, in conjunction with opinion from VE relying on AME opinion, insufficient to rebut PDRS).) Finally, VE Ms. Wilson's opinion on vocational nonfeasibility requires clarification under *Nunes I* and *Valdovinos*.

We note that the WCJ did not consider the VE opinions of either Ms. Wilson or Mr. Broadus based on the opinion of AME Dr. Markovitz. However, we found no such opinion from him in the evidentiary record. Accordingly, upon return of this matter to the trial level, we recommend the WCJ direct the parties to obtain supplemental reporting or deposition testimony specifically addressing the analysis required under *LeBoeuf*, *Nunes* and *Valdovinos* and reissue a decision that considers the VE evidence.

For the reasons set forth above, we amend the decision to defer the issues of permanent disability and attorney fees, and the issue of a credit against temporary or permanent disability indemnity to pay attorney fees (Finding of Fact 11, Award a, b), and otherwise affirm the decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award & Order issued on April 7, 2022 by the WCJ is **AFFIRMED** except it is **AMENDED** as follows:

FINDINGS

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11. The issues of permanent disability and applicant's attorney fees are deferred.

AWARD

a. The issues of permanent disability and applicant's attorney fees are deferred.

b. The issue of a credit against temporary or permanent disability indemnity to pay attorney fees is deferred.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 19, 2026

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

TIMOTHY SMITH
SPARAGNA & SPARAGNA
MICHAEL SULLIVAN & ASSOCIATES LLP

DLP/abs

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