WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VALERIE REBELES, *Applicant*

vs.

KAISER FOUNDATION HOSPITAL; permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ10401484
Oakland 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.

Applicant seeks reconsideration of the Findings, Award & Order (FA&O) issued on May 4, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that applicant, while employed by defendant on March 23, 2016, as a home health aide, sustained injury arising out of and in the course of employment to her bilateral knees; that there was good cause to reopen her case; and that her injury caused 64% permanent disability.

Applicant contends that the WCJ erred in disregarding the opinion of agreed medical evaluator (AME) John Lavorgna, M.D., with respect to applicant's increased permanent disability for her knees after her petition to reopen and that addition rather than the combined values chart (CVC) was the appropriate methodology for aggregation resulting in an award of 74% permanent disability.

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

Based upon our review of the record, and for the reasons stated below, we will amend the FA&O to award applicant 74% permanent disability.

FACTS

Applicant, while employed on March 23, 2016, as a home health aide, sustained an industrial injury to her knees when her left knee struck a door, and causing a compensable consequence injury to the right knee.

On September 26, 2018, AME Dr. Lavorgna examined applicant and issued a report. (Joint Ex. 109.) With respect to the left knee, he stated that:

> The patient has evidence for impairment according to AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Using Table 17-35 on page 549 of the AMA Guides to the Evaluation of Permanent Impairment, there is continual moderate pain for 10 points. Her range of motion is from 0-120°. This allows a further 24 points. The patient's knee is stable in the anteroposterior and mediolateral direction for an additional 25 points. The patient therefore has 59 points. Using Table 17-33 on page 541 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition there is a fair result indicating a 20% whole person impairment.

(*Id.* at p. 6.)

In a supplemental report dated February 21, 2019 (Joint Ex. 107), Dr. Lavorgna stated as follows with respect to the right knee:

> [O]nce again this is symptomatic as a compensable consequence of her left knee injury and surgery. Since the patient is a candidate for a future right knee replacement surgery, it is assumed that imaging studies which show bone-on-bone about the medial compartment of the right knee. Using Table 17-31 on page 544 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition this would indicate a 20% whole person impairment.

(*Id.* at pp. 1-2.)

On October 1, 2019, the parties entered into stipulations with request for award (Stipulations) based on the AME report of Dr. Lavorgna dated September 28, 2018, for 52% permanent disability. The WCJ issued his Award dated October 1, 2019. The permanent disability rating string was as follows:

> LEFT KNEE 85% (17.05.04.00 – 20 – [1.4] 28 – 340G – 31 – 36%) 31%
> RIGHT KNEE 85% (17.05.04.00 – 20 – [1.4] 28 – 340G – 31 – 36%) 31%
> 31 C 31 = 52% PD

(Stipulations, ¶ 9)

On January 8, 2020, applicant filed a timely petition for reopen claiming new and further

disability.

On November 10, 2020, applicant returned to Dr. Lavorgna for a reevaluation as to her claim of applicant's new and further disability. (Joint Ex. 105.) With respect to applicant's claim of new and further permanent disability, he opined that:

> The patient's evidence of worsening is seen with swelling about both knees at the present time, as well as decreased ability to walk and stand as she did over 2 years ago, with the need for a scooter at the present time which she did not require before.
>
> This patient, a bilateral according to past medical reports issued, has a bilateral 20% whole person impairment concerning her knees.
>
> It is medically reasonable at this time that she has a bilateral 25% impairment about both knees, with apportionment figures remaining the same as in prior reports.

(*Id.* at p. 2.)

Finally, in his supplemental report dated December 8, 2020 (Joint Ex. 104), Dr. Lavorgna opined as follows with respect to calculating permanent disability:

> Keeping in mind the unique circumstances of this particular case, with both knees involved, it is medically reasonable to add the disabilities rather than use the combined values chart in The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to most accurately reflect her true disability.

(*Id.* at p. 2.)

On May 4, 2022, the WCJ issued his FA&O on May 4, 2022, awarding applicant 64% permanent disability, less the prior award of 52% permanent disability.

Aggrieved by this decision, applicant seeks reconsideration, contending that based on Dr. Lavorgna's opinion, her award should be calculated based on adding her disabilities, rather than combining them.

DISCUSSION

Pursuant to Labor Code section 5410[1], an injured worker who has previously received workers' compensation benefits pursuant to an award is entitled to claim benefits for "new and further disability" within five years of the date of injury. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 925 [72 Cal.Comp.Cases 778].) In addition, sections 5803 and 5804,

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

authorize the WCAB to amend an award upon a good cause where the disability has recurred or increased. (*Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207 [33 Cal.Comp.Cases 345].) "New and further disability" requires a demonstrable change in an injured employee's condition causing an increase in permanent disability. (*Applied Materials v. Workers' Comp. Appeals Bd.* (2021) 64 Cal.App.5th 1042, 1080 [86 Cal.Comp.Cases 331]; *Nicky Blair's Rest. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941, 955 [45 Cal.Comp.Cases 876].) An award after a petition to reopen may find an increased level of permanent disability due to the industrial injury. If a WCJ awards increased permanent disability, "it is the total [permanent disability] award which is due, not the subtraction of the percent of permanent disability . . . On a reopening, it is as if a new award had issued." (*Sierra Vista Hospital v. Workers' Comp. Appeals Bd.* (*Shedelbower*) (1997) 62 Cal.Comp.Cases 1465, 1466 (writ denied); *Sykes v. L.A. Cnty. Metro. Transp. Auth.* [2022 Cal. Wrk. Comp. P.D. LEXIS 175, *15-16].) [2]

Finally, in *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc) (*Vigil*), the Appeals Board held that an injured employee can rebut the CVC in the Permanent Disability Rating Schedule and add impairments where they can establish the impact of each impairment on the activities of daily living (ADLs). In addition, they must show either (a) there is no overlap between the effects on ADLs between the body parts rated, or (b) there is overlap but the overlap increases or amplifies the impact on the overlapping ADLs. We 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.)

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[2] 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.

Based on the above discussion, we conclude that applicant's petition to reopen does not preclude her claim for increased permanent disability by addition in accordance with *Vigil*. In addition, we do not find the WCJ's reliance by analogy on *Vargas v. Atascadero State Hospital* (2006) 71 Cal.Comp.Cases 500, 502, 506–507 (Appeals Board en banc) (*Vargas*) to be applicable here. In *Vargas*, under "SB 899, the new apportionment statutes cannot be used to revisit or recalculate the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004." (*Id.* at p. 502) That is, it cannot be used to "revisit the basis for" a final order, decision, or award issued before SB 899's effective date. (*Id.* at pp. 506-507.)

However, by our decision we are not retroactively revising the Stipulations dated October 1, 2019, but we are instead recalculating applicant's current level of increased permanent disability under our authority pursuant to section 5410.

It is well established that decisions by the Appeals Board must be supported by 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 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, 97].)

The parties presumably choose an AME because of the AME's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) We will follow the opinions of the AME unless good cause exists to find his/her opinion unpersuasive. (*Ibid.*)

Here, AME Dr. Levorgna supports his opinion to add the disabilities by noting that applicant's worsened condition has affected her ADLs requiring her current need for a scooter.

Therefore, based on the medical opinions of AME Dr. Levorgna, which we conclude are substantial medical evidence, we amend the FA&O to award applicant 74% permanent disability based on the following calculated rating strings:

LEFT KNEE 85% (17.05.04.00 - 25 - 35 - 340G - 38 - 44%) 37%
RIGHT KNEE 85% (17.05.04.00 - 25 - 35 - 340G - 38 - 44%) 37%
37% + 37% = 74% PD

Accordingly, as our Decision After Reconsideration, we affirm the FA&O, but we amend it to find that applicant's injury caused 74% permanent disability.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award & Order dated on May 4, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

6. Applicant's injury caused 74% permanent disability, inclusive of amounts previously awarded.

AWARD

A) Permanent disability of 74%, with permanent disability indemnity benefits payable beginning on July 2, 2018, less credit for amounts previously paid.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 28, 2026

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

VALERIE REBELES
BOXER & GERSON, LLP
LAUGHLIN, FALBO, LEVY & MORESI, LLP
RUSSELL LEGAL GROUP

DLP/md

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