WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KENNETH ASHMAN, *Applicant*

vs.

STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS REHABILITATION CENTER, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND STATE CONTRACT SERVICES, *Defendants*

Adjudication Number: ADJ9077153
San Bernardino District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on July 23, 2021, wherein the WCJ found in pertinent part that defendant did not meet its burden of proof on apportionment of the cervical spine disability, that the injury caused 87% permanent disability, and that jurisdiction was reserved so that attorney fees may be awarded in the future based on applicant's life pension.

Defendant contends that the motor vehicle accident was not a violent act so applicant was not entitled to an award of psychiatric permanent disability, that the reports from orthopedic qualified medical examiner (QME) Kevin J. Pelton, M.D., are substantial evidence on the issue of apportionment, and that there is no legal basis for reserving jurisdiction in order to award future attorney fees.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the

[1] Commissioner Katherine Dodd, who previously served as a panelist in this matter is unavailable to participate at this time. Another panel member has been assigned in her place.

F&A except that we will amend the F&A to defer the issues of the disability caused by applicant's injury (Finding of Fact 3); and the amount of attorney fees to be awarded to applicant's counsel (Finding of Fact 5). Based thereon the Award will be amended and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his head, cervical spine, left upper extremity, lumbar spine, left lower extremity, right hip, right knee, and psyche, as a result of the motor vehicle accident that occurred on July 23, 2013, while he was employed by defendant as a correctional officer.

On June 10, 2016, QME Dr. Pelton evaluated applicant. (App. Exh. 3, Dr. Pelton, June 10, 2016.) Dr. Pelton took a history, reviewed the medical record, examined applicant's cervical spine, lumbar spine, and right knee, and concluded that applicant's condition had reached maximum medical improvement (MMI) as of date of the evaluation. (App. Exh. 3, p. 64.) On the issue of apportionment, Dr. Pelton stated:

> …90% of the current level of [lumbar spine] impairment will be apportioned to the specific injury of July 23, 2013 and 10% will be apportioned to the pre-existent degenerative changes and Class 1 obesity. ¶ …100% of the current level of impairment for the right knee is apportioned to the injury sustained on July 23, 2013 and 0% will be apportioned to pre-existent non-industrial factors.
> (App. Exh. 3, p.68.)

Regarding applicant's cervical spine, Dr. Pelton noted that applicant previously had a cervical fusion at the C5-C6 level resulting in 25% whole person impairment (WPI) and that an extended fusion at the C4-T1 level was due to the July 23, 2013 injury resulting in 28% WPI. (App. Exh. 3, p.63.) He apportioned the impairment as follows:

> Therefore, utilizing the subtraction method, 25% would have been subtracted to the current level of 28% which leaves the 3% to be apportioned to the current July 23, 2016 industrial injury. In terms of percentages, 89% of the current level of impairment of the cervical spine will be apportioned to the pre-existing multilevel fusion and 11% will be apportioned to the industrial injury of July 23, 2013.
> (App. Exh. 3, p.67.)

Dr. Pelton was provided additional medical records to review and after reviewing those

records he stated that, "…I remain with my previously assigned whole person impairment based on the DRE Category IV, 28%...." (Joint Exh. 6, Dr. Pelton, October 3, 2016, p. 40.)

On October 24, 2016, neuropsychology agreed medical examiner (AME) Lino Valdiva, Psy.D., evaluated applicant. (Joint Exh. 8, Dr. Valdiva, October 24, 2016.) Dr. Valdiva took a history, reviewed medical records, and performed neuropsychological tests. He diagnosed applicant as having cognitive disorder in remission, and adjustment disorder with anxiety/ depression, in partial remission, with a Global Assessment of Function (GAF) score of 62. (Joint Exh. 8, p. 12, p. 20.) Dr. Valdiva later stated, "The causation of these diagnoses directly related to the industrial injury of July 23, 2013." (Joint Exh. 8, p. 18.)

In response to correspondence from counsel, QME Dr. Pelton submitted a supplemental report wherein he said that the opinions he had stated in his October 3, 2016 supplemental report remained unchanged. (Joint Exh. 5, Dr. Pelton, April 5, 2017, p. 37.) In his June 21, 2017 report Dr. Pelton stated that his opinions regarding applicant's impairment remained unchanged. (Joint Exh. 4, Dr. Pelton, June 21, 2017, p. 38.)

Dr. Pelton re-evaluated applicant on May 28, 2020. (Joint Exh. 3, Dr. Pelton, June 26, 2020.) He re-examined applicant, took an interim history, reviewed additional medical records, and stated that "… a supplemental medical-legal report addressing all the pertinent issues of permanent impairment will be issued as soon as possible." (Joint Exh. 3, p. 48.) In the July 22, 2020 supplemental report Dr. Pelton reiterated his previously stated opinions pertaining to applicant's impairment and apportionment, including:

> Using the subtraction method, 11% (3 [divided by] 28) of the permanent cervical spine impairment will be attributed to the industrial injury of 07/23/13 and the remaining 89% (25 [divided by] 28) to the non-industrial fusion of 1998 & 2010. (Joint Exh. 2, Dr. Pelton, July 22, 2020, p. 64, italics and emphasis omitted.)

On October 29, and 30, 2020, AME Dr. Valdiva re-evaluated applicant. Based on his review of the interim medical record, the interim history he was given by applicant, and the neuropsychological test results, Dr. Valdiva re-assigned a GAF score of 62, and concluded that:

> … [T]here has been very little or no change in Mr. Ashman's overall neuropsychological condition … In fact, his overall neurocognitive condition has remained essentially unchanged and in some areas, he has scored exactly the same as he scored 4 years ago. This is the best indication that Mr. Ashman's

> neuropsychological condition has coalesced and is not changing significantly in any direction.
> (Joint Exh. 7, Dr. Valdiva, October 30, 2020, p. 20.)

The parties proceeded to trial on June 8, 2021. The issues submitted for decision included parts of body injured, permanent disability, and apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 8, 2021, p. 2.)

DISCUSSION

Pursuant to Labor Code section 4660.1(c):

> (c) (1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.
> (2) An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:
> (A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.
> (Lab. Code, § 4660.1.)[2]

The language of section 4660.1(c) is clear that it applies to sleep dysfunction, sexual dysfunction, or psychiatric disorder "arising out of a compensable physical injury." (Lab. Code, § 4660.1.) Section 4660.1(c) does not preclude increases in impairment ratings when the psychiatric injury arises directly from the events of employment. When the language is clear it is applied "according to its terms." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (*Arvizu*) (1982) 31 Cal.3d 715, 726 [47 Cal. Comp. Cases 500].) As noted above, Dr. Valdiva stated that the causation of the psychiatric conditions he diagnosed was "directly related to the industrial injury of July 23, 2013." (Joint Exh. 8, p. 18.)

Further, in the Report, the WCJ explained:

> The Applicant was T-boned on the driver side door. The Applicant's car was

[2] All further statutory references are to the Labor Code unless otherwise noted.

> totaled as a result of the accident. The Applicant underwent a fusion surgery to his cervical spine as well as his lumbar spine. The undersigned considered the motor vehicle accident, losing a car, undergoing multiple surgeries, and not being able to return to work, more than an unfortunate and unpleasant experience.
> (Report, p. 2.)

We agree with the WCJ's conclusion, based on his review of various Appeals Board panel decisions, that the July 23, 2013 motor vehicle accident was a violent act.[3] Therefore, even if applicant's psychiatric permanent disability were construed as arising out of his physical injury, applicant would still be entitled to additional permanent disability for his psychiatric injury as an exception to section 4660.1(c); thus, his psychiatric permanent disability is compensable.

Regarding the issue of apportionment, according to Dr. Pelton, there is 89% apportionment to the non-industrial fusions of 1998 & 2010 under Labor Code section 4663 because the ratio between the pre-existing impairment and the post-industrial injury impairment is 89% (25 [divided by] 28) = 89%.) In applying the ratio between the two impairments to determine apportionment of permanent disability, it appears that Dr. Pelton assumed the pre-existing impairment (25%) was subsumed within applicant's impairment at the time of the evaluation regarding the July 23, 2013 injury (28%). However, Dr. Pelton did not provide an explanation for this assumption. Further, Dr. Pelton treated impairment as the equivalent of permanent disability without explaining why this produces an accurate evaluation of apportionment and an accurate description of applicant's disability caused by the motor vehicle accident.

Also, if as here, the doctor states that a portion of the injured worker's disability is caused by a pre-existing condition, the physician must explain the nature of the pre-existing condition, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for the percentage of the disability assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Dr. Pelton did not

[3] Panel decisions of the Appeals Board are citable to the extent they point out the contemporaneous interpretation and application of the workers' compensation laws by the Board. (*Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145, 147, fn. 2].) Although panel decisions are not binding precedent and have no stare decisis effect, they may be considered by other panels of the Appeals Board to the extent they find their reasoning persuasive. (*Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 [Appeals Board en Banc], citing *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

provide an explanation of his apportionment opinions, and in turn did not comply with the requirements of *Escobedo v. Marshalls, supra.*

For these reasons, the reports from Dr. Pelton do not constitute substantial evidence on the issue of apportionment. Based on our review of the record, it appears there is no dispute that applicant had undergone cervical fusion surgeries prior to his July 23, 2013 injury, which would constitute pre-existing permanent disability factors. Permanent disability and apportionment were issues submitted for decision and as discussed herein, the record does not contain substantial evidence upon which those issues may be decided.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to 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].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) That would require that Dr. Pelton submit a report clarifying his opinions as to apportionment. However, under the circumstances of this matter, it may be in the parties' interest to have applicant evaluated by an AME, or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we affirm the F&A except that we amend the F&A to defer the issues of the disability caused by applicant's injury (Finding of Fact 3); and the amount of attorney fees to be awarded to applicant's counsel (Finding of Fact 5). Based thereon, the Award is amended and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 23, 2021 Findings and Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The issue of the permanent disability caused by the injury is deferred.

* * *

5. The issue of the amount of attorney fees to be awarded to applicant's counsel is deferred.

AWARD

* * *

a. The award of permanent disability indemnity is deferred pending development of the record.

* * *

c. The award of attorney fees to applicant's counsel is deferred pending development of the record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 31, 2022

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

KENNETH ASHMAN
WHITING, COTTER & HURLIMANN
STATE COMPENSATION INSURANCE FUND

TLH/*pc*

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