WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EARL MEYERS, *Applicant*

vs.

FRESNO UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by CNA CLAIMS PLUS, *Defendants*

Adjudication Numbers: ADJ3317169 (FRE 0210465); ADJ2130054 (FRE 0162261); ADJ4055925 (FRE 0210461); ADJ728821 (FRE 0210462); ADJ2475719 (FRE 0210463); ADJ3052880 (FRE 0226010); ADJ207659 (FRE 0210464)

Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration of the Joint Findings of Fact, Award, and Opinion on Decision (F&A) issued on June 9, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that due to the combined effect of multiple injuries, applicant was not amenable to participate in vocational rehabilitation and was unable to compete in the open labor market and issued a joint and several award of 100% permanent total disability without apportionment.

Defendant argues that the WCJ incorrectly found permanent total disability pursuant to Labor Code[2],section 4662. Defendant further argues that the F&A fails to address dates of injury and apportionment under section 4663, and that the evidence does not support a finding of permanent total disability.

---

[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 substituted in her place. Commissioner Dodd was on the panel that issued the order granting reconsideration. Commissioner Dodd was unavailable to participate further and a new panel member has been substituted in her place.

[2] All future references are to the Labor Code unless noted.

We received an answer from applicant.

The WCJ filed a Report recommending that the Petition for Reconsideration be denied.

We have considered the allegations in the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record. Based upon our review of the record, as our Decision After Reconsideration we will affirm the June 9, 2021 F&A.

FACTS

Per the WCJ's Report:

> Applicant suffered a prior industrial injury on November 8, 1995, (ADJ2130054) to his left shoulder which was resolved by a stipulated award for permanent disability of 14.5% and was not at issue in this case. Applicant tripped and fell on April 27, 1999, injuring his neck, left arm, left hand, right hand and left shoulder (ADJ4055925). Applicant tripped and fell again on May 29, 2000, injuring his head and right hand (ADJ728821). Applicant fell again on October 3, 2000, injuring his right hand and right knee (ADJ2475719). On October 26, 2001, Applicant tripped and fell again injuring his bilateral hands, right wrist, left ring finger, left little finger, back, neck and headaches (ADJ207659). On February 4, 2003, applicant was injured when a chair he sat in collapsed injuring his neck, back, headaches, right arm and right shoulder (ADJ3052880). Applicant sustained a cumulative trauma through May 4, 2007, injuring his bilateral wrists, bilateral hands, neck, back and erectile dysfunction (ADJ3317169).
>
> Applicant testified that he kept trying to go to work between each of these injuries but he never fully recovered between them. (MOH/SOE, 8/14/18, 7:16 - 17.) He testified that he retired from teaching in 2008. (MOH/SOE, 3/17/21, 3:37.)
>
> On August 22, 2018, Applicant fell off of his scooter in the parking lot at Costco. He had been provided with a scooter as part of his treatment for his workers' compensation injuries but it was no longer functioning. He had replaced the scooter previously provided by his employer with a smaller scooter when the employer failed to respond to his requests to have the scooter repaired. (MOH/SOE, 3/17/21, 3:40 - 47; 4:37 - 44.) Following the fall from his scooter, Applicant's condition deteriorated substantially and he required an additional surgery to his cervical spine. (MOH/SOE, 3/17/21, 4:1 - 5; 4:24 - 25)
>
> As a result of his various injuries, Applicant has undergone the following surgical procedures: September 14, 2000 - decompression of the right medial nerve at the wrist, decompression of the right ulnar nerve at the elbow, right palmar tenosynovectomy; July 26, 2001 - left ulnar nerve cubital tunnel decompression at the elbow and a decompression of the left median nerve at the wrist along with a left palmar tenosynovectomy; June 18, 2007 - anterior

> cervical discectomy at C4-5 for decompression of nerve roots and spinal cord, arthrodesis anterior interbody of C4-5 and anterior cervical plating at C4-5; December 18, 2009 - bilateral L4 and L5 decompression; January 31, 2011 - L4-5 fusion and instrumentation; September 24, 2018 - C3-4 laminectomy, C3-4 lateral mass screw fixation, C3-4 posterolateral and facet fusion with autograft and DBX. (Exh. QQ, Dr. Feinberg AME report 3/4/21, pg. 4.)
>
> Applicant testified to his need for a caregiver to assist him with most of all of his activities of daily living, including using the bathroom, getting out of bed and dressing. (MOH/SOE, 3/17 /21, 5:7 - 11.)

(WCJ's Report, pp. 2-4.)

Applicant was evaluated by AME Steven Feinberg, M.D., who authored 28 reports in evidence and was deposed twice. (Applicant's Exhibits 1 and 2; Defendant's Exhibits L-Z, AA-II, KK-MM, QQ.) Dr. Feinberg noted that applicant attended his final evaluation using an electric wheelchair. (*Id*. at p. 2.) Dr. Feinberg took the following history:

> He normally wore an adult diaper but had forgotten that day. He reported hurting all over. He required assistance getting in/out of the car. He was only comfortable when he was sleeping. He could not walk more than a few steps due to pain. He had to push himself to sit and [sic] appointments but had increasing pain. Following this appointment, he would go home, medicate, and lay on his recliner. He would spend most of his day in a recliner. He used a rolling walker in the house. He was unstable when walking even while using his walker. He had fallen last week in the garage while using his walker. He did not require treatment but had bruising on both knees.

(*Ibid*.)

Dr. Feinberg took a long history of multiple injuries to applicant as described in the WCJ's Report. (Defendant's Exhibit QQ, Report of Steven Feinberg, M.D., March 4, 2021, pp. 3-4.)

Dr. Feinberg assigned work restrictions as follows:

> In terms of work status, he could not go back to his former job duties. From my perspective he could not reengage in the open labor market but the final decision in this regard would need input from a forensic psychiatrist and vocational specialist. Subjective factors of disability could be described as slight to moderate pain becoming severe with substantial work activities. Objective factors of disability included abnormal radiographs, loss of range of motion, atrophy and decreased strength. He described bowel and bladder dysfunction.

> I opined that Mr. Meyers had a disability[,] best described overall as limiting him to sedentary activities. For the cervical & lumbar spine, he had a disability limiting him to sedentary work including no repetitive motions of the neck or static posturing of the neck. The use of a wheelchair or an assistive walking device was medically reasonable. For the left shoulder & upper extremities, he was precluded from overhead work except occasionally and prophylactically from very heavy shoulder work activities. He was precluded from forceful or repetitive left shoulder use. He was precluded in general from upper extremity forceful or repetitive use.

(*Id*. at pp. 4-5.)

Dr. Feinberg opined that applicant's use of the scooter was caused by the combined result of all his industrial injuries. (*Id*. at p. 5.)

Both parties obtained vocational evaluations. Applicant retained Everett O'Keefe as his expert. Mr. O'Keefe evaluated applicant and authored two reports in evidence. (Applicant's Exhibits 21 and 23.) Defendant retained Steven Koobatian, Ph.D. as its expert who authored four reports in evidence. (Applicant's Exhibit 22; Defendant's Exhibits NN-PP.) Both vocational experts agreed that applicant was not amenable to rehabilitation due to the industrial injury and suffered from a complete loss of earning capacity. (Defendant's Exhibit PP, Report of Steven Koobatian, Ph.D., November 30, 2020, p. 2.)

Both experts went on to offer opinions as to 'vocational apportionment', with applicant's expert concluding no issue of vocational apportionment existed in this case, and defendant's expert providing a "holistic estimate" of 10 to 20% vocational apportionment to non-industrial factors. (*Id*. at p. 3.)

DISCUSSION

I.

To properly analyze whether applicant is permanently totally disabled, one must understand how permanent total disability rebuttal works.

As our Supreme Court has explained:

> Permanent disability is understood as the irreversible residual of an injury. (Citation.) A permanent disability is one which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market. (Citation.) Thus, permanent disability payments are

> intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity.

(*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal. 4th 1313, 1320, 57 Cal. Rptr. 3d 644, 156 P.3d 1100 (Brodie).)

The court in *Ogilvie* explained that the PDRS is rebuttable.

> Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

(*Ogilvie v. Workers' Comp. Appeals Bd*., 197 Cal. App. 4th 1262, 1277, 129 Cal. Rptr. 3d 704.)

The standard for finding permanent total disability via *Ogilvie* rebuttal follows:

> The proper legal standard for determining whether applicant is permanently and totally disabled is whether applicant's industrial injury has resulted in applicant sustaining a complete loss of future earning capacity. (§§ 4660.1, 4662(b); see also 2005 PDRS, pp. 1–2, 1–3.) …
>
> A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., *Reyes v. CVS Pharmacy*, (2016) 81 Cal. Comp. Cases 388 (writ den.); see also, *Hudson v. County of San Diego*, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)
>
> A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.

* * *

> …[P]er Ogilvie and as described further in Dahl, the non-amenability to vocational rehabilitation must be due to industrial factors. (Contra Costa County v. Workers' Comp. *Appeals Bd.*, (*Dahl*) 240 Cal. App. 4th 746, 193 Cal. Rptr. 3d 7.)

(*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.)

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].) The Appeals Board will follow the opinions of the AME unless good cause exists to find the opinion unpersuasive. (*Ibid*.) Here, the AME provided significant work restrictions due to applicant's industrial injuries. No evidence was presented to ignore these opinions.

Using the **work restrictions** assigned by the AME, applicant presented substantial evidence establishing permanent total disability through vocational evidence. *Both* vocational experts agree that applicant's work restrictions preclude applicant from rehabilitating and have caused a complete loss of earning capacity. Accordingly, it is not reasonably in dispute that applicant has proven rebuttal of the Permanent Disability Ratings Schedule and that applicant is 100% permanently totally disabled.

The sole question to address is whether defendant met its burden of proof as to apportionment of disability. Defendant argues that applicant's vocational disability should be apportioned; however, defendant has not presented any evidence to establish such apportionment.

The purpose of the AMA Guides is to assign impairment based upon a person's loss of activities of daily living (ADLs). Most workers' compensation cases do not involve total disability. Most cases involve assignment of partial disability via the AMA Guides. Thus, doctors are accustomed to assigning causation based on the causation of the rated impairment in the AMA Guides. Defendant provided multiple apportionment opinions from the AME, but all of those opinions addressed **the cause of applicant's impairment under the AMA Guides**.

What appears to be a point of confusion in this case is that the focus of apportionment changes when using an *Ogilvie* rebuttal because the defined impairment changes.

When applicant is seeking to rebut the PDRS using *Ogilvie*, disability is no longer rated as an impairment under the AMA Guides. Instead, the impairment is now the *work restrictions* assigned to applicant from the industrial injury. The disability is the effect of those work restrictions on applicant's ability to rehabilitate and compete in the open labor market. Accordingly, causation and apportionment, when analyzed under an *Ogilvie* rebuttal, must focus on the ***cause of the work restrictions***.

Where applicant seeks to rebut the PDRS and prove permanent total disability, applicant must prove the following:

1) Applicant has been assigned an industrial 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.

When applicant's disability is based upon work restriction(s), to prove apportionment defendant must prove that the work restriction(s) are attributable to non-industrial causes. No such evidence exists in this case, and thus, applicant's disability is not apportioned.

The reporting of defendant's vocational expert is not substantial evidence as to the issue of apportionment. In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes I*"), the Appeals Board held that Labor Code section 4663 requires a **reporting physician** to make medical determinations in a case, including determinations on the issue of apportionment. The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but that a vocational evaluator may not opine on issues that require expert medical evidence. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*").

Here, defendant attempted to use a non-medical vocational expert to opine on the cause of applicant's work restrictions. This was not proper. However, even if we were to review the opinion on the merits, and for the reasons discussed by the WCJ, it would not constitute substantial evidence as the opinion was not precise, and merely provided a range of possible apportionment.

Even if a medical expert had issued the opinion, it would not have constituted substantial medical evidence as it was based upon surmise.

Defendant argues that the finding of permanent total disability conflicts with the holding in *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal. App. 5th 607. The findings in these matters were clearly based upon applicant rebutting the scheduled rating per *Ogilvie, supra*. The Court in *Fitzpatrick* expressly endorsed such a method of rebuttal:

> We further note the scheduled rating under section 4660 is rebuttable, which gives an applicant the opportunity to present evidence supporting a 100 percent disability rating when the scheduled rating is less.
>
> In *Ogilvie*, the court addressed "'whether, in light of the amendments to section 4660 enacted in Senate Bill No. 899 (2003–2004 Reg. Sess.), it is permissible to depart from a scheduled rating on the basis of vocational expert opinion that an employee has a greater loss of future earning capacity than reflected in a scheduled rating.' [Citation.]

(*Fitzpatrick, supra* at pp. 620-621.)

The holding in *Fitzpatrick* supports the finding that applicant may rebut a scheduled rating under *Ogilvie*.

Defendant has failed to present any evidence that applicant's disability should be apportioned in this case. Accordingly, as our Decision After Reconsideration we affirm the June 9, 2021 F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Appeals Board that the Joint Findings of Fact, Award, and Opinion on Decision issued on June 9, 2021, by the workers' compensation administrative law judge is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 21, 2025

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

EARL MYERS
THOMAS J. TUSAN
PARKER, KERN, NARD & WENZEL
DUNCAN, CASSIO, LUCCHESI, BINKLEY, & VAN DOREN
TUSTAN LAW

EDL/mc

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