WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARMEN TORRES, *Applicant*

vs.

SANTA BARBARA COMMUNITY COLLEGE DISTRICT, administered by KEENAN & ASSOCIATES, *Defendant*

Adjudication Number: ADJ8499651
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Carmen Torres seeks reconsideration of the January 21, 2021 Amended Findings of Fact and Order, wherein the workers' compensation administrative law judge (WCJ) found applicant sustained 52% permanent disability, after apportionment, and awarded indemnity totaling $75,681.91, less attorney fees, and further medical treatment. In his Amended Opinion on Decision, the WCJ adopted the parties' stipulation that applicant sustained an admitted injury on June 8, 2011, to her neck, back, bilateral shoulders, psyche and gastrointestinal system, while employed as a teacher by Santa Barbara City College, permissibly self-insured.

Applicant contests the WCJ's permanent disability award, contending that she is entitled to an award of 100% permanent disability, without apportionment, based on her testimony and vocational evidence that she is not amenable to participate in vocational rehabilitation and is unable to compete in the open labor market. Applicant further argues that in the event she is not deemed permanently totally disabled, her permanent disability rating should not be based on application of the combined values chart (CVC), which compresses the ratings for separate body parts, but should be based on adding her non-overlapping impairments. Finally, applicant contends the apportionment of her right shoulder disability is not justified, arguing Dr. Gjerdrum, the panel Qualified Medical Evaluator (QME) improperly apportioned to the cause of applicant's injury rather than to the cause of her disability.

We have received and reviewed the Answer filed by defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration to amend the Amended Findings of Fact and Order, to rescind the apportionment of applicant's right shoulder disability, but will otherwise affirm the WCJ's determination.

At the outset, we note that the Appeals Board has 60 days from the filing of a Petition for Reconsideration to act on that petition. (Lab. Code §5909.) Here, however, through no fault of applicant, the timely-filed petition did not come to the attention of the Appeals Board until April 22, 2021, after expiration of the statutory time period. Consistent with fundamental principles of due process, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a timely filed Petition for Reconsideration begins no earlier that the Board's actual notice of the petition. (See *Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd*. (*Felts*) (1981 119 Cal.App.3d 193 [146 Cal.Comp.Cases 622, 624].) Therefore, we will consider the Petition for Reconsideration on its merits.

FACTS

Applicant sustained an admitted injury from a slip and fall accident on June 8, 2011. She testified at trial on September 23, 2020, that she received some medical treatment for her injuries, including two surgeries to her left shoulder. She stated that she presently has constant pain in her neck, low back and shoulders, and sharp needles and pain in her left ankle. She also has pain and numbness in her hands and wrists.[1] She has emotional symptoms that are manifested in anxiety, nervousness, sleeplessness and feelings of loneliness. She discussed her difficulties with activities of daily living, such as brushing her hair and teeth, showering, washing her hands, laundry and other household duties. She cooks, cuts, and lifts dishes with difficulty. When grocery shopping,

[1] Applicant's diagnosis of carpal tunnel syndrome is not included in her claim for her June 8, 2011 specific injury. Dr. Gjerdrum found her carpal tunnel syndrome was caused by cumulative trauma, which is not alleged in ADJ8499651. (Ex. 4. 11/1/17 Dr. Gjerdrum Supp. Report, p. 4.)

she has difficulty reaching high places and lifting heavy objects, as when loading her groceries at checkout and taking them home. She thinks she is limited to lifting 2 pounds.

She testified that she last worked at either of her jobs in October of 2011, and has retired, due to her industrial injury, and in part due to her need to help her daughter who has special needs, though she emphasized that caring for her daughter was not her primary motivation. She testified that she devotes four to five hours per day to her daughter. She now receives a pension.

She testified that her treating physician returned her to work with restrictions, but the restrictions could not be accommodated. She has had no treatment since 2017. No doctor told her she could not return to gainful employment. She sought to return to employment as a translator, but could not type documents due to pain in her shoulders, low back, hands and wrists. She sought unemployment benefits two years after her first surgery, but did not receive any benefits.

Dr. Gjerdrum initially evaluated applicant in 2014, at which time he reported her complaints of pain in her left ankle, right wrist, bilateral shoulders, neck, low back and pain radiating down her arms. (Ex. 8. 6/18/14 Dr. Gjerdrum Report, p. 2.) Applicant had left shoulder surgery in 2011 and 2012. She was noted to have a full thickness right rotator cuff tear in 2013. (Ex. 8. 6/18/14 Dr. Gjerdrum Report, p. 6.)

He found her permanent and stationary for her left shoulder and low back in his June 18, 2014 report, and provided a 5% whole person impairment (WPI) rating for the lumbar spine based on the AMA Guides table 15-3, DRE lumbar category II. He also provided a 3% add on for pain. (Ex. 8. 6/18/14 Dr. Gjerdrum Report, p. 18.)

He rated her cervical spine impairment at 5% WPI. (Ex. 7. 12/17/14 Dr. Gjerdrum Report, p. 3.) In his February 9, 2016, he revised his upper extremity ratings, and provided a 13% WPI impairment for the left shoulder and 11% WPI for the right shoulder. (Ex. 5. 2/9/16 Dr. Gjerdrum Report, p. 13.) He initially found the right shoulder injury was not industrial since applicant did not raise a complaint about it for more than a year after her injury. However, he was subsequently persuaded by applicant that her right shoulder condition is a compensable consequence injury due to her favoring it after her two left shoulder surgeries.

In his February 9, 2016 report, Dr. Gjerdrum stated:

> It is more likely that the right shoulder prior injury in 2007 led to her rotator cuff tear that was minimally symptomatic, but it has become more symptomatic since she was forced to use the right shoulder for an excessive amount because of the left shoulder problem. Therefore, the right after further consideration can be at

> least to some extent considered a derivative injury, although I believe apportionment should be appropriate in regard to the right shoulder. (Ex. 5. 2/9/16 Dr. Gjerdrum Report, p. 11.)

Dr. Gjerdrum found the right shoulder injury was a "permanent aggravation" of a preexisting rotator cuff tear .

> The right shoulder is a derivative injury that represents a permanent aggravation of a preexisting condition. There is clearly preexisting condition present with reasonable medical certainty that is as much as the compensatory trauma. Therefore, the compensatory trauma of the impairment of the left shoulder led to a permanent aggravation of a preexisting right shoulder condition.
> (Ex. 5. 2/9/16 Dr. Gjerdrum Report, p. 13.)

Dr. Gjerdrum also found applicant could return to work on light duty, with restricted overhead lifting and no heavy lifting, bending or stooping. If no accommodation was available, she should be considered a Qualified Injured Worker. (Ex. 7. 12/17/14 Dr. Gjerdrum Report, p. 3.) In his February 9, 2016 report, Dr. Gjerdrum further indicated that applicant could return to the labor market.

> I am not sure whether this applicant can be reasonably considered a qualified injured worker. I do not know why she could not return to work, at least on some modified basis as a teacher. I will leave it to the fact whether or not she is indeed a qualified injured worker.
> (Ex. 5. 2/9/16 Dr. Gjerdrum Report, p. 14.)

At his February 27, 2019 deposition, he testified:

> Q. And, in your reports, you seem to indicate that you didn't see any reason why she couldn't go back to at least a modified position; is that right?
> A. Yeah, she's a teacher. I think she could go back and teach probably with the right restrictions, but that's again...
> Q. You're going to defer to somebody else on that, right?
> A. Yes. The case is a little more complex than just an orthopedic problem. (Ex. 9. 2/27/19 Dr. Gjerdrum Deposition Transcript, 19:3-12.)

He added that from "an orthopedic perspective, I think she could work in the open market . . . with modifications," that take her work restrictions into account. (Ex. 9. 2/27/19 Dr. Gjerdrum Deposition Transcript, 22:19-25; 23:1-6.)

Addressing the issue of apportionment of applicant's right shoulder impairment, he indicated that it should be apportioned 50% to a pre-existing shoulder injury:

> Therefore, the applicant's cervical spine, left shoulder, lumbar spine is 100% work related. The right shoulder 11% whole person impairment should be equally divided 6% for preexisting of [sic] 6% for the injury. Therefore, there would be a net increase of impairment for this claim of 6% whole person impairment. My opinion regarding apportionment takes into consideration Labor Code Sections 4663, 4664 and the Escobedo Decision. (Ex. 5. 2/9/16 Dr. Gjerdrum Report, p. 13.)

Dr. Gjerdrum further discussed apportionment of applicant's right shoulder disability at his February 27, 2019 deposition. After agreeing that he had not seen any medical reports between 2007 and her 2011 industrial injury, he was asked how he arrived at 50% apportionment of disability.

> Q. So how do we get an equal share of cause of disability from an incident that happened six years ago that's produced no sustained complaints or treatment to a situation where we can identify the mechanism of what her onset of symptoms are related to?
> A. Well –
> Q. Just seems extreme to me.
> A. With a derivative process, one has to have some underlying pathology.
> If she had a normal shoulder, I don't believe she would have developed a compensable injury to her shoulder. She has a torn rotator cuff, I believe, as I recall.
> Q. Right.
> A. Well, she would not have developed a rotator cuff tear absent some prior trauma.
> Q. I don't disagree with that. But that seems to me like you're talking about causation of injury, not causation of disability.
> And I don't have a dispute with the idea that there's a contributing factor to her earlier injury as to what may have caused her to start to suffer disability. What I'm trying to ask about is the cause of her permanent disability.
> A. Right. I think, in this case, it's reasonable to assume that both factors should be given equal weight.
> Q. Because?
> A. Because, absent the prior injury, it's unlikely that she would have had a derivative injury.
> (Ex. 9. 2/27/19 Dr. Gjerdrum Deposition Transcript, 25:20-25; 26:1-23.)

With regard to whether applicant's impairment should be rating using the CVC versus adding applicant's impairments, Dr. Gjerdrum indicated that the shoulder impairments should be added rather than combined based upon their synergistic effect in increasing applicant's disability. "Synergistic, in my opinion, it means that the condition is actually worse, not less. If one combines, what you essentially are doing is diminishing the impairment rather than equalizing." (Ex. 9.

2/27/19 Dr. Gjerdrum Deposition Transcript, 14:20-23.) However, with regard to applicant's neck and back impairments, he did not find it reasonable to add them, as he did not find them to be synergistic. (Ex. 9. 2/27/19 Dr. Gjerdrum Deposition Transcript, 15:20-22.) Dr. Gjerdrum also believed the sum of the shoulder impairments should be combined with the neck and back, rather than added. (Ex. 9. 2/27/19 Dr. Gjerdrum Deposition Transcript, 15:23-25; 16:1.)

Dr. Gjerdrum diagnosed applicant's wrist injury as bilateral carpal tunnel syndrome, which he found was due to cumulative trauma and not causally related to her fall on June 8, 2011. (Ex. 4. 11/1/17 Dr. Gjerdrum Supp. Report, p. 4.)

Applicant's claim for a psychiatric injury was evaluated by QME Dr. Echevarria, who reported on April 24, 2016. He diagnosed applicant as suffering from Adjustment Disorder with Mixed Anxiety and Depressed Mood, and a Pain Disorder Associated with Both Psychological Factors and a General Medical Condition, both chronic, which reached permanent and stationary status as of March 24, 2016. He further concluded that all of applicant's psychiatric injury was caused by her 2011 industrial injury. He scored her GAF at 66. "This GAF score places applicant within the mild symptoms decile (61-70). This is consistent with applicant's current description of symptoms (some continued low mood and anxiety in response to thinking injury, some continued difficulties insomnia, low energy and chronic pain), with some resultant functional difficulties, but generally functioning pretty well with some meaningful interpersonal relationships. (Ex. 12. 4/14/16 Dr. Echevarria Report, p. 159-160.) A GAF score of 66 rates a 6% WPI, which he identified as a mild permanent impairment based on Table 14-1 of the AMA Guides. He noted that applicant had not received, and did not require, any psychiatric or mental health treatment. (Ex. 12, p. 161.)

He found applicant to be a Qualified Injured Worker, who would benefit from vocational rehabilitation. The only restrictions he placed on her ability to return to the work force was "consistent work hours so that her sleep schedule is not constantly being disrupted and that she not be exposed to undue stress, which may exacerbate underlying anxiety and depressive condition." (Ex. 12, p. 163.)

After reviewing additional medical reports, he did not alter his opinions in his June 28, 2018 supplemental report. (Ex. 11. 6/28/18 Dr. Dr. Echevarria Report.)

Applicant obtained a vocational feasibility evaluation from P. Steve Ramirez, dated February 18, 2019. (Ex. 3. 2/18/19 Ramirez Vocational Report.) Mr. Ramirez reviewed applicant's

work history, medical records from Dr. Gjerdrum and Dr. Echevarria, performed vocational testing that was limited by applicant's inability to concentrate due to pain "radiating from her neck, both shoulders down to her median nerve into her hands and fingers." He reviewed the medical restrictions and applicant's self-report of her physical limitations.

> In reviewing the above medical records, Ms. Torres has the following work restrictions: Able to return to light duty work, no lifting overhead, no heavy lifting, no bending or stooping, needs consistent work hours, and no exposure to undue stress. Based on the work limitations of "light duty work", for this report, it is assumed she is limited to "Light Work" and "Sedentary Work" occupations. (Ex. 3. 2/18/19 Ramirez Vocational Report, p. 9.)

He noted Dr. Gjerdrum's finding that applicant's bilateral carpal tunnel syndrome was unrelated to her specific injury on June 8, 2011, and did not include issues with "handling, fingering or reaching," when analyzing her abilities using the McCroskey Vocational Quotient System, to evaluate applicant's employability using transferrable skills. Using the McCroskey System, he found applicant had mid to high average transferability, for occupations including translator, adult education teacher and interpreter.

Mr. Ramirez found applicant was not amenable to vocational rehabilitation, citing her pain complaints when performing testing, which he found consistent with her psychiatric impairments "of chronic pain, difficulty with concentration, no exposure to undue stress. This would make it difficult for her to be in a classroom setting for vocational training." (Ex. 3. 2/18/19 Ramirez Vocational Report, p. 10.)

> Based on her current orthopedic work limitation of "light duty work", it is assumed Ms. Torres is limited to light work. Unfortunately, Dr. Gjerdrum did not define what he meant by "light duty work."
>
> Psychiatrically, she is to avoid undue stress. Dr. Echeverria outlined Ms. Torres' permanent mental impairments for activities of daily living; social functioning; memory, concentration, persistence and pace; and adaptation to stressful situations. While he indicated these are mild impairments, the added detail provided may in fact preclude her from these occupations. She would be expected to travel as a translator; to have difficulties interacting with others as a teacher, translator or teaching assistant; to have problems maintaining attention and concentration for specific tasks; to have moderate impairment completing a normal workday and workweek; and difficulties completing tasks and performing activities on schedule.
>
> With these impairments, Ms. Torres is considered not amenable to rehabilitation

> nor employable. Additional clarification on how these impairments effect Ms. Torres is discussed in the conclusion.
> (Ex. 3. 2/18/19 Ramirez Vocational Report, p. 10.)

In his conclusion, Mr. Ramirez found applicant would have difficulty being employable. Mr. Ramirez noted applicant's permanent disabilities "have made an impact on her," noting her self-reported limitations for sitting, standing, walking, kneeling, squatting and limitations on her neck and torso rotation, though he noted that Dr. Gjerdrum did not provide any work limitations for neck movements or using her hands. He raised concerns about placing her in work settings in front of a computer, a conveyor belt or requiring reaching and grasping, handling and fingering. "If what occurred during the evaluation which was a total of 2.5 hours is an indication of what would occur in a work setting it is obvious that she would have difficulty being employable." (Ex. 3. 2/18/19 Ramirez Vocational Report, p. 11.) Mr. Ramirez also stated that though her mild psychiatric impairment "would seem to not limit her employability," Mr. Ramirez found the limitation of "no undue stress" would cause difficulties with applicant's interactions with others in employment settings, maintaining attention and concentration for specific tasks, cause "moderate impairment completing normal workday and workweek," and completing tasks on schedule. "Vocationally when combining the above in a synergistic manner Ms. Torres would not be employable in today's open labor market." (Ex. 3. 2/18/19 Ramirez Vocational Report, p. 11.)

Defendant obtained a vocational evaluation from Mark Remas, who reported on April 15, 2020. In addition to the medical reports of Dr. Gjerdrum and Dr. Echeverria, Mr. Remas reviewed applicant's deposition, surveillance videos and the vocational report obtained by applicant from Mr. Ramirez. (Ex. B. 4/15/20 Remas Vocational Report.)

He reviewed applicant's dual employment at the time of her injury as a bilingual GED instructor at Santa Barbara Community College, and a teacher's aide working for the Santa Barbara Unified School District as a bilingual assistant in special education classes. Applicant stopped working at both jobs after her industrial injury.

In addition to her employment, he noted that applicant attends to her adult daughter who has developmental difficulties. She drives her daughter to a daycare program and to her appointments. Addressing the care applicant provides for her daughter, Mr. Remas stated:

> Ms. Torres reported that she must monitor her daughter closely as she is anxious in crowds, must be accompanied on all outings and does not communicate. Ms. Torres spends her afternoons with her daughter and will assist her by guiding

> her in identification exercises and may work with her on puzzles and other basic life skills or enrichment activities.
>
> Ms. Torres reported that she prepares meals for she and her daughter and will clean dishes. She is able to direct her daughter to help with the laundry. Ms. Torres reported that she spends most of her time at home with her daughter and will engage her in activities, puzzles, and tasks. (Ex. B. 4/15/20 Remas Vocational Report, p. 5-6.)

He further noted applicant complained of upper back pain, rated 5 out of 10, and that applicant was taking anti-inflammatory and antidepressant medications, but was not taking any pain medications. "She is able to perform activities of daily living and will assist her daughter with her activities of daily living and engage her in activities during the afternoons, evenings and weekends." (Ex. B. 4/15/20 Remas Vocational Report, p. 6.)

He reported that applicant has limitations that stem from her pain complaints in her hands and wrists, impairing her ability to grasp objects while cooking and performing home maintenance. She is limited in her ability to lift groceries, and her daughter helps her with laundry tasks.

Mr. Remas reviewed Dr. Gjerdrum's opinion on applicant's ability to return to the workforce, noting that in his February 9, 2016 report, Dr. Gjerdrum indicated that she could return to work as a teacher, "at least on some modified basis."

As for applicant's industrial psychiatric disability, Mr. Remas noted that Dr. Echeverria's diagnosis that applicant sustained an Adjustment Disorder with Mixed Anxiety and Depressed Mood, and a Pain Disorder, both chronic. He noted that Dr. Echeverria rated applicant's impairment as mild, and assessed her GAF at 66, with a 6% whole person impairment. The only work restrictions Dr. Echeverria placed on applicant was that she work in a position with consistent work hours to avoid sleep disruption, and that she not be exposed to undue stress.

Mr. Remas reviewed surveillance videos taken in November and December of 2019, which he noted depicted applicant driving a Tahoe vehicle, an SUV that is high off the ground and requires applicant to use a step and grip a handle to access. She was filmed driving to and from a store to purchase groceries. Applicant was seen pushing a shopping cart and reaching into the cart for three bags, loading the bags into her SUV with each hand. Applicant also lifted a gallon carton of milk with one hand. On another date, applicant was again observed lifting shopping bags and a gallon container of milk into her SUV. (Ex. B. 4/15/20 Remas Vocational Report, p. 14-15.)

Mr. Remas concluded that applicant was capable of returning to the job market, including performing her previous job duties, with "reasonably attainable accommodations."

> Based on the orthopedic analysis by Dr. Gjerdrum and the psychiatric analysis by Dr. Echeverria, it is within reasonable vocational certainty that Ms. Torres could perform the job duties of an adult education instructor with accommodations. Thus, she would be able to return to her usual and customary occupation or apply her transferable skills as an adult education teacher by implementing reasonably attainable accommodations.
>
> . . .
>
> Separately, Ms. Torres has over 20 years' experience in as a bilingual teacher and teacher's assistant. As such, she has transferable skills that would allow her to work in other settings, i.e. tutor, interpreter, student advocate, job coach, behavior monitor, among others.
> (Ex. B. 4/15/20 Remas Vocational Report, p. 14-15.)

Mr. Remas also performed a labor market survey in applicant's geographic area and identified job postings for adult basic education/literacy instructor and teacher assistant positions. He also noted some positions might require additional certifications that would be available to applicant through vocational rehabilitation. He indicated applicant would have access to these positions with reasonable job accommodations.

He found applicant was amenable to vocational rehabilitation, stating that based on the findings of Dr. Gjerdrum and Dr. Echeverria, applicant "would be capable of working and could likely return to her usual and customary occupation with reasonable job accommodations." (Ex. B. 4/15/20 Remas Vocational Report, p. 17.)

Mr. Remas and Mr. Ramirez each prepared supplemental reports to respond to criticisms made by the other.

On this record, the WCJ awarded applicant 52% permanent disability. In his Opinion on Decision, the WCJ stated that his rating was based on applicant's credible testimony and Dr. Gjerdrum's impairment ratings for her orthopedic injuries, including a 50% apportionment of her right shoulder impairment. He also included Dr. Echeverria's psyche impairment and the parties' stipulation to a 3% disability for applicant's gastrointestinal injury. The WCJ's rating added the right and left shoulder disability and combined them with the remaining disability.

16.02.02.00 16 – [7]22 – 212F – 22 – 25 (LEFT SHOULDER)

50 (16.02.01.00 12 – [7] 16 - 212E – 14 – 16)8 (RIGHT SHOULDER)
14.01.00.00 6 – [8] 16 – 212J – 14 – 16 (PSYCHE)
15.01.01.00 5 – [5] 6 – 212E – 5 – 6 (CERVICAL SPINE)
15.03.01.00 5 – [5] 6 – 212E – 5 – 6 (LUMBAR SPINE)
Previous stipulation of 3% to GI.

25 + 8 = 33 c 16 = 44 c 6 = 47 c 6 = 50 c 3=52[2]

In his Report and Recommendation on Petition for Reconsideration, the WCJ explained that in finding applicant was not permanently totally disabled, he found persuasive applicant's testimony concerning the activities she performs for her daughter, indicating her ability to perform activities including driving, meal preparation, cleaning and laundry. He found applicant's claim for permanent total disability not supported by the evidence.

DISCUSSION

Applicant argues that this record justifies a finding that she is permanently totally disabled, without apportionment, based on a vocational rebuttal of the scheduled rating of her impairments. Secondly, she contends that if we find applicant has not rebutted the scheduled rating, her rating should be based on the addition of her impairments, rather than use of the CVC, because of a lack of overlapping disability in her injured body parts.

To find applicant is entitled to an award of 100% permanent disability, applicant must present substantial evidence that establishes that she is unable to benefit from vocational rehabilitation, such that her diminished future earning capacity is greater than reflected in the scheduled rating, and for that reason she is unable to return to full time employment in the labor market.

Labor Code section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), the proper application of the PDRS in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections &*

[2] This rating does not include Dr. Gjerdrum's 3% add-on for pain which he provided in his initial rating and did not alter in his subsequent reporting. (Ex. 8. 6/18/14 Dr. Gjerdrum Report, p. 18.)

Rehabilitation v. Workers' Comp. Appeals Bd. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service*/*Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Almaraz*/*Guzman*). It may also be shown by rebutting the diminished future earning capacity factor supplied by the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; c.f. *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].)

To rebut a scheduled permanent disability rating, applicant must establish that her future earning capacity is actually less than that anticipated by the scheduled rating. The court in *Ogilvie, supra,* addressed the question of: "What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating?" (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the scheduled rating is based upon a determination that the injured worker is "not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating." The employee's diminished future earnings must be directly attributable to the employee's work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education. (*Ogilvie*, 197 Cal.App.4th at pp. 1274–1275, 1277.) The evidence in the record here is not sufficient to rebut the scheduled rating.

The issue here is whether the vocational evidence constitutes substantial evidence to support the conclusion that applicant was permanently totally disabled due to her inability to benefit from vocational rehabilitation, per *Ogilvie v. Workers' Comp. Appeals Bd.*; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) and *LeBoeuf v. Workers' Comp. Appeals Bd.*

In *Dahl*, the Court of Appeal held that to rebut the scheduled rating, applicant must prove that the industrial injury precludes vocational rehabilitation, writing in pertinent part as follows:

> The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation

> and participating in the labor force. This necessarily requires an individualized approach. … It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule.
> (*Dahl*, 80 Cal.Comp.Cases at 1128.)

The vocational evidence the WCJ relied upon, the reporting of Mr. Remas, indicates that applicant is amenable to vocational rehabilitation and that Dr. Gjerdrum's and Dr. Echeverria's work restrictions do not preclude applicant from participating in vocational rehabilitation and returning to full time employment. Mr. Remas's "individualized assessment" of the vocational factors affecting applicant's ability to return to work shows that the medical restrictions do not preclude applicant from gainful employment.

We find Mr. Remas's analysis of applicant's vocational limitations to constitute substantial evidence to support the WCJ's determination, despite the conflicting analysis provided by Mr. Ramirez. Mr. Ramirez's conclusion that despite applicant's "mild" psychiatric impairment, the limitation on "undue stress" would likely cause her "moderate impairment completing normal workday and workweek," and completing tasks on schedule, appears to go beyond Dr. Echeverria's psychiatric limitations. Mr. Ramirez's focus on the limitations caused by her use of her hands also fails to acknowledge that there are no medical restrictions due to her carpal tunnel syndrome. Finally, Mr. Ramirez's findings did not include consideration of applicant's role as the main caregiver for her developmentally disabled adult daughter.

Applicant argues that since Dr. Gjerdrum stated that her case "is a little more complex than just an orthopedic problem," the issue of her vocational amenability cannot be based on his finding that applicant is capable of working within her orthopedic restrictions. However, the additional consideration of her mild psychiatric impairment does not lend credence to Mr. Ramirez's conclusion that she is therefore precluded from returning to the labor market.

On this record, we affirm the WCJ's conclusion that applicant did not establish through vocational evidence that she has rebutted the scheduled rating of her permanent disability. The WCJ had the opportunity to review and evaluate the vocational evidence, and properly exercised his power as the trier of fact to choose from among the conflicting evidence the report which he deemed most persuasive (*Jones* v. *Workers' Comp. Appeals Bd.* (1968) 86 Cal.2d 476 [33 Cal.Comp.Cases 221]), and the relevant and considered opinion of one expert may constitute substantial evidence even though inconsistent with other reports in the record. (*Place* v. *Workers'*

Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Smith* v. *Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 588, 592 [34 Cal.Comp.Cases 424]; *Patterson* v. *Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 921 [40 Cal.Comp.Cases 799].)

Next, applicant contests the 52% permanent disability rating based on the impairment ratings provided by Dr. Gjerdrum and Dr. Echeverria. Applicant contends that her permanent disability rating should be based on adding her non-overlapping disabilities, rather than compressing her disability by application of the CVC, per *Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213. Applicant argues that where there are "a multiplicity of orthopedic impairments that have a synergistic effect, the impairments should be added." Applicant notes that Dr. Gjerdrum testified at his deposition that the impairment from applicant's shoulder disability should be added, and the WCJ's rating followed that recommendation. Applicant however argues that the CVC should not be applied to rate the disability of any of her body parts based upon the absence of overlapping disability.

We concur with the WCJ's conclusion that applicant has not established a medical basis for rating her impairments, other than her shoulder disabilities, using the additive method recognized in *Kite*, *supra*, rather than using the CVC.

Impairments may be added if substantial medical evidence supports a physician's opinion that adding them will result in a more accurate rating of the applicant's level of disability than the rating resulting from the use of the CVC. A physician's opinion on the most accurate rating method should be followed if he provides a reasonably articulated medical basis for doing so. (*De La Cerda v. Martin Selko & Co.* (2017) 83 Cal. Comp. Cases 567 (writ den.).)

Here, applicant contends that the trier of fact may determine whether to add her impairments based on the absence of overlapping impairments and the synergistic effect of the various impairments. However, applicant has not cited to any medical reports in which Dr. Gjerdrum concluded that use of the CVC to combine her other impairments would not accurately reflect applicant's overall disability. Dr. Gjerdrum testified that only the shoulder disability should be added, and that applicant's neck and back disability should be combined. A WCJ cannot make the determination to add disability in the absence of a physician's opinion that adding them will result in a more accurate rating of the applicant's level of disability. Therefore, we will affirm the WCJ's determination to add the shoulder disabilities and combine them with applicant's other disabilities.

Finally, applicant contends it was error to follow Dr. Gjerdrum's determination to apportion 50% of applicant's right shoulder disability to a pre-existing non-industrial rotator cuff tear. Applicant argues that Dr. Gjerdrum improperly apportioned to the cause of her injury, rather than to the cause of her disability, where he found the existence of the rotator cuff tear caused her disability.

"Apportionment of permanent disability shall be based on causation," and "[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab Code, §§ 4663 and 4664; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) It is the defendant's burden to prove a basis for apportionment. (*Escobedo,* supra; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].)

In order to meet its burden of proof to establish apportionment of permanent disability, defendant must present substantial medical evidence that establishes "what approximate percentage of the permanent disability was caused by the direct result of the industrial injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Labor Code section 4663, subd. (c).)

In *Escobedo*, the Appeals Board held that for a medical opinion on apportionment to constitute substantial evidence, the 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*, 70 Cal.Comp.Cases at 621-622. accord: *Andersen v. Workers' Comp. Appeals Bd*. (2007) 149 Cal.App.4th 1369, 1381–1382 [72 Cal.Comp.Cases 389]; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (*Gatten*) (2006) 145 Cal.App.4th 922, 927–928 [71 Cal.Comp.Cases 1687]; *Marsh v. Workers' Comp. Appeals Bd*. (2005) 130 Cal.App.4th 906, 917, fn. 7 [70 Cal.Comp.Cases 787].)

To constitute substantial evidence on apportionment,

> . . . 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.

> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.
>
> And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.
> (*Escobedo*, 70 Cal.Comp.Cases at 621-622.)

Further, as held in *Escobedo*, to constitute legal apportionment, the physician must not apportion to the causation of the industrial injury, but provide specificity as to the cause of the current level of disability. "Thus, the percentage to which an applicant's injury is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." (*Escobedo*, 70 Cal.Comp.Cases at 611. Emphasis in original.)

Here, Dr. Gjerdrum opined that applicant's right shoulder condition was industrial because of applicant's overuse of that shoulder after she injured her left shoulder. He identified a pre-existing rotator cuff tear that was present in her right shoulder at the time she began to experience her overuse injury. He testified in his deposition that applicant would not have sustained her compensable consequence injury to her right shoulder if she did not have the pre-existing condition. Despite couching his opinion in terms of using his best clinical judgment, his analysis fails to address the issue presented, that is, how and why the level of impairment he assessed was caused by that prior injury. His testimony that it would be unlikely for applicant to have sustained a derivative injury but for the prior injury does not adequately explain the mechanism by which that prior injury caused 50% of her right shoulder disability.

Accordingly, we will grant reconsideration and amend the Findings and Award to find applicant is entitled to an unapportioned award of 58% permanent disability, based on the following rating formula, which also includes a 3% add-on for pain per Dr. Gjerdrum's reporting.

25 + 16 = 41 c 16 = 50 c 6 = 53 c 6 = 56 c 3 = 57 c 3 = 58% Permanent Disability

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the January 21, 2021 Amended Findings of Fact and Order, is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 21, 2021 Amended Findings of Fact and Order, is **AMENDED** as follows.

AMENDED FINDINGS OF FACT

1. It is found Applicant sustained 58% permanent disability equivalent to 335.25 weeks of indemnity payable at the rate of $230.00 per week, plus 15% increase in the permanent disability payments pursuant to L.C. 4658(d) in the total sum of $88,377.91, less attorney fees as provided below.
2. It is found there is no legal basis for apportionment.
3. It is found there is a need for further medical care and treatment to relieve the effects of the industrial injury found herein.
4. It is found Applicant is entitled to be reimbursed for all out of pocket expenses incurred in an amount to be adjusted by the parties.
5. It is found a reasonable attorney's fee is $13,256.70 in connection with the permanent disability award herein.

AMENDED AWARD

AWARD IS MADE in favor of **CARMEN TORRES** and against **SANTA BARBARA COMMUNITY COLLEGE DISTRICT**, permissibly self-insured, as follows:

A. Permanent disability as provided in Findings number 1.

B. Further medical care as provided in Findings number 3.

C. Reimbursement for medical expenses as provided in Findings number 4.

D. Attorney fees as provided in Findings number 5.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 3, 2021

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

CARMEN TORRES
GHITTERMAN, GHITTERMAN & FELD
LANSFORD & CARBONARA

SV/*pc*

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