WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRENDA LEE, ***Applicant***

vs.

CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, legally uninsured, ***Defendants***

Adjudication Number: ADJ10199171
Sacramento District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report and the opinion on decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report and the opinion on decision, both of which we adopt and incorporate, we will deny reconsideration.

Pursuant to Labor Code section 4660, the determination of permanent disability is addressed by consideration of whole person impairment (WPI) within the four corners of the AMA Guides, the proper application of the permanent disability rating schedule (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]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* 27 Cal.App.5th 607 [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*). The determination of permanent disability 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 rating under the PDRS, 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, supra*, 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, supra*, 197 Cal.App.4th at pp. 1274–1275, 1277).

The issue here is whether applicant's vocational evidence constitutes substantial evidence to support the conclusion that applicant was permanently totally disabled due to her inability to benefit from vocational rehabilitation. In *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119], the Court of Appeal held that to rebut the scheduled rating, an 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, supra*, 240 Cal.App.4th 758.)

For the reasons stated by the WCJ in the report and opinion on decision, we agree that applicant's vocational expert's opinion was not substantial evidence to rebut the scheduled rating. (See *Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97] [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 Appeals Board's findings if it is based on surmise, speculation, conjecture or guess.].) We also agree that the WCJ properly relied on the medical opinion of panel qualified medical examiner (PQME) Patrick J. McGahan, M.D., to find 26% permanent disability.

Finally, we admonish applicant's attorney Ronald Metzinger for attaching documents that are already part of the record in violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, former § 10842(c), now § 10945(c)(1)-(2) (eff. Jan. 1, 2020).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 9, 2021

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

BRENDA LEE
METZINGER & ASSOCIATES
STATE COMPENSATION INSURANCE FUND

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1.	Order Issued:	6/4/2021
2.	Identity of Petitioner:	Applicant
3.	Verification:	The person verified
4.	Timeliness:	The petition is timely
5.	Date Petition for Removal Filed:	6/10/2021
6.	Petitioner alleges: permanent disability.	The Court erred in finding applicant's level of

Applicant sustained an industrial injury on July 21, 2014 to her back, hips and left leg; the case resolved by Stipulation & Award on May 14, 2018 for 20% permanent disability. Thereafter applicant filed a Petition to Reopen and subsequently obtained a vocational evaluator. The parties were unable to agree upon applicant's new level of disability and thus set the issue for trial. The Court found that applicant sustained 26% permanent disability based upon the PQME reporting of Dr. McGahan and that the reporting of the vocational evaluator was not substantial evidence to be relied upon. Applicant filed her Petition for Reconsideration disputing the level of permanent disability found by the Court and inquiring as to the vocational evaluators invoicing.

The Court found that Mr. Diaz's vocational evaluation was not substantial evidence on the issue of permanent disability in part because Mr. Diaz's reporting was based upon a misinterpretation of applicant's work restrictions. Throughout Dr. McGahan's reporting, applicant's work restrictions remained essentially the same, applicant's restrictions were to alternate sitting and standing every 10 minutes, no lifting, pushing, or pulling greater than 20 pounds, and a 10-minute break every hour. (Exhibit FF p.4, Ex. EE, Ex. CC p.3, Ex. BB p. 10) Dr. McGahan later added a restriction of no repetitive bending and squatting. (Ex. Y p.12). As noted in the Opinion on Decision, Mr. Diaz interpreted this restriction as follows: "Ms. Lee's need to take ten (10) minute breaks every hour is significantly labor disabling as she would require breaks totaling eighty (80) minutes per day. Ms. Lee's need to take a ten (10) minute break every hour and potentially leave her work station during these breaks could not be readily accommodated in the open labor market." However, in his May 24, 2017 report Dr. McGahan explained the restriction as needing to "alternate tasks as well as stretching. I do not believe that Ms. Lee has to clock out and take an off the clock break. It is my professional opinion that through an alternate task with an allowance for stretching, she would be able to accomplish this break while on the clock." (Ex. EE). This specific restriction did not change as alluded by applicant. It is noted that

Mr. Diaz did not review the May 24, 2017 report by Dr. McGahan and was therefore unaware of this important distinction in the restriction.

Applicant also alleges that the Court should have addressed the issue of the billing from the vocational evaluator. Applicant states that the bill was admitted as evidence. (Petition for Reconsideration p. 3 lines 16-25, p.4 lines 3-6). This is a misrepresentation of the basic facts of the trial. The issue of the billing was not submitted as an issue for the Court to decide, rather as noted in the April 5, 2021 Minutes of Hearing and Summary of Evidence it was bifurcated with jurisdiction reserved. A copy of the billing was not submitted as evidence. Applicant should be admonished for this misrepresentation.

The Petition for Reconsideration also mentions that the Court "misinterpreted the discussions of the parties at the time of trial. The court notes that the stipulations of the parties were for 28% for the strict interpretation of the AMA Guidelines." (Petition for Reconsideration p. 4 lines 9-20). The only stipulations noted in the Opinion for Decision is the original Stipulation & Award dated May 14, 2018. It is unknown what applicant is alluding to. Nonetheless, the Court found applicant's level of permanent disability based upon the rating of Dr. McGahan's November 4, 2019 reporting (Ex Y), not the stipulation of the parties. The issue submitted to the court to decide was applicant's level of permanent disability; this was not based upon a stipulation.

RECOMMENDATION

It is recommended that the Petition be denied.

DATE: July 6, 2021

Darcy Kosta
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Applicant sustained an industrial injury on July 21, 2014 to her back, hips and left leg; the case resolved by Stipulation & Award on May 14, 2018 for 20% permanent disability. The parties agreed applicant's disability rated as follows: 50% (15.03.01.00 - 28 - 39 - 112D - 33 - 40) 20%. The parties further stipulated that defendant could take credit for an overpayment of $114.96 against any new and further disability. Applicant filed a Petition to Reopen on July 6, 2018.

The parties were unable to agree upon applicant's current level of permanent disability. Dr. McGahan served as the panel qualified medical examiner. In his April 19, 2019 report Dr. McGahan found applicant to be TTD as she had recently has a spinal fusion. He re-evaluated applicant on October 30, 2019 and found applicant to be permanent and stationary at the time of evaluation. He opined that applicant continued to have 28% WPI and also found that applicant had a 3% impairment for her right and left hip due to her industrially related bursitis. He specifically mentioned that applicant's osteoarthritis of the hips was not due to the industrial injury.

Applicant relies upon the vocational reporting of Frank Diaz. Mr Diaz opined that applicant is unable to return to work in the open labor market. Mr. Diaz's report, however, is based upon a misinterpretation of Dr. McGahan's work restrictions. Mr Diaz writes "Ms. Lee's need to take ten (10) minute breaks every hour is significantly labor disabling as she would require breaks totaling eighty (80) minutes per day. Ms. Lee's need to take a ten (10) minute break every hour and potentially leave her work station during these breaks could not be readily accommodated in the open labor market." Dr. McGahan described the work restriction in the May 24, 2017 report as needing to "alternate tasks as well as stretching. I do not believe that Ms. Lee has to .clock out and take an off the clock break. It is my professional opinion that through an alternate task with an allowance for stretching, she would be able to accomplish this break while on the clock." It appears that Mr. Diaz did not have an understanding of the work restriction. In addition, it is noted that this work restriction was in place at the time that the parties stipulated that applicant's permanent disability was 20%. Furthermore, applicant's work restrictions did not change from 2017 to when she was last evaluated by Dr. McGahan in 2020. Overall, Mr. Diaz's reporting lacked the proper analysis that applicant was permanently totally disabled.

It is found that the AMA Guides rating is a more accurate representation of applicant's level of disability. Applicant's permanent disability therefore rates as follows:

50% (15.03.01.00 - 28 - 39 - 112D - 33 - 40)20%.
(left) l7.01.07.00 - 3 - [1.4] 4 - 112C - 3 - 4%
(right) 17.01.07.00 - 3 - [1.4] 4 - 112C - 3 - 4% eve = 26%

Applicant is, therefore, awarded 26% permanent disability payable at the rate of $290.00 per week for 206.75 weeks totaling $30,957.50, less sums paid to date and less attorney fee in the amount of $1,359.38.

DATE: June 4, 2021

Darcy Kosta
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE