WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ROBERT GONZALES, ***Applicant***

vs.

NORTHROP GRUMMAN SYSTEMS CORPORATION;
AIG, ***Defendants***

Adjudication Number: ADJ9689895
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the February 3, 2020 Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant, while employed during the period from March 31, 1992 to July 28, 2014 as a structural aircraft mechanic, sustained admitted industrial injury to both shoulders, both knees, cervical spine, lumbar spine, and internal injury in the form of heart disease and hypertension. The WCJ further found 85% industrial apportionment with regard to the permanent disability attributable to the cervical and lumbar spines, left knee and right knee; 100% industrial apportionment with regard to left shoulder, right shoulder and right wrist; and 50% industrial apportionment with regard to hypertension and coronary artery disease. The WCJ also found that the injury herein caused 100% permanent disability.

Defendant contends that the WCJ erred in finding applicant 100% permanently disabled, arguing that total permanent disability cannot be found where there is valid apportionment, that the WCJ ignored the apportionment findings of agreed medical examiner (AME) Steven Silbart, M.D., and panel qualified medical examiner (PQME) Benjamin Simon, M.D., and that the vocational expert opinion of Robert Liebman is not substantial evidence.

Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that we deny reconsideration.

Based on our review of the record and for the reasons stated in the WCJ's Report, which we adopt and incorporate, and for the reasons stated below, we will affirm the February 3, 2020 Findings of Fact and Award.

Defendant does not dispute the Disability Evaluation Unit's (DEU) October 28, 2019 recommended rating of 97% permanent disability based on the WCJ's rating instructions. Likewise, defendant does not dispute the finding of 100% industrial apportionment with regard to the permanent disability attributed to applicant's shoulders and right wrist and does not dispute that the scheduled rating can be rebutted by vocational evidence under Labor Code[1] section 4660.1. Therefore, we do not address those issues.

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. (Lab. Code, § 4660.1). To rebut a scheduled permanent disability rating, an injured worker must establish that his future earning capacity is less than that anticipated by the scheduled rating. The court in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 addressed the issue of "[w]hat 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 therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating." (*Id.,* at pp. 1274-1275, 1277.) 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. (*Id*.)

In *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119], 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:

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

> 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 at p. 758.)

In this case, applicant submitted the vocational expert opinion of Mr. Liebman. In addressing the symptoms related to applicant's 100% industrially caused shoulders and wrist injury, Mr. Liebman noted that:

> Mr. Gonzales reported the following:
> 1. Constant daily pain, every day/all day, 24/7, in both shoulders, more so on the left side than the right, radiating to both elbows, and both wrists to his fingers, with a numbness in all of his fingers that causes him to drops things he may be holding. On a scale of 1 to 10 with 10 being excruciating pain, and 1 being minimal. Mr. Gonzales reports an average of 6-7/10 throughout the day….
> (Vocational Report of Robert Liebman, 4/13/19, Applicant's Exhibit 2 at p. 5.)

In addressing the issue of apportionment, Mr. Liebman stated:

> It must be understood that the concept of apportionment in medicine and in vocational issues are two different concepts which are not always the same as one another. In medicine the concept applies to impairment, whereas in vocational issues it is disability/ employability, and the two are different from one another. Medical impairment may develop as we age or may involve long-standing impairments that an individual may have throughout much of their life. Many individuals that have medical impairment are able to function effectively in the workplace with impediment.
>
> ….
>
> From the Orthopedic standpoint, the AME Dr. Silbart apportioned 15% of Mr. Gonzales's cervical, lumbar and bilateral knee disability to non-industrial degenerative disc and degenerative joint changes, and 85% to trauma sustained continuously at Northrop Grumman.
>
> He apportioned Mr. Gonzales's bilateral shoulder and right wrist disability entirely to trauma sustained continuously at Northrop Grumman.
>
> Agreed QME in Internal Medicine, Dr. Simon, apportioned as follows:

> • Hypertension – Dr. Simon apportioned 50% of the applicant's permanent disability from his hypertension to industrial etiology, and 50% to non-industrial etiology, including obesity and metabolic syndrome of which hypertension is associated.
>
> • Coronary Artery – Dr. Simon apportioned 50% of the applicant's permanent disability from his myocardial infarction to industrial etiology, including hypertension and recent total knee replacement; and 50% to non-industrial etiology, including hyperlipidemia, previous tobacco use, glucose intolerance, and non-compliance.
>
> Opinion of the Vocational Expert
>
> I have carefully considered apportionment in this case from the vocational perspective. The issues preventing Mr. Gonzales from being able to return to the open labor market are the overall combined global effect of his orthopedic and internal medicine conditions. In view of this, I considered the substantial medical evidence as discussed above and related that to the open labor market for purposes of my overall analysis. From an orthopedic and internal medicine perspective, Mr. Gonzales was able to perform his employment with Northrop Corporation for 23 years, up until August 2015, when he chose to prematurely retire due to the extent of the industrial-related injures he incurred while working for the employer. Even if there were any pre-existing orthopedic and/or internal medical factors that may have been involved, they did not prevent him from performing his job. In fact, Mr. Gonzales reported to me that he underwent a preemployment physical examination with the employer prior to the beginning of his employment and was not given any work restrictions. Therefore, and in view of this, there is nothing to indicate that there was any degree of vocational apportionment that prevented Mr. Gonzales from performing his job prior to his injuries with the employer Northrop Corporation. During my interview with Mr. Gonzales, he appeared credible and gave me no reason to disbelieve any of his statements. As such, I find that 100% of his loss of earning capacity is industrial in nature…..
> (*Id*, at pp. 14-15.)

In addressing employability and placeability, Mr. Liebman stated:

> I have extremely grave concerns with regard to Mr. Gonzales's employability and placeability both. The combined residual effect of his industrial-related work limitations and resulting functional capacity would preclude him from performing any employment in the competitive labor market. The synergistic and global effect of his overall physical and psychological impairment and residual functional capacity would prevent him from performing work at a sedentary or light level even on a regular-schedule part-time basis. His degree of constant pain; limited use of his wrists and hands; inability to concentrate and lack of focus, and lack of stamina and fatigue are such that he would be unable to maintain an acceptable work pace, as well as maintaining acceptable attendance performance.

It is important in this case that the combined global effects of limitations be considered, that is, all credibly supported limitations should be considered in combination with one another. It would seem virtually impossible that this type of individual, as described by the medical examiners, and evaluated in person by myself, would be able to function in the workplace due to the combined effects of his industrial-related impairment.

I also examined the possibility for the applicant to work out of his home in which he could work when he would feel capable of working, and rest when he would not feel capable of working. In essence, he would determine his own hours and literally be his own boss. However, this may be somewhat equivalent to working in a sheltered environment, which in the manner described above, is not considered to be gainful employment and may be equivalent to being 100% permanently and totally disabled. However, here again, I was unable to identify any jobs in the open labor market that would be available in this environment due to the severity of his injuries described in this report, including the employability and placeability factors referred to above.

FINDINGS AND CONCLUSIONS

Taking all of the above factors as noted in this report into consideration, it is my professional opinion within a reasonable degree of vocational certainty, based on an individualized sequential analysis using empirical data as explained above, that Mr. Gonzales would be unable to return to the open labor market and has a total loss (100%) of earning capacity. His residual functional capacity as a result of his industrial-related injury indicates that he is not capable of successfully returning to any form of employment in the competitive labor market. Furthermore, due to the industrial-related factors described in this report, Mr. Gonzales would not be amenable to or capable of benefiting from any form of assistance through vocational rehabilitation services.

This report outlines my findings and conclusions based on information available at this time - my review of medical reports I have been furnished, the industrial-related work limitations imposed by Mr. Gonzales's injuries, my personal meeting with the applicant, my experience as a vocational rehabilitation expert, my educational background, the results of a transferable skills analysis utilizing the Vocational Diagnosis and Assessment of Residual Employability (VDARE) method and the OASYS computerized software, and my knowledge of the labor market. Should additional information become available in the future, my opinions may be modified.

(*Id.*, at pp. 19-20.)

We found Mr. Liebman's vocational opinion thorough, well-reasoned and substantial evidence upon which the WCJ properly relied to determine that applicant rebutted the permanent disability rating and is permanently totally disability.

Moreover, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

Finally, we note that defendant's reliance on *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751] is misplaced. In *Borman*, the WCJ actually ignored and failed to address substantial medical evidence of non-industrial apportionment. (*Id*, at p. 1143.) In this case, both Mr. Liebman and the WCJ considered and applied the non-industrial apportionment found.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 3, 2020 Findings of Fact and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 6, 2022

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

ROBERT GONZALES
PENNINGTON & TRODDEN
BLACK AND ROSE

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. Applicant's Occupation:	Structural Aircraft Mechanic
2. Applicant's Age:	68
3. Date of injury:	3/31/1992 to 7/28/2014
4. Parts of Body Injured:	Both shoulders, both knees, cervical spine, lumbar spine and internal (heart disease and hypertension)
5. Manner in which injuries have occurred:	Cumulative Trauma
6. Identity of Petitioner:	Defendant, Northrop Grumman Systems Corporation
7. Timeliness:	The petition was timely filed.
8. Verification:	A verification is attached.
9. Date of Findings and Award:	2/3/2020
10. Petitioner's contention:	WCJ's Award of 100% is not supported by the evidence and is in excess of the WCAB's powers because there is valid apportionment and the vocational report of Robert Liebman is not substantial evidence.

II

JURISDICTIONAL FACTS

Applicant, Robert Gonzales, born [], while employed for Northrop Grumman Systems Corporation during the period 3/31/1992 to 7/28/2014, as a Structural Aircraft Mechanic, sustained injury arising out of and in the course of his employment to both shoulders, both knees, cervical spine, lumbar spine and internal (heart disease and hypertension)

The matter commenced trial before the undersigned on 9/11/2019 and was submitted pending referral to the Disability Evaluation Unit. The WCJ vacated her submission pending

referral to the Disability Evaluation Unit on 10/28/2019. A formal rating and instruction was served on all parties on 10/28/2019.

There was no objection filed in response to the formal rating or instructions. On 2/3/2019 the WCJ issued a Findings of Fact and Award indicating Applicant was permanently and totally disabled. Defendant filed a timely and verified Petition for Reconsideration on 2/24/2020. Applicant filed a verified Answer to Petition for Reconsideration on 3/5/2020. Defendant's contentions are that the Findings of Fact and Award of 100% permanent and total disability is not supported by the evidence and is in excess of the WCAB's powers because there is valid apportionment and the Vocational Reports of Robert Liebman are not substantial evidence. For the following reasons Defendant's Petition should be denied.

III

DISCUSSION

THE FINDINGS OF FACT AND AWARD OF 100% PERMANENT AND TOTAL DISABILITY IS NOT SUPPORTED BY THE EVIDENCE AND IS IN EXCESS OF THE WCAB'S POWERS BECAUSE THERE IS VALID APPORTIONMENT

The WCJ concurs that there is valid non industrial apportionment per the Agreed Medical Examiner, Dr. Steven Silbart and the Panel QME, Dr. Benjamin Simon. This nonindustrial apportionment is reflected in the Findings of Fact and Award as well as the Formal Rating and instructions dated 10/28/2019 to which there was no objection filed. According to the formal rating, the permanent disability is 97% after apportionment. Defendant's contention that non-industrial apportionment was not considered is unfounded.

However, notwithstanding the non-industrial apportionment, the Applicant is found to be permanently and totally disabled. This finding was not based on the medical evidence alone but the entire record in this matter which includes the credible and unrebutted testimony of the Applicant which was corroborated by the Vocational Expert reporting of Robert Liebman.

Defendant's second contention specifically addresses the vocational reporting of Robert Liebman. Defendant contends that the vocational reporting of Robert Liebman is based on an incorrect legal theory and therefore cannot be relied upon. This is a misleading and incomplete summary of the findings and analysis that was done by Robert Liebman.

In his report dated 4/13/2019, he conducts a thorough personal evaluation of the Applicant including Applicant's complete work history and his present symptoms, reviews and summarizes all the relevant medical reporting in this matter and provides his resulting analysis as to Applicant's employability. As a result he finds that, "In view of the medical and empirical evidence in this case as well as my personal evaluation of the applicant, it is my professional opinion that Mr. Gonzales is totally and permanently disabled based on the degree of the residual effect of his combined industrial-related work limitations and resulting functional capacity would prevent him from performing any employment in the competitive labor market." (See Exhibit 3 at page 12) In support of his opinion, Mr. Liebman indicates, "His degree of constant pain, inability to concentrate and lack of focus, and lack of stamina and fatigue are such that he would be unable to maintain an

acceptable work pace, as well as maintaining acceptable attendance performance. Mr. Gonzales would not be a reliable employee." (See Exhibit 3 at page 12) Applicant's credible and unrebutted testimony supports the conclusions of Mr. Liebman that the reason he is not working is due to his medical problems and that he does not think there is a job he can do on a full-time basis. (See Minutes of Hearing and Summary of Evidence dated 9/11/2019 page 5 lines 2 to 3) For these reasons, Applicant has rebutted the permanent disability rating and is therefore permanently and totally disabled.

Additionally, Mr. Liebman opines that the Applicant is not amenable to vocational retraining in accordance with *LeBoeuf*. He states the following, "Due to the combination of his age and occupation, and the nature and severity of his industrial injuries, it is my professional opinion that he would not be a candidate for a vocational training program to acquire computer skills that would lead to a return to the competitive labor market." (See Exhibit 3 at page 17) while it is correct that Mr. Liebman cites the former Labor Code section 4660(a) in his report, this same analysis holds under the applicable Labor Code Section 4660.1(a). Applicant was seventy years old on the last date of his industrial injury. Applicant's unrebutted testimony was that he was not computer proficient as he testified that had limited ability to use the internet or even fully operate his own cellular device which was a "flip phone". This credible and unrebutted testimony further supports the finding that Applicant is totally and permanently disabled based on his inability to be retrained as set forth in Mr. Liebman's report and in accordance with *LeBoeuf* .

Finally, Defendant takes issue with Mr. Liebman's citation to Labor Code Section 4662 as well as Applicant's work history. With regard to these contentions, this WCJ concurs with Applicant's rationale set forth in his Answer to Petition for Reconsideration, that Mr. Liebman does not premise his opinion on Labor Code Section 4662 or that the work history given to Mr. Liebman was inaccurate. The mere reference made by Mr. Liebman to Labor Code Section 4662 does not cause the reporting of Mr. Liebman to not be substantial evidence. The report must be read in its entirety to determine its substantiality in light of the entire record. Mr. Liebman's opinions are consistent with the rationale set forth in *Fitzpatrick* that the Applicant has effectively rebutted the permanent disability rating schedule and is permanently and totally disabled based on his vocational analysis set forth in greater detail above. As Applicant states, "At no point does Mr. Liebman ignore the medical opinions of the physicians and find 'a separate pathway' to a 100% disability finding by reliance upon Labor Code Section 4662(b)." (See Answer to Petition for Reconsideration dated 3/5/2020 at page 5 lines 21 to 24)

Defendant also raises an issue with regard Mr. Liebman's reference to a pre-employment physical that Applicant had prior to his employment with Northrop Grumman, the employer at issue. As Applicant points out in his Answer, "The unrebutted facts demonstrate Mr. Gonzales performed his laborious occupation for some 23 years – this speaks for itself". If Defendant wished to demonstrate otherwise they had ample opportunity to do so but failed to do so by either evidence or testimony. Based on the entire record, there is no reason to doubt the truth of Applicant's testimony regarding his job duties performed over his 23 year career which was corroborated by the entire record.

RECOMMENDATION

As the Petition for Reconsideration fails to demonstrate good cause upon which to base the setting aside of the Findings and Award dated 2/3/2020, it is respectfully recommended that the Petition for Reconsideration be denied for lack of good cause as set forth above.

Respectfully submitted,

CIRINA A. ROSE
Workers' Compensation Judge

Date: 3/18/20