WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVID SCHWEIKERT, ***Applicant,*** **vs.** **STATE OF CALIFORNIA - CALIFORNIA HIGHWAY PATROL, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. ADJ6981320** **(Fresno District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

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

Defendant seeks reconsideration of the Findings of Fact, Award and Opinion on Decision (F&A) issued by the workers' compensation administrative law judge (WCJ) on September 14, 2017, wherein the WCJ found in pertinent part that applicant injured his head, neck, back, left upper extremity and psyche, that applicant did not sustain injury to his abdomen or internal system, that applicant is in need of further medical treatment for each of the injured body parts, and that the injury caused 75% permanent disability.

Defendant contends that the disability rating is incorrect because it includes whole person impairment (WPI) for applicant's lumbar spine which was not included in this injury claim, that applicant is not entitled to three separate 3% pain add-ons, that applicant's headaches should not have been rated as a consciousness disorder, that the injury caused 64% permanent disability, and that applicant should not have been awarded future medical treatment for his lumbar spine and psyche.

Subsequent to issuing the F&A the WCJ retired and we have not received a Report and Recommendation on Petition for Reconsideration. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer. Based upon our review of the record, and for the reasons set forth below, we will affirm the F&A except that we will amend the F&A

to find that applicant sustained injury to his head, neck, and left upper extremity, that the injury caused 72% permanent disability, and that applicant is not entitled to future or further psychiatric treatment.

BACKGROUND

Applicant claimed injury to his head, neck, back left arm, abdomen (gastrointestinal problems), body system (blood clot) and in the form of a neuropsychological injury/headaches while employed by defendant as a flight officer during the period ending July 13, 2009.

Applicant later claimed a cumulative trauma injury to his lower back (lumbar spine). The injury claim was resolved by Stipulations With Request for Award including 12% permanent disability, based upon the March 13, 2013 report from Peter Mandell, M.D.; a WCJ issued an Award on February 28, 2014. (see Stipulations/Award in ADJ8723024.) On December 31, 2014, applicant filed a petition to re-open.

Regarding the July 13, 2009 injury claim, applicant was evaluated by four Agreed Medical Examiners. Grant L. Hutchinson, Ph.D., performed a neuropsychological evaluation of applicant and later performed a psychological evaluation. (Joint Exhs. I and J.) Michael A. Kasman, M.D., evaluated applicant as the neurological AME. (Joint Exhs. C, D, E, F, G, and H.) Peter J. Mandell, M.D., examined applicant as the orthopedic AME. (Joint Exhs. A and B.) Michael M. Bronshvag, M.D., was the internal medicine AME. (Joint Exhs. K, L, M, N, O, and P.)

Dr. Hutchinson determined that applicant had 3% WPI caused by his cognitive disorder. (Joint Exh. J, Grant L. Hutchinson, Ph.D., January 10, 2013, p. 35.) However, with respect to a psychiatric disorder the doctor stated:

> With respect to Axis I psychiatric issues, while Mr. Schweikert has some minor sadness, this does not reach the level of a diagnosable disorder. Further, he denies any Axis I symptoms and his psychological testing is not compatible with Axis I disorders. This is in keeping with the findings of prior evaluators. With respect to Axis II, investigation of his background and functioning up to the time of the injury also does not provide evidence of a diagnosable personality disorder on Axis II, again in concert with prior evaluators. (Joint Exh. J, p. 34.)

He determined that applicant had no Axis I or Axis II psychiatric disorders and in turn no disability caused by the psychiatric injury (Joint Exh. J, p. 35) and that applicant did not need psychiatric

treatment. (Joint Exh. J, p. 36.) The doctor concluded that applicant sustained permanent disability as a result of his cognitive disorder but that he had no ratable psychiatric disorders.

In his January 13, 2015 report Dr. Kasman stated that:

> "Although Mr. Schweikert does not manifest epilepsy/seizures, the epilepsy section in the Guides (Table 13-3 on page 312), can be used because the characteristics of seizures, as worded in this section, is very typical of headaches: "paroxysmal disorder with predictable characteristics and unpredictable occurrence that does not limit usual activities, but is a risk to individuals or limits daily activities ..." (Class I - [0-14% Whole Person Impairment]) . Class II (15-29% Whole Person Impairment) is "paroxysmal disorder that interferes with some daily activities", and Class III (30-49% Whole Person Impairment) is "severe paroxysmal disorder of such frequency that it limits activities to those that are supervised, protected, or restricted ..." Certainly Mr. Schweikert does not qualify for Class III, but I would indicate a 29% Whole Person Impairment with an additional 3% impairment from Chapter 18, which would equal a 31% Whole Person Impairment according to the Combined Value Chart."
> (Joint Exh. G, Michael A. Kasman, M.D., January 13, 2015, p. 76.)

The doctor also stated that applicant had 5% WPI due to vestibular disorder/vertigo. (Joint Exh. G, p. 77.)

Dr. Mandell stated:

> "Under the strict AMA Guides and for his symptomatic cervical disc disease with primarily LEFT upper extremity radiculopathy, the DRE method is called for. Turning to Table 15-5 on page 392, he fits into DRE Cervical Category II with nonverifiable radicular complaints. Due to restrictions in activities of daily living he has an 8% whole person impairment. I would add an additional 3% for pain for a total of 11% whole person impairment."
> (Joint Exh. A, Peter J. Mandell, M.D., March 13, 2013, p. 7.)

He also found that applicant had 6% WPI related to his lumbar spine. (Joint Exh. A, p. 7.)

In his September 15, 2016 report, Dr. Bronshvag indicated that:

> " There is a table on page 498, Chapter 16 - Table 16 - 17 entitled "Impairment of the Upper Extremity Due to Peripheral Vascular Disease." (¶) ... Class 1, which goes up to 9% upper extremity is reviewed. Class 2 describes intermittent claudication with severe use and permanent - moderate edema. The simplest (and perhaps most accurate) use of the Guides is to state that the claimant is a 10% upper extremity rating, (borderline between Class 1 and Class 2), which would convert (page 439,

Table 16-3) to a 6% WPI with an add on of 3% for pain symptoms for a 9% WPI."
(Joint Exh. P, Michael M. Bronshvag, M.D., September 15, 2016, p. 7.)

The parties proceeded to trial on July 24, 2017. They stipulated that applicant sustained an industrial injury to his head, neck, and psyche; and applicant also claimed injury to his upper extremities, abdomen, back and internal organs. (Minutes of Hearing (MOH), July 24, 2017, p. 2.) The issues submitted for decision included parts of body injured, permanent disability and the need for future medical treatment for applicant's upper extremities, abdomen, back, and internal organs. (MOH, pp. 2 - 3.)[1] The issue of whether applicant needed further medical treatment for his psychiatric injury was not identified and/or submitted for decision.

DISCUSSION

Defendant contends that applicant is not entitled to more than one 3% pain add-on.

We first note that each of the reporting doctors was an AME. "[W]orkers' compensation law favors agreed medical [evaluators] in resolving medical disputes fairly and expeditiously." (*Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444 [70 Cal.Comp.Cases 294].) The Agreed Medical Examiner was presumably chosen by the parties because of his expertise and neutrality. Therefore, an agreed medical evaluator's opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive. (*Power v Workers' Compensation Appeals Board* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) Also, the Sixth District Court of Appeal stated that the AMA Guides provide guidelines for the exercise of professional skill and judgment which may result, in a given case, in ratings that depart from those found in the AMA Guides. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal. Comp. Cases 837].) The Court explained that application of the Guides must take into account the instructions on its use, which clearly prescribe the exercise of clinical judgment in the impairment evaluation, even beyond the descriptions, tables, and percentages provided for each of the listed conditions. (*Id* at 824.)

[1] The MOH indicates that applicant claimed injury to his back but in the Petition and Answer both parties state that applicant has a separate low back injury claim and that his low back is not an issue in this matter.

Here, each of the reporting AME doctors explained why the recommended WPI, including the pain add-on, accurately described applicant's disability caused by the injury. The analysis by each of the doctors appears to be consistent with the applicable law and we see no good reason to disturb the WCJ's conclusion on that issue.

Defendant also asserts that it was not appropriate to rate applicant's headaches as a "consciousness disorder."

As noted above, in his January 13, 2015 report Dr. Kasman explained why it was appropriate to use the Whole Person Impairment (WPI) described in Table 13-3 of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides). The doctor explained why the impairment factors identified in Table 13-3 were applicable to applicant's symptoms caused by his head injury. There is no evidence in the record which is inconsistent with Dr. Kasman's opinions and as such using the impairment factors for consciousness disorder was appropriate.

Further, we note that based upon the report from Dr. Hutchinson, defendant correctly contends that there is no basis for an award of future medical treatment for applicant's psychiatric injury; and as previously noted, the parties did not submit that issue for decision.

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Finally, the parties agree that applicant's lumbar spine injury was at issue in case number ADJ8723024, and is not at issue in the present matter. Thus, the WPI caused by applicant's lumbar spine injury was not a factor to be included in the rating of applicant's disability herein.

Based on the foregoing discussion, applicants' disability is rated as follows:

Consciousness Disorder-Headaches-includes 3% pain add-on

13.01.00.00 - 32 - [6]42 - 4901 - 51 - 51

Cervical-Diagnosis-related Estimate-includes 3% pain add-on

15.01.01.99 - 11 - [5]14 - 4901 - 20 - 20

Left-Arm-Peripheral vascular-includes 3% pain add-on

16.01.03.00 - 9 - [5]11 - 4901 - 16 – 16

Ear-Vestibular Disorder

11.01.02.00 - 5 - [8]7 - 4901 - 11 - 11

Cognitive Impairment

13.04.00.00 - 3 - [2]3 - 4901 - 5 - 5

51 C 20 C 16 C 11 C 5 = 72%

Accordingly, we affirm the F&A except that we amend it to find applicant has 72% disability caused by the injury and that there is no need for future psychiatric treatment as a result of the injury, and that applicant did not sustain injury to his low back.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Award and Opinion on Decision issued by the WCJ on September 14, 2017, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

2. The injury caused 72% permanent partial disability.

4. There is a need for further medical treatment to cure or relieve from the effects of the industrial injuries to applicant's head, neck, and left upper extremity.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

JOSÉ H. RAZO
CHAIR

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 29 2018

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

DAVID SCHWEIKERT
JONES, CLIFFORD ET AL.
STATE COMPENSATION INSURANCE FUND

TLH/abs/pc