



Significant Decision

No. 18-06

September 25, 2018

DEPARTMENT OF CORRECTIONS V. WCAB (FITZPATRICK)

IN THE THIRD DISTRICT COURT OF APPEAL (C085850)

FILED: SEPTEMBER 25, 2018

The WCAB exceeded its jurisdiction when it relied upon Labor Code §4662(b) to find 100% permanent total disability, where the scheduled permanent disability rating of 99% under section 4660 was un rebutted.

Significance: Even in cases falling under §4662(b) “in accordance with the fact,” applicant must nevertheless provide substantial evidence rebutting the scheduled rating pursuant to §4660.

Facts: Applicant sustained injury to his heart (evaluated by Dr. Chang-Sing), and psyche (evaluated by Dr. Lieberman). Dr. Chang-Sing found 75% WPI, resulting in 97% PD; Dr. Lieberman found 45 GAF, 40% WPI, and 71% PD. The parties agreed that the combined rating under the 2005 Schedule was 99% permanent partial disability. However, applicant contended that Dr. Lieberman’s stated findings (that applicant was “on strict psychiatric grounds totally and permanently disabled”) were sufficient to entitle him to a 100% award under §4662(b). The WCJ agreed, as did the Appeals Board. On appeal, defendants argued that the finding of 100% permanent disability based solely on Dr. Lieberman’s statements was in error, and that §4660 requires permanent disability to be rated in accordance with the 2005 PDRS unless properly rebutted under *Ogilvie*.

Holding: Section 4662(b) does not provide a separate path to permanent total disability. While a determination of permanent total disability may be made “in accordance with the fact,” the process of such a determination is governed by §4660 and the methodologies outlined in *Ogilvie* for rebutting a scheduled rating.

Discussion: This case presented the issue of whether the Appeals Board correctly interpreted and applied sections 4660 and 4662(b) for a pre-2013 DOI. The court first determined that §4662(b) applies to non-conclusively presumed permanent total disability cases (*i.e.*, those cases not enumerated in §4662(a)), where permanent total disability may be found “in accordance with the fact.” This phrase has increasingly provided WCJs with free rein to issue 100% awards in any case that approached that number in a scheduled rating, regardless of whether a proper rebuttal under *Ogilvie* had been made.

No longer. This decision holds that §4662(b) merely *authorizes* a determination of permanent total disability made on the facts of the case; it does not explain *how* such a determination should be made. That process falls squarely within the confines of §4660, a course that the court describes as “mandatory.” As

previously confirmed in *Ogilvie*, there are three methods to rebut a scheduled rating under §4660 (i.e., factual error, *LeBoeuf* and its progeny, or error in the computation of the adjustment factor). “That it is difficult or onerous to obtain a 100 percent rating under section 4660 or through rebuttal of the scheduled rating does not affect” the court’s finding that §4660 controls the determination of the amount of permanent disability.

The WCJ, the Appeals Board, and to some extent applicant himself had relied upon *Coca-Cola Enterprises, Inc. v. WCAB (Jaramillo)*, a 2012 writ denied case in which the panel held that §4660 applied only to permanent partial disability cases. Rejecting the statutory analysis in *Jaramillo*, the Court of Appeal here refused to limit §4660’s application only to permanent partial disability, and rejected the proposition under *Jaramillo* that §4660 and §4662 were “separate sections for computing disability payments” which provided “different paths” to a finding of 100% total disability.

The court also flatly discounted applicant’s argument that §4660 “only goes to 99%” and can never support a finding of 100% PD. Both the 2005 PDRS and the combined values chart include references to a 100% rating. Furthermore, since the PDRS is rebuttable under §4660, applicant has the opportunity to present evidence supporting a 100% permanent disability rating even when the scheduled rating is less. In this case, the applicant failed to do so.

In the closing section of the decision, the Court of Appeal took the Appeals Board to task for raising a new issue at oral argument (that neither the AMA Guides nor the 2005 PDRS require the use of the combined values chart, and that the conclusions of the examining physician may support the use of the “additive” method to combine multiple disability values). In declining to address the Appeals Board’s contentions, the Court of Appeal noted that even if it were to agree with the Appeals Board, it would not change the outcome of this case because no evidence was presented that the addition of the disability values would result in a “more accurate rating” than the combined values under the Chart.

In summary, the court fully endorsed the defense’s argument that §4662(b) does not provide a second, independent path to permanent total disability findings separate from §4660. This interpretation “gives effect to the legislative intent to promote consistency, uniformity, and objectivity in the overall process of determining disability across individuals.” To find otherwise, as urged by applicant and the Appeals Board, would return the system to the ad hoc decision-making that prevailed prior to the reforms: “It would allow [a WCJ] to make a subjective determination that may lead to inconsistent and nonuniform permanent disability ratings with respect to the most expensive claims under our workers’ compensation framework. Such a result cannot be squared with the Legislature’s intent.”

The effect of this case should be an immediate cessation of the practice of automatically awarding 100% disability in any case that even approaches total. Instead, applicant must proceed through §4660 and rebut the scheduled rating. While the decision addresses only §4660 and not §4660.1 (applicable to injuries after 1/1/13), it may provide further ammunition for the idea that the successor statute actually prohibits VR rebuttal evidence altogether (by removing DFEC from the determination of PD). Furthermore, given this decision’s mandate that permanent disability must be determined pursuant to §4660 (and arguably §4660.1 as applicable), the defense community now has a potent weapon when arguing for apportionment -- even in 100% cases determined pursuant to §4662(b) “in accordance with the fact.”

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