APPEAL NO. 931064

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). On October 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) reached maximum medical improvement (MMI) on July 23, 1991, with an eight percent impairment rating. Claimant asserts that certain findings of fact and conclusions of law are incorrect because he does not believe that the 90-day rule for contesting impairment (Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) should be enforced against him for not contesting MMI within 90 days; he also points out that he had surgery for the same condition in December 1992. The respondent (carrier) replies that the hearing officer should be upheld.

DECISION

We affirm.

Claimant hurt his right shoulder on (date of injury), when lifting a barrel of vegetables over his head. He was treated by (Dr. C) in May, June, and July 1991. Dr. C, on an unsigned note dated July 23, 1991, stated that claimant "has achieved maximum medical improvement." He added a detailed explanation of why he placed claimant's impairment at eight percent whole body impairment. While we note that Rule 130.5(e) does not start to run until a claimant has been certified as having reached MMI (*See* Texas Workers' Compensation Commission Appeal No. 93691, decided September 15, 1993), claimant did not appeal findings of fact that Dr. C found MMI was reached on July 23, 1991, nor that claimant was notified of such no later than August 9, 1991. In addition, on a specific and subsequent medical report signed by Dr. C on August 6, 1991, claimant is again stated to have reached MMI on July 23, 1991; these documents, absent an appeal as to the finding that MMI had been reached, provide a sufficient basis for the finding of fact that MMI was reached. We also note that Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992, states that any question as to impairment rating always starts with the inquiry as to whether MMI was certified.

At the hearing the issues were: when was MMI reached (whether the claimant timely disputed the first rating assigned to him), what is the rating, and whether claimant has disability. Claimant primarily attacks the reliance placed on the initial rating (of Dr. C) because the Appeals Panel did not interpret Rule 130.5(e) to warrant some inclusion of MMI within that rule until February 1993, citing Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Texas Workers' Compensation Commission Appeal No. 93975, decided December 3, 1993, dealt directly with the same question and denied claimant's contention that the interpretation of the rule as to MMI should not be applied retroactively; that decision controls this aspect of claimant's appeal. Rule 130.5(e) was in effect since January 25, 1991; the hearing officer did not err in applying Rule 130.5(e) to an MMI question arising between July 23, 1991, and August 20, 1992.

Claimant also states that because surgery was performed on him in December 1992, he should receive temporary income benefits until statutory MMI was reached. He does not indicate that medical opinion prior to the time of surgery was wrong as to diagnosis (*See* Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993), but simply refers to surgery having been done. Section 401.011(30) in defining MMI looks to "reasonable medical probability" to indicate that further material recovery or lasting improvement can no longer "reasonably be anticipated" (emphasis added). The definition requires no guarantee. In this case, an arthrogram had found a "normal shoulder" in May 1991. The doctor who found MMI with an eight percent impairment rating, Dr. C, considered surgery and found no indication for it. On the other hand, the rest of Dr. C's opinion was less than overwhelming. (Dr. C observed that claimant's condition had remained unchanged since injury and that claimant did not respond to therapy or injections, so no further treatment was said to be indicated.) While (Dr. T) found right shoulder impingement syndrome and performed surgery in December 1992, prior to surgery but subsequent to Dr. C's MMI date of July 23, 1991, (Dr. K) on January 29, 1992, did not think that claimant had a torn rotator cuff and felt that surgery was not indicated "unless the inflammatory condition lasts for another 7 to 8 months."

The hearing officer made no finding as to when claimant disputed Dr. C's opinion that MMI had been reached, but did note in his Discussion of the Evidence that claimant's dispute was received on August 20, 1992. This is supported by Claimant's Exhibit No. 2, which shows that a benefit review conference was requested by TWCC-45 dated August 18, 1992 (received August 20, 1992), in which claimant's attorney stated that MMI and the impairment rating of Dr. C were being disputed. In addition, claimant in his appeal acknowledges that he disputed MMI on August 20, 1992.

With evidence that MMI was reached on July 23, 1991, with an eight percent impairment rating and with no attack on the certification of MMI, Dr. C's impairment rating was the initial impairment rating under Rule 130.5(e). With no appeal of the finding that claimant received notice of Dr. C's opinion in August 1991, plus the finding that over 90 days then lapsed prior to dispute, which claimant acknowledged occurred in August 1992, Rule 130.5(e) applied and MMI became final. While the Appeals Panel has held that in certain cases, such as a missed diagnosis, the finality of Rule 130.5(e) may be questioned because of the validity of the initial rating, that is not the case here. Surgery was considered and the definition of MMI only requires reasonable anticipation in regard to further material recovery or lasting improvement. With MMI found to have been reached on July 23, 1991, there is no question under Sections 408.101 or 408.102, that temporary income benefits, which are based on disability, ceased when MMI was reached.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge