APPEAL NO. 93691

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On July 16, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) had disability from May 29, 1991, to June 23, 1991, with maximum medical improvement (MMI) reached on August 19, 1991, with zero percent impairment, per the Report of Medical Evaluation of (Dr. G), dated August 13, 1992. Claimant asserts on appeal that several reports filed by Dr. G, claimant's treating doctor at the time, between August 19, 1991 and August 13, 1992, do not say MMI was reached. Claimant also refers to reports of other doctors who treated her but does not contest the hearing officer's finding that (Dr. S) was not an agreed designated doctor. The carrier replies that the evidence supports the hearing officer.

DECISION

The decision is reversed and remanded.

The issues at the hearing were when did claimant reach MMI, what is the correct impairment rating, was Dr. S an agreed designated doctor, did the claimant have disability, and if so, when, and what temporary income benefits are due.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

Claimant basically asserts on appeal that Dr. G did not certify MMI until August 13, 1992. (The carrier opines that the appeal appears to contest Findings of Fact Nos. 16, 17, and 21; Finding of Fact No. 16 said that Dr. G's findings became final in the absence of a timely dispute of them; Finding of Fact No. 17 related that the parties were bound by the determination of Dr. G so there was no dispute to invoke the designated doctor provisions; Finding of Fact No. 21 indicated that disability was only considered through the date of MMI, August 19, 1991.)

The Appeals Panel determines:

That the MMI and impairment rating of Dr. G could not become "final" within the meaning of Tex. W. C. Comm'n, 28 TEX. ADMIN. Code § 130.5(e) (Rule 130.5(e)) until at least 90 days after MMI was certified which could not occur before August 13, 1992, the day Dr. G signed a document certifying MMI.

That MMI was reached 104 weeks after income benefits began to accrue on June 6, 1991, if not before. A determination should be made as to what impairment rating should be assigned.

That the finding of the hearing officer only considered whether disability existed

through August 19, 1991, the incorrect date of MMI; therefore a factual determination as to disability should be made for the period from August 19, 1991, to the time of a correct MMI date.

Claimant was compensably injured on (date of injury). She twisted her ankle when she slipped while working as a housekeeper in a dormitory. She saw Dr. G who took her off work for three weeks originally and then returned her to work June 24, 1991. The finding of the hearing officer that claimant had disability from May 29, 1991, through June 23, 1991, is sufficiently supported by the evidence contained in the reports of Dr. G.

On June 20, 1991, when Dr. G noted that he was returning claimant to work as of June 24, 1991, he also recorded that he would see her back in three to four weeks to check her progress and "perform an MMI for final disposition." Thereafter, on August 19, 1991, Dr. G in a progress note and on a TWCC-64 (Specific and Subsequent Medical Report), stated that claimant was doing very well, reporting full function of the ankle. He referred her to physical therapy and stated he would see her as needed. He did not fill in block 23 of the TWCC-64 as to the anticipated date she would achieve MMI, nor did he address the criteria required for certification of MMI in discussing her condition (the Appeals Panel has said MMI could be certified even though the correct form was not used if the criteria for determining MMI was addressed). *See* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992.

The hearing officer makes no finding as to when MMI was certified by Dr. G. In Finding of Fact No. 12, the hearing officer states that Dr. G found MMI on August 19, 1991, and in Finding of Fact No. 13, states that claimant was aware of Dr. G's determination of MMI on August 19, 1991. The record shows that Dr. G submitted reports of visits by claimant on October 21, 1991, and January 7, 1992. None of Dr. G's reports of August, 1991, October, 1991, or January, 1992, certify MMI, but none states findings or progress that would be inconsistent with a certification of MMI, had such certification been made.

The record contains one document, a TWCC-69, of Dr. G that purports to certify MMI; that document is dated August 13, 1992, and says that MMI was reached on August 19, 1991, with zero percent impairment. It contains no entry as to the claimant's condition or most recent clinical evaluation of the claimant, which Texas Workers' Compensation Commission Appeal No. 92132, decided May 15, 1992, recognized as necessary; the thoroughness of the August 13, 1992, document is not determinative of this case, however.

Section 408.123 of the 1989 Act provides, "(a) After an employee has been <u>certified</u> by a doctor as having reached [MMI] the certifying doctor shall evaluate the condition of the employee and assign an impairment rating. . . ." It then continues in subsection (b) by saying, "A certifying doctor shall issue a <u>written</u> report . . . (emphasis added). The Appeals Panel has never indicated that MMI could be certified without a written document addressing

the criteria for MMI called for by the statute and applicable rules. In Texas Workers' Compensation Commission Appeal No. 93046, decided March 5, 1993, the statutory requirement for a "certifying" doctor was stated to require more than just a "signing" doctor. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992, pointed out that the absence of a signature results in insufficient evidence to show that MMI was certified.

Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, stated that impairment cannot be assigned without a certification of MMI, and without that certification the rating cannot be "made final." In addition, Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, said that since none of the reports of the doctor was signed, the reports were "defective to certify MMI or establish an impairment rating." Rule 130.5(e) states, "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." While the Appeals Panel has said that the 1989 Act does not prohibit a doctor from "assigning a date of MMI that is retrospective," i.e., the doctor can say that a claimant reached MMI at an earlier date (*see* Texas Workers' Compensation Commission Appeal No. 92686, decided February 3, 1993), it has not said that a doctor can make the date on which he acted to certify MMI, or on which he assigned impairment, retrospective.

Texas Workers' Compensation Commission Appeal No. 93330, decided June 10, 1993, indicated that the communication of the certification of MMI and assignment of an impairment rating to the claimant did not have to be in the form of a TWCC-69. Unlike the case before us on appeal, Appeal No. 93330 did have a certification of MMI and assignment of impairment rating that predated the time claimant received notice of the rating and date of MMI; the question in Appeal No. 93330 dealt with sufficiency of communication as to an existing certification, not communication of facts relating to MMI that had not been shown to have been certified prior to the communication. As stated, the record only contains one document by Dr. G purporting to certify MMI and assign an impairment rating and that document is shown to have been signed on August 13, 1992. We hold that rule 130.5(e), making final a first impairment rating 90 days after it is assigned, requires that certification of MMI and assignment of an impairment rating shall have occurred prior to the time the 90 days begins to run. *See* Texas Workers' Compensation Commission Appeal No. 93551, decided August 19, 1993, which cited Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992, in stating that "the hearing officer begins his consideration of the evidence with a doctor's certification of MMI in deciding whether MMI has been reached" and later saying, "it is only after certification of MMI that an impairment rating is assigned."

At the hearing the claimant disputed that she had ever stated that Dr. G had informed her of MMI in 1991; a hearing officer's exhibit reflected that the benefit review officer reported

that claimant "was aware of [Dr. G's] determination and issuance of the certification on the date it was issued 08/19/91." The Appeals Panel will not reverse a factual determination of the hearing officer unless it is against the great weight and preponderance of the evidence and does not reverse in this instance on the basis of the great weight of the evidence. Without evidence of a certification of MMI, however, an impairment rating cannot be made final. At one point in the testimony, the claimant did acknowledge that she did not request a benefit review conference within 90 days. Although no dates of reference were included in the question, previous questions had referred to a benefit review conference scheduled for July, 1992. As a result, we do not read the record as indicating that the claimant admitted that she did not contest the impairment rating within 90 days of the time the TWCC-69 was assigned (which could not be earlier than August 13, 1992, when it was signed).

Since MMI has been reached (104 weeks have elapsed since the time income benefits began to accrue and the hearing officer found disability from May 29, 1991 through June 23, 1991), a decision must be made as to whether any impairment exists and whether any disability existed between August 19, 1991, and the date that MMI was reached, which should be stated, particularly if it is before the passage of 104 weeks.

The decision is reversed and remanded. Reconsideration and development of the evidence, together with additional or different findings and decision, may be appropriate as determined by the hearing officer. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge