

APPEAL NO. 950072
FILED FEBRUARY 17, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 21, 1994, a hearing was held. He determined that claimant's thoracic syrinx was aggravated by the compensable injury, that claimant did not reach maximum medical improvement (MMI) until the statutory time period for MMI had been reached, that no impairment rating (IR) has been assigned for the compensable injury, and that claimant had disability from July 16, 1992, through the date of the hearing, but pointed out that temporary income benefits would not be paid beyond the date of statutory MMI. Appellant (carrier) asserts that the hearing officer erred in excluding a medical review it offered, that the great weight of the evidence showed that the syrinx was not aggravated by the injury, that MMI has been reached on April 26, 1993, with five percent IR, and that disability ended on April 27, 1993. Claimant replies that the decision of the hearing officer should be upheld.

DECISION

We reverse and remand.

This remand is directed for the hearing officer to consider the medical opinion of (Dr. D) offered by the carrier, which was not admitted on the basis that there was a failure to timely exchange without good cause for exchanging at the time of hearing.

Claimant worked as a home care aid for (employer). On _____, claimant lifted a patient into a chair and felt sharp pain in her lower back. The pain extended into her left leg. While the first issue at the hearing was identified as whether claimant's syrinx (a tube or fistula) in the thoracic area and disc disruption at L5-S1 resulted from the injury of _____, carrier announced at the hearing that it did not dispute the relationship of the disc problem to the injury.

Claimant was seen by a number of physicians, the sequence of which is thoroughly set forth in the Statement of Evidence in the hearing officer's opinion. (Dr. A) on July 26, 1993, reported an MRI as showing that "abnormal appearances with cord expansion and increased signal intensity . . . from T3-4 to T6-7. These findings represent a differential diagnosis of focal syrinx formation, which may be post-traumatic in origin."

Dr. B, on January 21, 1994, refers to the MRI indicating a syrinx and states:

The situation is complex. First, I feel that the thoracic syrinx is not the cause of her low back and radiating left leg pain. She has no evidence of myelopathy, and no pain in the thoracic area. Therefore, any surgical procedure that might be performed to address the syrinx is unlikely to relieve

her back and leg pain. We do know that the syrinxes can occur from trauma, and it is certainly possible that the trauma from the accident produced a small hemorrhage in the spinal cord, which led to the production of the syrinx. However, I must say that usually a much more direct trauma is required to produce this type of condition.

Dr. B next wrote about the syrinx on February 11, 1993, and referred to a urological examination. He mentions urological problems and states that they are "more consistent" with neurological dysfunction related to the syrinx - he did not advise surgery. On March 1, 1994, Dr. B wrote that he believes that her bladder problems are due to the syrinx which he also believes is related to her work injury.

Claimant's Exhibit No. 1, which includes the medical documents referred to previously, also contains correspondence from the attorney for carrier. On April 6, 1994, that attorney wrote to the ombudsman proposing a series of questions for Dr. B to answer, stating that the benefit review officer "felt that this would be advisable" A list of eight questions were attached in a proposed letter to Dr. B. No reply or comment by the ombudsman is in evidence. This exhibit also contains a letter dated June 9, 1994, from carrier's attorney to Dr. B, now with 10 questions, with a copy to the ombudsman.

On September 23, 1994, the benefit review conference (BRC) immediately preceding this hearing was held. (There was more than one BRC.) At that time no response had been received by either party to the letter that questioned Dr. B, but Dr. B had sent a short letter, dated September 8, 1994, which said that the thoracic syrinx "may or may not have been caused by her work related injury." He added that he believed there was "insufficient data" as to the cause of the syrinx.

In ruling against admitting Dr. D's affidavit offered by carrier, the hearing officer commented that carrier had all the medical records with the exception of one by September 23, 1994. He found that the carrier did not show due diligence in obtaining Dr. D's review. He commented that the affidavit of Dr. D was not timely exchanged until the date of hearing and could have been generated within 15 days of the BRC. There was no assertion by the hearing officer that the one document carrier did not have by September 23rd was irrelevant or immaterial. The record indicates that the one document in question included specific answers by Dr. B (the doctor who appeared to tie the syrinx problem to the compensable injury - in some of his statements) to questions propounded by, or at least reviewed by, both parties. The hearing officer also added that there was no good cause shown for the untimely exchange.

Carrier pointed out that claimant's treating doctor, Dr. B, replied to its letter of June 9, 1994, by letter dated October 12, 1994, which it received on October 24, 1994. There was no argument from claimant that carrier received the reply of Dr. B any earlier, nor was there any argument from claimant that the benefit review officer at an earlier conference had not indicated that such an inquiry was advisable. Carrier represented that after

receiving Dr. B's reply on October 24, 1994, it provided medical documents, including that letter, to a neurologist, Dr. D, and asked him for an opinion. His opinion is dated November 18, 1994, a Friday, and the affidavit was brought to the hearing on November 21, 1994, a Monday. Carrier represented that a review of medical records by a neurologist in the time shown reflects due diligence. (We note that the time between carrier's receipt of Dr. B's reply and the affidavit of Dr. D was approximately 25 days, and the time between carrier's letter of June 9, 1994, to Dr. B, and receipt of his reply was approximately 137 days.

If the carrier should be expected to obtain a medical review when it has all documents - except one, then due diligence could have secured a review prior to or within 15 days of the BRC of September 23, 1994. If the carrier should be allowed to have its reviewing physician review the document in question from the claimant's treating doctor, which was requested over three months before, then it was impossible for the carrier to exchange a review within 15 days of the BRC, when it had to wait 31 days past the BRC to receive the treating physician's comments before a review could then be requested.

Appeal of a ruling excluding evidence is resolved by determining whether the hearing officer abused his discretion in determining whether good cause existed for failure to comply with the applicable rule for admittance. See Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992, in which Judge O'Neill stated that the test for good cause was one of ordinary prudence, "the degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances." We do not think that an ordinarily prudent person would have acted more quickly upon receiving all the documents or that an ordinarily prudent party should be expected to obtain a review at a time that it does not have one significant document through no fault of its own. It was an abuse of discretion and prejudicial error not to admit the affidavit of Dr. D in the circumstances set forth herein. (We note that this was not a case in which a party merely waited to the last minute to get a review and then claimed it exchanged as soon as it got the document.)

To order a remand, we must also consider whether this error "reasonably could have caused an improper decision," (Appeal No. 92409, *supra*). The excluded document states that Dr. D, upon reasonable medical probability believes that the syrinx neither resulted from the injury nor was made worse by the injury. The letter of reply by Dr. B, dated October 12, 1994, states that Dr. B believes that the injury either caused the syrinx or aggravated it. Thus, the excluded medical evidence of Dr. D is directly in conflict with that of the treating doctor on the focal issues of causation related to the syrinx. Other physicians, reported in the record, defer to Dr. B but do not state their own opinions as to causation of the syrinx; none states an opinion such as that of Dr. D. As stated in Appeal No. 92409, "we cannot say . . . that a different result would not have been reached had the excluded medical evidence been considered." (We note that the decision of the hearing officer lists Dr. D's review as admitted, but the record and the written letters, "NA", on Dr. D's affidavit, control and show that it was not admitted.)

Since the record indicates that the question addressed by the excluded evidence, whether the syringe was a part of the compensable injury, could have an effect on some or all of the other issues including MMI, IR, and disability, those issues will not be reviewed at this time.

The decision and order of the hearing officer are reversed and the case is remanded for consideration of the evidence previously excluded. The evidence may be reconsidered and findings of fact should be made upon consideration of all the evidence. Since reversal and remand necessitates issuing another decision, 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 the new decision is received, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge