

APPEAL NO. 980160
FILED MARCH 11, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 18, 1997. The hearing officer held the record open and it closed on December 23, 1997. With respect to the issue before him, the hearing officer determined that the impairment rating (IR) of the appellant (claimant) is 11%, as first certified by the designated doctor, (Dr. BL) on December 7, 1995. The hearing officer determined that there was no substantial change of condition warranting the rescission or amendment of the 11% IR. Claimant appeals, contending that his IR should be 24% as the designated doctor certified after he reexamined claimant on June 26, 1997. Respondent (carrier) responds that the hearing officer properly gave presumptive weight to the designated doctor's first report and IR of 11% and that it was improper for the designated doctor to reexamine claimant and amend his report for no reason.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that claimant's IR is 11% rather than 24%. Claimant asserts that the hearing officer should have given presumptive weight to the designated doctor's second report rather than his first. Carrier responds that claimant waited 15 months to complain about the designated doctor's certification of the 11% IR and that we should affirm the hearing officer's decision. Texas Workers' Compensation Commission (Commission) DRIS records indicate that claimant did not call the Commission to complain about the designated doctor's December 7, 1995, certification of the 11% IR and no mention is made indicating a dispute of that rating until early 1997.

Claimant did not testify at the CCH. (Dr. MA), claimant's current treating doctor, testified at the CCH and said that he began treating claimant in February 1996, and that, before that time, (Dr. DO) was claimant's treating doctor. Dr. MA was asked whether the change from an 11% IR to a 24% IR indicates a substantial change in condition and he replied that it does not necessarily indicate a substantial change in condition. He said it is a possibility but that it could also be that "the reviewing physician makes the determination that adequate weight was not given to other factors involved in the rating of impairment such as invalidating certain aspects of the physical examination measurements incorporated in that rating."

In a November 1994, IR report, dated a few weeks before claimant's ulnar transposition/flexor tenosynovectomy of the left wrist and carpal tunnel syndrome (CTS) release surgery, the designated doctor stated that range of motion (ROM) in claimant's wrist and elbows was normal. The designated doctor said claimant was not at maximum medical improvement (MMI) in November 1994. The designated doctor reevaluated

claimant in December 1995. In his December 7, 1995, report, the designated doctor said that: (1) claimant was diagnosed with CTS and cubital tunnel syndrome as a result of his _____, work-related incident; (2) claimant was at MMI on October 24, 1995; (3) claimant's current deficiencies are based on decreased sensation over the median and ulnar nerve distribution and decreased grip strength of the ulnar nerve; and (4) claimant's 11% IR resulted from combining his seven percent whole body impairment of his right upper extremity with his four percent whole body impairment for his left upper extremity. These upper body impairments were for loss of sensation and reduced grip strength for each upper extremity, but did not include impairment for ROM losses for the wrists or elbows. In a June 55, 1996, letter, (Dr. MA), stated that the developments over the last six months "document a change in medical status due to the current injury since the designated doctor . . . determined . . . an 11% [IR]." Dr. MA said there has been a change in "medical status," but then discussed that claimant had lost his employment with his longtime employer, that based on his limited education, skills, and deficits in function, he has been unable to find alternative employment, that Dr. DO [a former treating doctor] and the designated doctor misperceived "true MMI," that claimant continues to be "temporarily totally disabled," that the designated doctor's "invalidation of test data" should be reconsidered, and that medical treatment has been denied to claimant. Dr. MA then said:

Since appropriate medical treatment consistent with Texas Spine Treatment Guideline is inappropriately denied, it is also inappropriate to invalidate an [IR] based on the patient's failure to overcome residual temporary impairment.

Dr. MA said claimant's impairment income benefits (IIBS) were about to "run out" and said that "reevaluation of the [IR] at statutory endpoint, based on the new medical information of inability to work and overcome the residual impairment needs to be clarified."

A Commission benefit review officer (BRO) wrote to the designated doctor about the 11% IR and the designated doctor responded in May 1997 and said that he read the additional medical documentation sent to him. He said that it was his impression that he was being asked to render a different IR, and that, "based on my previous evaluation, I really do not have any medical criteria to provide any change in medical opinion." The designated doctor offered to reevaluate claimant if it was the BRO's wish. The record reflects that claimant was sent to the designated doctor for reexamination and that he was reexamined on June 26, 1997. In his June 26, 1997, new report, the designated doctor explained the amendment of the IR and the 24% IR he found. He stated that: (1) claimant's MMI date (October 24, 1995) stays the same; (2) claimant still had sensation loss in both upper extremities and that there is loss of grip strength on the right, but impairment for such on the left is "disqualified" based on "an inappropriate curve"; and (3) claimant's 24% IR includes impairment for loss of ROM in both wrists and both elbows. The designated doctor said:

In order to recalculate the patient's impairment, we must take into consideration his two point discrimination as well as the residual sensory

deficiencies that are more severe on the right than the left. We must also take into consideration any residual motion parameters that are occurring at the wrist and elbow. I do not feel these should be encompassed in the rating utilizing the peripheral nerves in that they do represent an operative process which has resulted in some stiffness of the operative sites.

In a November 18, 1997, letter to the "hearings department," the designated doctor answered a question from a deposition on written questions as follows:

Do you feel that [claimant] underwent a substantial change in his medical condition caused by his compensable injury after you examined him on December 7, 1995?

My examination of June 26, 1997, indicated a 24% [IR] associated with the work related injury of _____.

Evaluation of my previous report dated December 7, 1995, indicated a whole person permanent partial impairment of 11%. Obviously, there has been a significant change in the patient's [IR] status between those dates. As such, I would consider that the clinical condition which caused his compensable injury had undergone a substantial change during the period interim of the initial and subsequent report dated July 26, 1997.

[Italics ours.] The designated doctor also stated that Dr. DO, claimant's former treating doctor, had initially agreed with the 11% IR, but then later agreed with Dr. MA that the 11% IR should be rescinded.

The hearing officer determined that: (1) the great weight of the other medical evidence is not contrary to Dr. BL's 11% IR; (2) Dr. BL's 11% IR is entitled to presumptive weight; and (3) claimant did not have a substantial change in condition warranting the rescinding of the designated doctor's 11% IR.

As a general rule, an IR is assessed once MMI is reached and is not held open or subject to change indefinitely, and particularly so without justifiable reason. *See generally* Texas Workers' Compensation Commission Appeal No. 970885, decided June 26, 1997; Sections 408.121 *et seq.* and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1 *et seq.* (Rule 130.1 *et seq.*). The resolution of IR cannot be indefinitely deferred to await the results of a potential lifetime course of medical treatment. Texas Workers' Compensation Commission Appeal No. 950615, decided June 5, 1995. Where a change or amendment is made by a designated doctor to his initial report of an IR, the Appeals Panel has stated that "a designated doctor may, with proper reason and in a reasonable period of time, amend his original report of MMI and IR." Texas Workers' Compensation Commission Appeal No. 960960, decided July 3, 1996. There must be a proper reason for the amended report and the criteria for reevaluation may include that there was a substantial change of condition.

Appeal No. 960960, *supra*. Even the fact that there was a subsequent surgery, by itself, may not be a sufficient basis or good reason. See Texas Workers' Compensation Commission Appeal No. 961794, decided October 23, 1996; Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994. There may be a proper reason for amending an IR if there is significant new and previously unavailable medical evidence, Texas Workers' Compensation Commission Appeal No. 970138, decided March 7, 1997, or a lack of knowledge, at the time of assessment, of significant information concerning the impairment, Texas Workers' Compensation Commission Appeal No. 970344, decided April 9, 1997; Texas Workers' Compensation Commission Appeal No. 94124, decided March 15, 1994.

In this case, the hearing officer could and did find that the record did not show that there was a substantial change in condition and also that there was no compelling reason for the amendment of the designated doctor's IR. The hearing officer could have concluded from the record before him that there was not significant new and previously unavailable medical evidence or new significant information concerning claimant's impairment. We conclude that the hearing officer did not err in according presumptive weight to the designated doctor's first report and in determining that claimant's IR is 11%.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge