

APPEAL NO. 980287
FILED MARCH 30, 1998

The respondent (claimant) sustained a compensable lumbar spine and knee injury on _____. In Texas Workers' Compensation Commission Appeal No. 972089, decided November 24, 1997, the Appeals Panel reversed the decision of the hearing officer that the respondent (claimant) reached maximum medical improvement (MMI) on January 30, 1997, with a two percent impairment rating (IR) as certified by Dr. M, the designated doctor in this case, and remanded the case for further clarification from the designated doctor about the reasons for his certification of MMI and IR. The hearing officer, conducted further proceedings on remand and in a new decision and order determined that Dr. M properly rescinded his prior certification and concluded that the claimant was not yet at MMI and that, for this reason, an IR could not yet be determined. The appellant (carrier) appeals this determination, contending that it is against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

Dr. M completed a Report of Medical Evaluation (TWCC-69) on February 4, 1997, in which he assigned the claimant a two percent IR solely for loss of range of motion (ROM) of the lumbar spine. He found the claimant's knee essentially normal and considered the knee injury to be a contusion and strain. Upon further inquiry from a benefit review officer (BRO) on June 28, 1997, Dr. M reaffirmed his original certification of both the date of MMI and the IR. Thereafter, on September 8, 1997, the claimant underwent arthroscopy of the knee which showed high grade chondromalacia and synovitis. In his first decision and order, the hearing officer concluded that the chondromalacia was degenerative in nature and not the result of trauma to the knee based on a medical dictionary definition of chondromalacia as a premature degeneration of the cartilage. The purpose of the remand, with regard to the knee portion of Dr. M's IR, was to seek further information from Dr. M about whether this diagnosis of chondromalacia, in light of the hearing officer's conclusion that it represented a degenerative condition, would nonetheless support an IR¹ and/or a change in Dr. M's certification of a date of MMI.

In a letter of December 12, 1997, the hearing officer asked Dr. M what effect, if any, the claimant's knee operation of September 8, 1997, would have on his IR for the knee injury. Our concern on remand was not the fact that the claimant underwent knee arthroscopy after Dr. M assigned a date of MMI and an IR, but whether the condition disclosed by the surgery, chondromalacia, was significant and would cause Dr. M to

¹See Table 36, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

amend his report. Dr. M replied to the hearing officer by letter of December 29, 1997, in which he addressed causation of the chondromalacia and concluded that it could not be determined whether it was due to trauma or a degenerative joint disease. He further concluded that knee surgery of this type required use of crutches for six weeks which, in turn, could result in a "flare-up" of low back pain. He concluded that because of the knee surgery, the IR "undoubtedly changed" and so would the date of MMI.

With regard to an IR for the lumbar injury, the purpose of the remand was to seek clarification from Dr. M as to why he did not assign an IR for a specific disorder of the spine under Table 49 of the AMA Guides for six months of documented pain. In his letter of December 12, 1997, to Dr. M, the hearing officer stated that spinal surgery was scheduled and he attached a copy of the opinion of the claimant's second-opinion doctor recommending approval of the surgery. The hearing officer asked Dr. M whether there was documented pain at the time of his examination to support a rating for a specific disorder of the spine and the effect of the recommendation for spinal surgery "on the existence or absence of ratable specific disorder of the lumbar spine." Dr. M responded that the claimant's date of MMI and IR would "certainly . . . need to be reevaluated at a later time after he has recovered from his back surgery."

In his decision and order on remand, the hearing officer concluded that Dr. M's letter of December 29, 1997, "when taken as a whole, rescinds the earlier certification of MMI and the earlier assignment of an IR." He further found that the claimant was not at MMI and that an IR could not be determined. In its appeal of these determinations, the carrier argues that the hearing officer should have simply asked Dr. M whether the chondromalacia was caused by the trauma of the injury and whether the claimant had six months of documented pain prior to the date of certification, rather than the questions he asked. The carrier further argues that Dr. M improperly amended, by rescission, his prior certification of a date of MMI and an IR. The questions presented to Dr. M and his answers did not address our concerns which led to the remand. The hearing officer sent a copy of his letter to Dr. M to the parties. There was, however, no evidence of any attempt to have the hearing officer correct these deficiencies.

Because we will affirm a decision of a hearing officer on any legal theory sufficiently supported by the evidence, see Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991, we will resolve this appeal in terms of whether Dr. M amended his TWCC-69 for a proper reason. In doing so, we observe, as we did in Appeal No. 972089, *supra*, that the claimant has not yet reached statutory MMI as defined by Section 401.011(30)(b). See Texas Workers' Compensation Commission Appeal No. 971339, decided August 28, 1997.

Dr. M expressly declined to assign a rating for a specific disorder of the lumbar spine because, despite complaints of pain and tenderness to palpation, the claimant's x-rays and MRI were both within normal limits.

When Dr. F began treating the claimant, he too agreed that the MRI appeared normal despite complaints of severe pain. Exercises and nerve blocks were recommended with the latter being somewhat successful. By May 1997, Dr. F was considering whether other diagnostic studies were indicated in light of the continuing pain. Based on a discogram of October 30, 1997, and a clinical examination of November 5, 1997, Dr. D, on referral from Dr. F, diagnosed internal disc disruption and recommended surgery which apparently has been approved. This information, particularly the results of the discography and the recommendation for surgery, caused Dr. M to rescind his prior certification of a date of MMI and an IR and to conclude that the claimant was not yet at MMI. Thus, a determination of IR was premature. Whether a designated doctor has amended a certification of MMI and IR for a proper reason² is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996. In Texas Workers' Compensation Commission Appeal No. 972423, decided January 2, 1998, we discussed various appropriate reasons for amending a TWCC-69, including undiagnosed medical conditions. In the case we now consider, Dr. M at the time of his initial certification assigned no IR for the lumbar spine. He did this largely on the basis of a "normal" MRI despite continuing complaints of pain. Only later, after extensive attempts at therapy by Dr. F proved of no lasting effect, was discography undertaken, which in turn led to approved spinal surgery. Upon being made aware of this new information, Dr. M rescinded his prior certification. We consider this a proper reason to do so with ample evidentiary support in the record. In order to determine a date of MMI and an IR, the question of the cause of the chondromalacia must be resolved.

²No argument was made that the amendment was not done within a reasonable time. Texas Workers' Compensation Commission Appeal No. 960960, decided July 3, 1996.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge