APPEAL NO. 980426

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing was held, on September 23, 1996, with a hearing officer, and on January 24 and December 4, 1997, with. a second hearing officer. The hearing record closed on February 3, 1998. The second hearing officer resolved the disputed issues by determining that the appellant/cross-respondent's (claimant) compensable injury of _____, to her neck and back caused her depression, that the respondent/cross-appellant (carrier) failed to timely contest the compensability of claimant's depression and did not have newly discovered evidence which could not reasonably have been discovered at an earlier date, and that the issue of claimant's impairment rating (IR) is not ready for adjudication until after the designated doctor, (Dr. FB), has had a chance to evaluate or have evaluated claimant's depression for permanent impairment. The hearing officer further determined that (Dr. JG), the psychiatrist who was to have evaluated claimant's depression for impairment, is no longer allowed to participate in this claim because of his failure to respond and cooperate with the Texas Workers' Compensation Commission (Commission).

Claimant appeals the hearing officer's determination that Dr. FB's 64% IR, which he found to include 60% for depression and to not be in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), is not entitled to presumptive weight. The hearing officer further found that Dr. FB's IR of 11% for claimant's physical injury is a reasonable assessment of claimant's physical impairment and is not against the great weight of the other medical evidence and that no valid assessment of any potential impairment from claimant's depression has been made. Claimant urges that Dr. FB's 64% IR is the only IR in evidence which assigns ratings for both her physical and the psychological injuries and that it is entitled to presumptive weight. Claimant also urges that if the hearing officer is affirmed on this determination, the Commission also bar Dr. FB's further participation in the case and arrange for claimant to be evaluated by a new designated doctor. The carrier filed a response to claimant's appeal.

The carrier appeals from the determinations that claimant's compensable injury extended to her depression, that the carrier failed to timely contest the compensability of claimant's depression, and that the IR issue is not ready for adjudication. The carrier contends that the hearing officer should have determined that claimant's IR is 11% for her physical injury, as determined by the designated doctor. The carrier also asserts that the hearing officer erred in not phrasing the extent of injury issue as whether or not claimant "sustained a mental trauma injury on or about _____," erred in not adding additional issues as to whether claimant timely reported a mental trauma injury and timely filed a notice of injury and claim for compensation alleging a mental trauma injury, erred in not adding an additional issue as to the date the carrier received written notice that claimant

was claiming a mental trauma injury, erred in improperly placing the burden of proof on the carrier to establish claimant's IR, and erred in improperly placing the burden of proof on the carrier on the waiver issue. Claimant filed a response to the carrier's appeal.

DECISION

Affirmed.

Concerning the carrier's assertion of error in assigning the burden of proof on the IR issue, the record reflected that the first hearing officer advised the carrier that the designated doctor's IR of 64% (the revised IR following the earlier 11% IR) was entitled to presumptive weight unless shown to be against the great weight of the other medical evidence, and that since it was the carrier who disputed the 64% IR, it would be the carrier's burden to show that the 64% IR was contrary to the great weight of the other medical evidence. The carrier contended that the designated doctor's initial IR of 11% was entitled to presumptive weight and that it was claimant's burden to show that the 11% IR was invalid and, thus, that claimant had the burden of proof on the IR issue. In closing argument, the second hearing officer interjected that he was not the hearing officer who assigned the burdens of proof. We find no merit in this assertion of error. The report with the 64% IR was the later report, it revised the earlier 11% IR to 64%, and it was the carrier who disputed the 64% IR.

Concerning the carrier's assertion of error in the phrasing of the extent of injury issue, we note that in it's June 26, 1996, response to a benefit review conference (BRC) report, the carrier sought the addition of seven issues it asserted were raised at the BRC but not included in the BRC report. The carrier did not seek a "mental trauma injury" issue as such but requested the issue of "whether or not the claimant's alleged mental or psychological condition or depression is compensable." In claimant's response to the BRC report and to the carrier's request for additional issues, claimant contended that the issue should be framed as an extent of injury issue. At the hearing on September 23, 1996, the carrier first indicated its agreement with the hearing officer's stating that they were "only dealing now with reported depression, psychological problem, alleged mental or psychological condition." Later when the hearing officer framed the issues on the extent of the injury and on carrier waiver, the carrier requested the injury issue be framed as "whether or not she sustained a mental trauma injury on _____." The hearing officer declined that phraseology because he did not want to limit claimant to the date of January 24, 1994, recognizing that she could have a follow-on injury after that date, for example, from medical treatment. The carrier responded that it was just trying to follow the decision in Texas Workers' Compensation Commission Appeal No. 941723, decided February 2, 1995, a case it relied on for the waiver issue. We do not find merit in this assertion of error.

Concerning the carrier's assertions of error in the hearing officer's not adding issues as to whether claimant timely reported and timely filed a claim for her depression or

psychological problem, the carrier's BRC response did request these issues. The claimant's response contended that the carrier accepted her compensable injury of _____, thus waiving any issue of timely notice, that claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) for the compensable injury of _____, was timely filed, and that a claimant is not required to file an additional TWCC-41 for a follow-on injury from the original compensable injury. The carrier conceded at the hearing that claimant filed a TWCC-41 on January 26, 1995, and the TWCC-41 is in evidence. The hearing officer denied the carrier's requests for these issues at the hearing and we find no abuse of discretion in his rulings.

Concerning the carrier's assertion of error in the hearing officer's not adding an issue as to the date the carrier received written notice of claimant's assertion of a claim for her depression, this issue was not requested in the response to the BRC report. At the hearing, the carrier stated that if claimant is contending that the carrier waived the right to contest the psychological condition injury (by not contesting the compensability) within 60 days, "I suppose another issue that is -- would have to go along with that is . . . what is the date that the carrier received written notice of a mental trauma injury or that she was claiming a mental trauma injury in connection with a _____ incident." The hearing officer then discussed the framing of the extent of injury issue and asked the carrier if it had further comment on the framing of the extent of injury and waiver issues. The carrier responded, "not at this time." The carrier did not renew a request for an issue on the date it received written notice of the psychological condition injury and that matter was not revisited. We find no merit in this assertion of error. Not only did the carrier appear to abandon the request but the issue is subsumed in the waiver issue since a claimant must prove the date carrier received written notice of a follow-on injury in order to start the carrier's 60-day period to dispute compensability (Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997; Texas Workers' Compensation Commission Appeal No. 941398, decided December 1, 1994) and the carrier must prove its contest of compensability within the 60-day period (Texas Workers' Compensation Commission Appeal No. 960974, decided July 8, 1996). This also resolves the assertion of error in the hearing officer's having misplaced the burden of proof on the waiver issue.

The hearing officer's decision and order contains a detailed recitation of the evidence with which neither party takes issue on appeal. Accordingly, our discussion of the evidence will be limited to that necessary to the decision.

Claimant testified that while working at a preschool facility on _____, she pulled on a bookshelf in an effort to move it out of some water on the floor and felt her neck "tear." She maintained that she injured her neck, her thoracic spine, and her lumbar spine, and that she has herniated discs in all three spinal regions. The carrier indicated that it did not dispute a neck injury and voluntarily paid benefits. There was no disputed issue at this hearing concerning whether the injury extended to the thoracic and lumbar spinal regions.

Claimant indicated that she continued to work while being treated conservatively, including physical therapy (PT), and that her doctor took her off work in August 1994 because of her pain. She said she developed depression from the pain and from not being able to do the things she was used to doing, primarily, working at the job she loved. She said that in the summer of 1994 she was being considered for spinal surgery by (Dr. SG) and was referred for a presurgery evaluation to (Dr. R), a psychologist, who tested her and told her she had depression and commenced treating her in August 1994. She said she had six sessions with Dr. R, the last being in January or February 1995, and that she improved "very little."

Dr. R's report of August 23, 1994, reflects his administration of several psychological tests over a three-hour period, that claimant complained of burning pain and muscle spasm in the mid and low back and lower extremity weakness, that her pain has gradually increased in spite of PT, and that she reported significant functional disability and emotional distress from her pain. Dr. R also reported the results of the testing and stated the impression of chronic pain syndrome and recommended pharmacotherapy and psychotherapy for treatment of her depression prior to consideration for surgery. Dr. R reported on August 30, 1994, that he explained claimant's depression to her.

Dr. SG wrote the carrier's adjuster, (Ms. B), on October 19, 1994, stating that claimant has persistent pain, that he felt she would benefit from six to eight sessions of psychotherapy which would better enable him to evaluate her for surgery, and that "[a]t this time, she is in need of psychotherapy for her injury and this is medically necessary irrespective of any additional treatment." Dr. SG wrote the carrier on October 31, 1994, stating that he had been asked to elaborate on the need for psychotherapy, that claimant demonstrates signs of stress and chronic depression which may be a factor in complicating her response to treatment, and that it would be in her best interest to undergo psychological assessment and treatment to prepare her for any additional treatment. Incidentally, the carrier contended, relying on Appeal No. 941723, *supra,* that such treatment did not, per se, constitute notice to the carrier of a follow-on injury of depression. We note that Dr. R's records did not bear evidence on their face of having been sent to or received by the carrier.

The carrier's medical examination order doctor, (Dr. JS), wrote Ms. B on November 23, 1994, stating that she felt that Dr. R's report substantiates the diagnosis of depression, that she concurs with treatment to include anti-depressant medication and psychotherapy, and that "it is very reasonable that [claimant's] symptoms of depression may have been precipitated by her work-related injury with the attendant pain and the necessary use of pain medication."

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The parties stipulated that claimant reached maximum medical improvement (MMI) on August 23, 1994, and that Dr. FB is the Commission-selected designated doctor. The carrier represented that it paid claimant impairment income benefits based on the 11% IR first determined by Dr. FB.

Concerning the challenged finding that on _____, claimant suffered a compensable injury to her neck and back and that this injury resulted in her depression, the hearing officer stated that through a preponderance of the evidence, even supported by Dr. JS, claimant did establish she had depression resulting from the compensable injury. We do not find the challenged finding on the extent of claimant's injury to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the carrier waiver issue, the hearing officer found and carrier has challenged that claimant had been diagnosed and treated for depression as a result of the compensable injury, and the carrier was aware of this diagnosis and relation to the injury by the end of November 1994, referring to Dr. JS's November 23, 1994, report "and all chronologically prior evidence." The carrier does not appeal the finding that it first disputed the depression with the Commission in a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), dated March 29, 1996, and filed with the Commission on April 1, 1996, which is 16 months after the end of November 1994. However the carrier does challenge a finding that it did not dispute the depression within 60 days of being notified in writing of the depression diagnosis and a finding that the carrier did not have newly discovered evidence which could not reasonably have been discovered earlier on the depression diagnosis.

Again, we do not regard these challenged findings as being insufficiently supported by the evidence. Cain, *supra*, and King, *supra*. The hearing officer could consider Dr. JS's November 23, 1994, report to Ms. B as constituting notice of claimant's having depression related to her compensable injury of January 24, 1994, and it was not disputed that the carrier did not contest the compensability of such injury until it filed its March 29, 1996, TWCC-21. The carrier did not contend that Dr. JS's report failed to meet the requirements for written notice of injury provided for in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a) (Rule 124.1(a)). As for newly discovered evidence, the carrier did not pursue that theory or adduce any evidence on it.

Dr. JS reported on November 8, 1994, that she evaluated claimant and assigned an IR of nine percent based on the AMA Guides; that the nine percent consisted of three percent under Table 49 II C for thoracic strain with radiculopathy and six percent for abnormal thoracic spine range of motion (ROM); and that she is a symptom magnifier. Dr. JS's Report of Medical Evaluation (TWCC-69) stated that claimant reached MMI on "8-23-94" with an IR of "9%."

Dr. FB's TWCC-69 of February 6, 1995, stated that claimant reached MMI on August 23, 1994, with an IR of 11%. In his narrative report, Dr. FB stated that claimant has cervical, thoracic, and lumbar pain, possibly on the basis of a spine strain syndrome; that

there are no neurologic findings; that several of her findings indicate claimant may well be magnifying symptoms, consciously or unconsciously; that ROM impairment cannot be assigned due to lack of full effort, a pattern repeated in Dr. JS's findings; that no abnormalities of the shoulder or feet were found; and that all impairments, totaling 11%, are based on specific disorders of the cervical, thoracic, and lumbar spine regions per Table 49. Dr. FB's spine impairment summary reflected four percent for the cervical region, two percent for the thoracic region, and five percent for the lumbar spine region. Dr. FB's diagnosis is total spine strain. Dr. FB concluded that he cannot say claimant is depressed as some other physicians have indicated, but that he has not seen claimant as often and therefore not when she was depressed, and that no assessment is given for depression.

A Commission benefit review officer wrote Dr. FB on January 9, 1996, asking for clarification of Dr. FB's report including referring claimant to a psychologist for an impairment evaluation.

Dr. JG's report of February 26, 1996, stated in detail how claimant was feeling. Dr. JG concluded that claimant is moderately to markedly impaired from a psychiatric standpoint, that she needs help in her daily activities, that her capacity to function in routine work had decreased importantly, that she has isolated herself and tolerates dealing with people with great difficulty, that her attention span and concentration have decreased, and that her adaptational skills are limited. Dr. JG concluded that he considers claimant to have an important decrease in her general functioning of about 60% to 70% of the level she used to perform. His report made no reference to any testing or to the AMA Guides.

Dr. FB responded on March 8, 1996, that he received a report from Dr. JG, that Dr. JG's assessment of claimant "indicates a 60% impairment," and that "combining this with the 11%, using the AMA guidelines [an apparent reference to the Combined Values Chart in the AMA Guides], one comes to a 64% permanent impairment." Dr. FB signed a TWCC-69 on March 11, 1996, certifying MMI on August 23, 1994, with an IR of 64%.

Dr. JS wrote on May 20, 1996, that, as she previously reported on November 23, 1994, she felt Dr. R made an appropriate diagnosis of depression, that she had recommended that claimant's treatment include anti-depressant medication and psychotherapy, and that she was distressed to learn that this treatment had not been pursued. Dr. JS further reported that the severity of claimant's depression is based on totally subjective data and that to allot a 60% to 70% impairment based on only the patient's interview seemed a less than scientific manner of determining the impairment. She suggested obtaining some objective data to correlate with claimant's self-reported complaints such as videos of claimant's normal daily activities and other standards such as the Beck Depression Inventory.

(Dr. C), a psychiatrist, testified that he reviewed the medical records including the reports of Dr. FB and Dr. JG. He said that Dr. JG only performed a mental status

assessment, that he regarded Dr. JG's report as "incomplete" and "inaccurate" for not having done some standardized testing, that Dr. JG's opinion is based solely on claimant's subjective history and complaints, that depression is not usually permanent but more often resolves, that in his opinion claimant did not sustain a mental trauma injury in connection with her claim, and that he is unfamiliar with the AMA Guides and does not perform IR evaluations. Dr. C conceded he had not seen Dr. R's tests.

(Dr. KB), a rehabilitation medicine specialist who operates a utilization review company, testified that she had reviewed the medical records, that in her opinion both Dr. FB's 11% IR and Dr. JS's nine percent IR "could be very valid" and were ":generously high," that the medical evidence contradicts the 64% IR, and that the correct IR is either 11% or nine percent. In her undated report bearing a facsimile transmission date of May 19, 1996, Dr. KB states that the 64% IR cannot be validated and she has no way of knowing if it is correct or in accordance with the AMA Guides. She also stated that "the psychological issues related to this case need to be addressed by a psychiatrist." Dr. KB also testified that she is certified to perform IR evaluations but does not do psychiatric evaluations, that the AMA Guides provide that there should be objective testing for psychiatric impairment, that there are no objective clinical findings to support a 64% IR, and that in her opinion it is "outrageous" that anyone could relate a psychiatric injury to claimant's physical injury.

The first hearing officer wrote Dr. JG on December 3, 1996, advising that claimant's evaluation for an IR must be accomplished in accordance with the AMA Guides and that his report "appears to be insufficient to constitute a valid [IR] done in accordance with the Guides." The hearing officer requested that, within five days, Dr. JG review his notes, reexamine claimant if necessary, and prepare a report which documents the impairment in accordance with the AMA Guides and send it to Dr. FB. That hearing officer also wrote Dr. FB asking that he review the report the hearing officer requested of Dr JG, determine whether he will adopt Dr. JG's findings and incorporate Dr. JG's impairment with his own to arrive at a whole body IR, and respond to the letter within five days. The record contains no responses from Dr. JG and Dr. FB.

The carrier does not challenge a finding that a reasonable assessment of claimant's IR is 11% based on the physical impairment determined by Dr. FB and that this physical impairment is not against the great weight of the other medical evidence. The carrier does appeal findings that the great weight of the other medical evidence is not contrary to the determinations by Dr. FB of the physical IR of 11% but that a final determination of the IR cannot be made until a determination is made on the depression. Since the carrier did not appeal the preceding finding that Dr. FB's 11% IR is not contrary to the great weight of the other medical evidence, we will assume that portion of this finding is also not being appealed but rather the portion that a final determination of the IR cannot be made until a determination is made on the depression. The carrier also appeals a finding that no valid assessment of any potential impairment as a result of the depression has been made in

accordance with the AMA Guides and that the issue of the IR is not ready for adjudication until after Dr. FB, and any necessary referral doctor, have had a chance to evaluate the depression for impairment.

We are satisfied that the evidence is sufficient to support the challenged findings on the IR issue. Dr. JG's assessment of 60% to 70% was made without any reference to the results of psychological testing or other objective, clinical findings and without any reference to Chapter 14 of the AMA Guides relating to impairment from mental and behavioral disorders. Since we are affirming that claimant's compensable injury of January 24, 1994, extended to her depression, that injury needs to be evaluated for a determination as to whether it has resulted in permanent impairment. Section 408.122(a) provides that a claimant may not recover impairment income benefits unless evidence of impairment based on an objective clinical or laboratory finding exists. Impairment is defined in as any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Section 401.011(23).

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm the decision and order of the hearing officer.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge