

APPEAL NO. 990058

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 December 7, 1998. With respect to the issues before her, the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on April 2, 1995, with an impairment rating (IR) of 16% as certified by the Texas Workers' Compensation Commission (Commission)-selected designated doctor in his amended report and that the claimant is entitled to supplemental income benefits (SIBS) for the first through the 11th compensable quarters. In its appeal, the appellant (self-insured) argues that the hearing officer erred in giving presumptive weight to the designated doctor's amended certification of MMI and IR, asserting that the great weight of the other medical evidence is contrary to the amended report because it was not made within a reasonable time. The self-insured asks that we render a new decision that the claimant reached MMI on July 22, 1994, with an IR of 11% as certified by the designated doctor in his initial report.

The self-insured's only challenge to the hearing officer's determination that the claimant is entitled to the first 11 quarters of SIBS is that her IR is 11% and thus, she does not satisfy the requirement of having at least a 15% IR. The self-insured did not appeal the findings that the claimant's unemployment in the filing periods for the first 11 quarters was a direct result of her impairment or the findings that the claimant had no ability to work in those periods, thus, she satisfied the good faith job search requirement despite not having looked for work in the filing periods. Accordingly, those determinations have become final under Section 410.169. In her response, the claimant urges affirmance.

DECISION

Reversed and a new decision rendered that the claimant reached MMI on July 22, 1994, with an IR of 11% and that she is not entitled to SIBS for the first through the 11th quarters.

The parties stipulated that the claimant sustained a compensable injury on _____. She testified that she injured her left shoulder and her cervical spine when she pulled on a gate that was difficult to close. She testified that initially her treating doctors were not sure whether her neck or her shoulder was causing the problems and thus, they were not certain as to the proper focus of her treatment. The claimant testified that Dr. W is her treating doctor for her shoulder and that two surgeries were performed on her shoulder, the second of which was performed on July 26, 1993. She stated that Dr. W determined that her neck also required treatment and he referred her to Dr. M for that treatment. The claimant's initial appointment with Dr. M was in February 1994. She further stated that Dr. M decided that he wanted a surgical consultation and he referred her to Dr. B.

The claimant first saw Dr. B on July 25, 1995. In a letter to Dr. M dated July 25, 1995, Dr. B stated "I don't think non-surgical treatment is going to cure her at all and I think the only `cure' would be a microsurgical anterior discectomy and interbody fusion, C5-6 and C6-7 using bank bone." Dr. B initiated the spinal surgery second opinion process in August

1995. Dr. L was selected to serve as the self-insured's second opinion doctor. In a report of August 30, 1995, Dr. L did not concur in the need for surgery. On October 4, 1995, Dr. D, the claimant's second opinion doctor, also did not concur in the recommended surgery. On October 27, 1995, the Commission's Medical Review Division notified the parties that the surgery had not been approved in the spinal surgery second opinion process and that the self-insured was not liable for the costs of surgery. The case proceeded to a hearing and in a decision of November 28, 1995, the hearing officer, who presided over that hearing, determined that the request for surgery should not be approved. The claimant did not appeal that decision and it became final.

The exact course of Dr. B's resubmission of the spinal surgery recommendation is unclear from the record; however, in December 1997, Dr. B's request to perform the surgery was approved. The parties stipulated that on February 6, 1998, Dr. B performed a microsurgical anterior discectomy and fusion at C5-6 and C6-7. The claimant testified that she had recovered well after surgery, noting that she was about "95% better than before surgery."

On October 18, 1994, Dr. AD, a chiropractor, examined the claimant after having been selected by the Commission to serve as the designated doctor. In a Report of Medical Evaluation (TWCC-69) dated October 28, 1994, Dr. AD certified that the claimant reached MMI on July 22, 1994, with an IR of 11%. In the narrative report accompanying his TWCC-69, Dr. AD stated that the claimant "reached statutory [MMI] on July 22, 1994." The parties stipulated, however, that the date of statutory MMI in this case is April 2, 1995. The hearing officer made an unappealed factual finding that the claimant's cervical surgery was not contemplated at the time of the designated doctor's initial examination. In addition, as noted above, Dr. B first recommended surgery in July 1995 and the spinal surgery second opinion process was initiated in August 1995, dates which are three and four months respectively after statutory MMI. That process resulted in neither of the second opinion doctors concurring in the recommended surgery and in a decision of November 25, 1995, approximately eight months after statutory MMI, a Commission hearing officer determined that the requested surgery should not be approved.

The date of Dr. B's resubmission of the spinal surgery recommendation cannot be determined with specificity from the record; however, the surgery was approved in December 1997, approximately 32 months after statutory MMI, and the surgery was performed on February 6, 1998. At the request of the Commission, Dr. AD reexamined the claimant on July 27, 1998, 38 months after his initial examination and four years after his July 22, 1994, MMI date. In his amended TWCC-69, Dr. AD certified that the claimant reached MMI by statute and assigned an IR of 16%, which is comprised of 10% for specific disorders of the cervical spine, three percent for loss of cervical range of motion (ROM), and three percent for loss of ROM in the claimant's upper extremity.

In this instance, the hearing officer gave presumptive weight to Dr. AD's amended report, determining that the claimant reached MMI on April 2, 1995, with an IR of 16%. In so doing, she stated that "[t]he evidence indicates that the designated doctor's amended certification of MMI/IR is not contrary to the great weight of the other medical evidence and

that the amendment was issued within a reasonable period of time, given the circumstances of this particular case." The hearing officer noted that there was a lengthy dispute of Dr. B's spinal surgery recommendation and stated that "[c]laimant should not be penalized because of the time it took the dispute to come to resolution."

As the hearing officer states, we have long recognized that a designated doctor may amend his report. See Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995, and the cases cited therein. However, we have required that the amendment be made for a proper reason, within a reasonable period of time. Texas Workers' Compensation Commission Appeal No. 971770, decided October 23, 1997; Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994. The self-insured does not argue that the claimant's having undergone spinal surgery after the designated doctor's certification is not a proper reason for the designated doctor to amend his report. Rather, it argues that the amendment was not made within a reasonable time. In Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994, we stated that our cases concerning amendments of a certification of MMI and IR had not had established "any particular outside limit on the amount of time that may pass between a certification of MMI or IR and an amendment of that certification." However, a review of those cases demonstrates that we have attempted to establish parameters and guidelines for determining whether an amendment was made within a reasonable time. In cases such as this one, where surgery is performed after the date of statutory MMI, we have considered whether surgery was contemplated at the time of the designated doctor's initial examination and/or at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 980985, decided June 26, 1998; Appeal No. 950861, *supra*; and Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994. In this case, the claimant's spinal surgery was not recommended until July 1995 and the spinal surgery second opinion process was not initiated until August 1995. The date of the designated doctor's first examination of the claimant was October 18, 1994, and the claimant reached statutory MMI on April 2, 1995. Thus, the surgery in this case was not contemplated at either the time of Dr. D's examination or at the time the claimant reached statutory MMI. In addition, the first spinal surgery recommendation was not approved in the second opinion process. The resubmission was not approved until December 1997.

After carefully reviewing the record in this case, we cannot agree with the hearing officer's assessment that under the circumstances of this case, the designated doctor's amendment was made within a reasonable time. The spinal surgery was not being considered either at the time of Dr. AD's initial examination or at the time the claimant reached statutory MMI, on April 2, 1995. And, while the surgery was recommended in July 1995 and the spinal surgery second opinion process was initiated in August 1995, that process resulted in a Commission determination that the surgery was not reasonable and necessary medical treatment at that time, in that neither the self-insured's nor the claimant's second opinion doctors concurred in her need for the surgery recommended by Dr. B. The fact that the surgery was approved in December 1997 and performed in February 1998, is not, in and of itself, sufficient to bring it within the ambit of the cases where a designated doctor's amended report has been given presumptive weight following post-statutory MMI surgery. To the contrary, this case is analogous to Texas Workers'

Compensation Commission Appeal No. 980355, decided April 6, 1998; Appeal No. 950861, *supra*; and Appeal No. 941243, *supra*, where the initial certification of the designated doctor was afforded presumptive weight because the delay between the initial certification of MMI and IR and the amendment was determined to be unreasonable. In permitting amendment of a designated doctor's certification, we have recognized that "a properly revised IR . . . should not be sacrificed solely for the expediency of finality." Appeal No. 94492, *supra*. However, decisions that permit amendment of an IR after statutory MMI must be balanced against the goal of finality clearly embodied in the MMI and IR provisions of the 1989 Act, particularly the statutory MMI provision of Section 401.011(30)(B). Because surgery was not under active consideration at either the time of the designated doctor's initial examination of the claimant or at the time of statutory MMI and in light of the fact that the surgery was not approved until 32 months after the claimant reached statutory MMI following resubmission of the recommendation, we simply cannot agree that the amendment of the designated doctor's report was made within a reasonable time in this case. As such, the hearing officer erred in giving presumptive weight to the amended report.

We reverse the hearing officer's determinations that the claimant reached MMI on April 2, 1995, and that her IR is 16% and render a new decision that the claimant reached MMI on July 22, 1994, and that her IR is 11% as certified by Dr. AD in his initial TWCC-69. Given our determination that the claimant's IR is 11%, we reverse the hearing officer's determinations that the claimant is entitled to first through 11th quarter SIBS and render a new decision that she is not entitled to those benefits because she has not satisfied the threshold requirement of having at least a 15% IR to qualify for SIBS.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge