APPEAL NO. 990584

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 26, 1999. The issues at the CCH were impairment rating (IR) and the claimant's entitlement to first through 17th quarters of supplemental income benefits (SIBS). The hearing officer determined that the claimant's IR is 14% and the claimant is not entitled to SIBS because he was not assigned an impairment rating of at least 15%. The appellant (claimant) urges that his IR is 28% and that he is entitled to SIBS, and requests that we reverse the hearing officer's decision. The respondent (carrier) urges that the hearing officer's decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Reversed and a new decision rendered as to the claimant's IR. Reversed and remanded on the issue of SIBS.

The claimant sustained a compensable back injury on _____, as a result of lifting a sack of concrete. In January 1992, the claimant had a laminotomy and diskectomy L4-5. In January 1993, a repeat MRI showed no evidence of recurrent disc herniation. The claimant's treating doctor, Dr. H, completed a Report of Medical Evaluation (TWCC-69) on February 2, 1993, certifying the date of maximum medical improvement (MMI) as February 9, 1993, with a 14% IR.

The claimant continued receiving conservative medical treatment with Dr. H. Dr. H's medical records indicate that the claimant continued having back pain and leg pain in 1993 and in 1994 was walking with a limp and using a cane. In May 1995, Dr. H noted increased back pain, the claimant's legs were causing him to fall, and another MRI was performed which showed evidence of narrowing at L4-5 on the right with scarring. In May 1996 the claimant had radiating pain and fusion surgery was discussed. Another MRI was performed in January 1997 which showed marked narrowing of the foramen at L4-5 on the right. On February 13, 1997, the claimant had a laminectomy, discectomy and interbody fusion with cage at L4-5. On March 31, 1997, the claimant had surgery for a spinal fluid leak. Dr. H's records indicate that in June 1997 the claimant fell as a result of his legs giving out, injuring his right hand. The claimant sustained a fracture of his fifth metacarpal which required surgery in December 1997. The claimant testified that he had another surgery on his right hand in 1998.

On July 27, 1998, Dr. H filed an "updated" IR for the claimant, indicating the claimant's IR is 26%. The issue of whether the first IR assigned to the claimant by Dr. H became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) was the subject of Texas Workers' Compensation Commission Appeal No. 982120, decided October 21, 1998. In that decision, the Appeals Panel affirmed the decision of the hearing officer that the MMI date certified by Dr. H was a prospective date of MMI and did not become final.

Because of a dispute on IR, a designated doctor, Dr. A, was appointed by the Texas Workers' Compensation Commission (Commission). On September 11, 1998, Dr. A assessed a 28% IR and indicated that he did not receive an EMG record from 1996. When this EMG record was not provided to Dr. A, he referred the claimant for an EMG which was performed on October 5, 1998.

Several letters of clarification were sent by the Commission to Dr. A. In December 1998, following a benefit review conference, the benefit review officer (BRO) wrote Dr. A a letter of clarification asking him to base his opinion of the IR on the actual medical evidence, including range of motion (ROM) measurements from Dr. H existing at the time of MMI. In response to the BRO's letter, Dr. A revised his IR to 18%, stating that he factored out the additional two back surgeries and right hand from the whole person impairment, but indicated the ROM and neurological components remained because he felt they were somewhat present at statutory MMI. Following the CCH on January 26, 1999, the hearing officer wrote a letter to Dr. A asking him to advise whether the neurological components of the IR were the result of recent testing alone, medical records available at the time of statutory MMI, or both. Dr. A responded on February 5, 1999, indicating that an EMG was never done at the time of statutory MMI, that he believed that the claimant's first surgery either did not completely resolve his radicular symptoms or that claimant had continued symptoms, and that the neurological components should be included in the IR. Additionally, Dr. A stated that his prior opinion that the claimant had an 18% IR contained a mathematical error, and should have been a 21% IR. On February 11, 1999, the hearing officer wrote another letter to Dr. A enclosing an EMG report performed on September 19, 1995, and inquired about his findings concerning the claimant's neurological impairment. Dr. A responded on February 15, 1999, stating that based on the 1995 EMG, there is no objective evidence to include the neurological components in the claimant's IR, revising the claimant's IR to 14%.

The parties stipulated at the CCH that the claimant reached MMI on February 13, 1993. This was the date of statutory MMI pursuant to Section 401.011(30)(B). The claimant asserts in his appeal that his impairment rating is 28% as originally assessed by Dr. A because it considers the entire compensable injury and was based on his condition as of the day of the examination. The carrier urges that the Appeals Panel made it clear in Appeal No. 982120, *supra*, that the designated doctor should focus on the extent of the claimant's injury at the time of MMI, regardless of what medical treatment the claimant received well over four years after the date of statutory MMI. The carrier contends that the IR at the time of statutory MMI was 14% as stated by the designated doctor. The carrier further contends that the IR performed by Dr. H (approximately 10 days prior to the statutory date) corroborates the designated doctor's opinion and so does the opinion of (Dr. S), the carrier's peer review doctor.

Section 408.122(c) provides that the report of the designated doctor has presumptive weight which can be overcome only if the great weight of the other medical evidence is to the contrary. Unfortunately, the designated doctor did not examine the claimant until over five years after the claimant reached statutory MMI. We have previously held that a designated doctor may, with proper reason and in a reasonable period of time,

amend his original report of MMI and IR. We have stated, however, that this should take place after surgery when compelling circumstances will affect the ultimate IR resulting from an injury. Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994. However, this is not a case of a designated doctor amending his opinion; rather, it is a case where the designated doctor first examined the claimant five years after statutory MMI and was instructed by the Commission to evaluate the claimant but render an opinion as to what the claimant's IR was five years ago.

The carrier is asserting the IR should be a "snapshot" of the claimant's IR on the date of MMI. We have rejected this argument in previous decisions. In Appeal No. 94492, *supra*, the employee sustained a back injury in January 1991, reached statutory MMI in February 1993, received a 12% IR from the designated doctor in May 1993, underwent back surgery in August 1993, and was, at the direction of the Commission, reevaluated by the designated doctor, who in December 1993 amended the IR to 16% but stated he could not measure ROM due to the recency of the surgery. The carrier contended that since MMI was reached by operation of law (Section 401.011(30)(B)), the IR should be a "snapshot" of the employee's impairment on the date of MMI. The Appeals Panel noted its previous holdings that a doctor may amend or correct an MMI and IR determination for proper reason in limited but appropriate circumstances, that subsequent surgery can be a valid basis for a designated doctor to amend his opinion as to MMI, and that just because a claimant may be a candidate for surgery does not mean in every instance that MMI or IR may not be found. Discussing the need for orderly, expeditious resolution of claims, the Appeals Panel nonetheless observed that "there will be those rare, exceptional cases where compelling circumstances, such as the need for further surgery, might reasonably be expected to, or necessarily will, affect the claimant's ultimate IR resulting from a compensable injury," and that "a properly revised IR (premised on a clinical or laboratory finding, Section 408.122) should not be sacrificed solely for the expediency of finality." The opinion also noted the provision of Section 410.307 and stated that it did "not seem reasonable to conclude that a substantial change of condition, such as occasioned by required surgery subsequent to an initial IR determination following statutory MMI must be ignored by the Commission thereby forcing the parties into court." On the other hand, the Appeals Panel has also stated that "resolution of IR cannot be indefinitely deferred to await the result of a potential lifetime course of medical treatment." Texas Workers' Compensation Commission Appeal No. 950615, decided June 5, 1995.

In Texas Workers' Compensation Commission Appeal No. 951273, decided September 18, 1995, we affirmed the hearing officer's decision that the claimant's IR was 30% as assessed by the designated doctor. The carrier contended that the opinion of the designated doctor was more than one year post MMI. We noted that while this was true, and unfortunate, the carrier cited no authority, and we know of none, where that fact alone will invalidate a designated doctor's report. In Texas Workers' Compensation Commission Appeal No. 960300, decided March 28, 1996, the Appeals Panel affirmed a decision in which the hearing officer gave presumptive weight to the designated doctor's assignment of 100% IR, based on the designated doctor's examination approximately 17 months after MMI.

While the designated doctor has been asked to render an opinion as to what he believes the claimant's IR to have been on February 13, 1993, based on a number of records over several earlier years, and he has done so, we find this to be nearly an impossible task, resulting in an IR which was not based on the designated doctor's physical examination that was performed on September 11, 1998. This is particularly evident in attempting to determine the claimant's ROM and neurological deficits. In fact, Dr. A's letter dated January 7, 1999, states "I think you do realize that it would be impossible for me to give you an accurate impairment rating as of February 1993, having examined Mr. B in 1998." While a designated doctor can appropriately consider and rely on tests, exams, data, medical reports, etc. performed by others in arriving at a final evaluation in a given case, the designated doctor's opinion must be based upon an actual physical examination ultimately done pursuant to his appointment as a designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993. We note that while Appeal No. 982120, *supra*, does state in dicta the designated doctor should be focused on the extent of injury at the time of MMI, the sole issue in dispute and on appeal was finality of the first impairment rating.

The parties stipulated at the CCH that the claimant sustained a compensable injury on _____. The extent of injury was not litigated. Dr. H's medical records are clear that the claimant fell as a result of his legs giving out, injuring his right hand. The claimant sustained a fracture of his fifth metacarpal which required surgery in December 1997. The evidence indicates that all of the medical records concerning the right hand injury were sent to the carrier. There was no evidence that the carrier had not paid for the hand injury. The claimant testified that he had two hand surgeries and in closing argument asserted that the designated doctor's 28% IR encompassed the entire compensable injury, back and right hand. The carrier offered no argument as to the extent of the compensable injury and did not deny the compensable injury included the right hand.

For the foregoing reasons, we reverse the decision of the hearing officer and render a decision that the claimant's IR is 28% as certified by Dr. A and based upon his first actual examination. We must reverse and remand for further consideration and development of the record as deemed necessary by the hearing officer, as to the issue of the claimant's entitlement to SIBS for the first through 17th quarters. The hearing officer made findings of fact based on stipulations concerning the dates of the quarters, the filing periods, and that the claimant made no attempt to seek employment. The hearing officer made a conclusion of law that the claimant is not entitled to SIBS because he was not assigned an IR of at least 15%. We reverse and remand to the hearing officer to make appropriate findings of fact concerning good faith effort and direct result, and make the appropriate conclusions of law.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, 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 such new decision is

received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge