APPEAL NO. 991012

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 13, 1999, a hearing was held. He determined that the respondent/cross- appellant's (claimant) impairment rating (IR) was 15% but that claimant is not entitled to supplemental income benefits (SIBS) for the first, second, and third compensable quarters. Appellant/cross-respondent (carrier) asserts that the designated doctor should have been disqualified because of a disqualifying association, that the IR should not be 15% because there was no showing that the designated doctor's amendment provided approximately 16 months after the first IR was provided for a proper reason in a reasonable time, and that a finding relating to claimant's left eye should be disregarded because it is not an issue. Claimant asserts that he should have been awarded SIBS for the first three quarters because he has no ability to work. Both parties responded to the other's appeal.

DECISION

We reverse and render in part, and reverse and remand in part.

Claimant worked for (employer) on _____. Claimant did not indicate the type of job site where he was working when injured, but did say that he and another worker were lifting trusses (medical records say "braces") when the other worker let go or slipped, placing more weight on claimant. He said he injured his back. The records do not contain an abundance of reports from studies performed, but do include an MRI performed in December 1998, which was introduced by carrier. It showed no disc bulges, protrusions, or herniations, but did say, "facet degenerative changes right greater than left at L4-5 and L5-S1 and no other significant abnormality noted on MRI of the lumbar spine without contrast." The evidence indicates no surgery has been performed.

The parties stipulated that claimant was injured in the course and scope of employment on _____; that Dr. O is the designated doctor who examined claimant on October 21, 1997 (assigning an IR of 10%); that the Texas Workers' Compensation Commission (Commission) inquired of Dr. O on January 15, 1999 (which resulted in an IR of 15%); that claimant saw Dr. D' on January 12, 1999, on referral; that Dr. D' was associated with Dr. O at the time of the referral; that Dr. F, claimant's treating doctor, referred claimant to Dr. D'; and that claimant made no job search during any filing period.

First, while there is no issue stated in the hearing officer's opinion in regard to disqualification of Dr. O, the audio record discloses that the parties discussed at length whether an issue of disqualification should be an added issue or whether it was subsumed in the issue of IR. The hearing officer at one point appeared to indicate that it was subsumed, but later appeared to indicate that the issue would be added. At any rate, it was litigated, and it was appropriate to make findings of fact relative to that point.

A finding of fact said that Dr. O was not disqualified from making a "technical correction" to his report. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.10 (Rule 126.10) addresses disqualifying association and states that a disqualifying association between a designated doctor and a "party" (defined as including "health care provider [including designated doctor and treating doctor]") is one which may reasonably be perceived as having potential to influence the conduct or decision of the designated doctor. The association includes "contracts or agreements for space . . . or any other services related to the management of the doctor's practice."

The record shows that Dr. F referred claimant to Dr. D', not just for a consultation, for instance, in regard to management of claimant's high blood pressure, which Dr. F might need in his treatment, but for treatment (facet point injections) by Dr. D'. In a January 12, 1999, note, Dr. D' says that claimant returns "for follow-up," indicating obviously that he had been referred to Dr. D' at least once previously. A laboratory note on results of various lab tests dated December 17, 1998, states that the tests were run per Dr. F but adds that a copy should go to Dr. D'. While Rule 126.10(a)(4) says that the disqualifying association "may" include shared office space, as previously discussed, which indicates some reasonable discretion in a fact finder in determining whether the association is disqualifying, there appears to be no provision in Rule 126.10 for excluding "technical corrections" by a designated doctor from consideration of the questions raised by an association. To say that Dr. O was not disqualified from making a technical correction does not address the questions raised by Rule 126.10, which is applicable to this injury occurring in 1996. The stipulation as to an association is noted; on remand, the hearing officer should determine whether Dr. O was disqualified by his association with Dr. D'. He should also determine, if the disqualifying rule applies in this case, whether a new designated doctor needs to be appointed since there is no evidence that Dr. D' was a health care provider of claimant at the time of the initial examination by Dr. O in October 1997.

While the carrier states that it is "clear" that Dr. O's opinion in 1999 was affected by his association, we do not see evidence of that fact through Dr. O's stating that he saw claimant twice when claimant says Dr. O only saw him once in 1997. (The assertion is that claimant saw Dr. D' and Dr. O in the same office and even Dr. O cannot keep straight whether he or Dr. D' had seen the claimant.) However, the hearing officer may develop evidence relevant to this question on appeal, especially since it may intertwine with another question to be considered on remand; that question is whether the Commission's request in January 1999 to Dr. O for clarification of his opinion was made for a proper reason and within a reasonable time. No finding of fact addresses whether the Commission's request in January 1999 was for a proper reason and in a reasonable time. While the evidence indicates that the Commission in 1999 merely questioned the lack of impairment from Table 49, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) was assigned by Dr. O, which may be a proper reason for inquiry, there is no finding of fact to that effect and there is no indication from the evidence of record as to why the Commission waited approximately 16 months to raise such a question, which the hearing officer stated resulted in a "technical" correction.

Use of the word "technical" to modify "correction" may or may not effect whether the request was proper, but we do not agree that it applies to a situation in which the designated doctor first said in 1997, over a year after the injury in question, that "according to the guidelines, impairment is not given for the pain itself"; in 1997, 10% IR was given for range of motion deficits. After the Commission queried Dr. O in January 1999, why zero percent IR was provided from Table 49, Dr. O responded that "we" made a "technical mistake"; he then recited that lumbar injury with six months of documented pain provides five percent IR which should be added.

The determination of whether the designated doctor provided an amended report for a proper reason and within a reasonable time may or may not overlap into the area of disqualifying association. We note that the MRI showing some degenerative changes was made on December 16, 1998, while lab reports were going to Dr. D' on December 17, 1998; that Dr. D' then saw claimant for at least the second time on January 12, 1999; and the Commission queried Dr. O on January 15, 1999, after saying nothing to Dr. O about his IR for approximately 16 months. In regard to reasonable time, *see* Texas Workers' Compensation Commission Appeal No. 981778, decided September 17, 1998, in which Judge 1 said that 18 months was not a reasonable time to revise a report based on a peer review opinion; *see also* Texas Workers' Compensation Commission Appeal No. 970344, decided April 9, 1997, in which Judge 2 said that 20 months was a reasonable time when an MRI had just been provided which amounted to material medical evidence. A finding of reasonable time is often tied to new material evidence being provided such as in Appeal No. 990344, *supra,* but it was not to a peer review, which is not necessarily new medical evidence, as in Appeal No. 981778, *supra*. A reasonable time is also influenced by the determination as to a proper reason and when that reason developed; in this regard, consideration should also be given as to when statutory maximum medical improvement (MMI) occurred in this case and whether that time was reached prior to the second designated doctor's opinion.

The record disclosed no medical evidence that linked claimant's eye condition to his compensable back injury. Even claimant's testimony only indicated the inception of the eye condition as occurring about "two and one-half months" before the hearing without any disclosure of medical opinion relayed to claimant as to cause or relationship. (There was no issue as to the eye condition and no allegation that it should be included in the IR.) For these reasons, the finding of fact that indicates it relates to the compensable injury is reversed. A new finding of fact is provided that states only that claimant testified that he now has problems with his left eye.

If the claimant has an IR of 15% or more, and if the first compensable quarter is found to have begun on August 13, 1998, the second is found to have begun on November 13, 1998, and the third is found to have begun on February 12, 1999 (with corresponding filing periods of 90 days preceding each), then the determinations that claimant is not entitled to SIBS for the first, second, and third quarters may be affirmed. Claimant stipulated that he conducted no job searches in the relevant filing periods. The medical records of Dr. F do not reveal any advice to claimant not to work or any opinion that claimant cannot do any work. On the contrary, in February 1997, Dr. F commented about a

functional capacity evaluation and said that claimant cannot return to his "previous job activities," and "at most would be able to perform light duty work . . . based on the test results." Dr. F's office notes reveal "minimal complaints" in March 1998, and "doing quite well" on Naprosyn in April 1998. In September 1998 (in the filing period of the second quarter), Dr. F took claimant off the Naprosyn because of elevated liver function tests, and noted that he will test claimant for numbness of his feet. In November 1998, Dr. F noted that "electrodiagnostic testing" was done and no objective evidence of neuropathy was found. If an IR of 15% had been affirmed so that the quarters set forth were accurate in their time periods, the determinations of no SIBS would be affirmed as sufficiently supported by the evidence.

Since the case is remanded for findings as to disqualification of the designated doctor, whether the designated doctor provided a second opinion for a proper reason within a reasonable time, and as to the date of statutory MMI, none of the issues at hearing may be resolved by this review; all are dependent somewhat on the determinations made at the hearing on remand. In so saying, we observe that the finding reversed and rendered by this review was not part of any issue at the hearing.

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

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Judy L. Stephens
Appeals Judge