APPEAL NO. 991692

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 July 16, 1999. The issues at the CCH were the date of maximum medical improvement (MMI) and the impairment rating (IR) of the appellant (claimant). The hearing officer determined that the claimant reached MMI on April 11, 1997, with a five percent IR as certified by the designated doctor. The claimant appeals, urging that the hearing officer erred in not forwarding a deposition on written questions to the designated doctor with additional medical records, that the designated doctor made an error as to the date of MMI and IR, and requests that the Texas Workers' Compensation Commission (Commission) appoint another designated doctor. The respondent (carrier) replies that the great weight of the credible evidence is not contrary to the findings of the designated doctor, that the hearing officer did not err in refusing to submit a deposition on written questions to the designated doctor, and that the decision should be affirmed.

DECISION

Reversed and remanded.

The claimant sustained a compensable injury on _____, a lumbar strain which resulted in a psychological condition. The claimant received treatment from Dr. W, who referred her to (clinic)., in April 1997, where she received treatment from Ms. H, a psychotherapist, under the supervision of Dr. A. On April 11, 1997, the claimant was examined by Dr. M at the request of the carrier, who certified that the claimant reached MMI on April 11, 1997, with a five percent IR. The Commission appointed Dr. O as the designated doctor. He examined the claimant on June 27, 1997, and certified that the claimant reached MMI on April 11, 1997, with a five percent IR. His report reflects that he assessed a five percent based on Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); that he gave zero percent for range of motion (ROM); and that the claimant's mental condition is depression, but does not indicate that he considered the claimant's psychological condition in determining the IR. On January 7, 1998, Dr. W certified that the claimant reached MMI on January 7, 1998 with a 21% IR. Dr. W assessed a five percent based on Table 49, gave five percent for ROM, and 12% for mental/behavioral. Dr. W opined that the claimant was not at MMI, but had reached statutory MMI.

On January 14, 1998, Dr. W wrote a letter to the carrier indicating that he disagreed with Dr. O's assessment because Dr. O "did not identify, evaluate or assess the claimant's mental and behavioral impairment sustained and traceable to the work injury which resulted in persistent signs and symptoms which had not reached MMI at the time of the designated exam." On January 15, 1999, a dispute resolution officer with the Commission wrote a letter of clarification to Dr. O, enclosing a report from Dr. W dated September 8, 1998, and a report from Dr. A and Ms. H dated July 17, 1998. On April 10, 1998, Dr. O responded

that he reviewed the reports, that the claimant has experienced anxiety and depression for which she has a reasonable prognosis, and that no additional impairment is provided for the emotional or psychological aspects of her condition.

A benefit review conference (BRC) was held on May 20, 1999. The benefit review officer's (BRO) report contains the following comments:

> The pivotal issue of impairment resultant of psychological disorders brought about by the compensable injury was addressed to the designated doctor by the Commission on 09-28-98. The doctor responded, on 04-10-98, that he felt the current edition of the AMA [Guides] did not support additional impairment in the claimant's case.
>
> The [BRO] did not feel it was appropriate to re-address the issue with [Dr. O], as it had been asked and answered. Further [Dr. O] is no longer on the designated doctor's list for the Commission, and when asked to appoint a new designated doctor, the [BRO] felt that in accordance with Appeal Panel decision 981778, decided on 09-17-1998 [Texas Workers' Compensation Commission Appeal No. 981778, decided September 17, 1998], that the matter at hand had been fully addressed with the designated doctor at the time of his assessment and no good cause existed to either replace him or to further address an issue which had been brought to his attention and for which a response had been received. This is especially true when considering that no further medical information was available at the [BRC] to buttress the claimant's case.

Although the BRO references a Commission request for clarification on September 28, 1998, the record reflects only one letter of clarification was made on January 15, 1999. On June 14, 1999, the claimant filed a motion for a new designated doctor and motion for deposition on written questions (Motion) to Dr. O. The Motion requested that Dr. O review medical records generated after the date of the claimant's examination and indicate whether the date of MMI should be the statutory date or the date he provided; asked whether the claimant should be entitled to additional impairment because she had only 24 degrees of lateral flexion; and asked whether he personally assessed the claimant's psychological impairment, or relied on another healthcare provider's assessment. The Motion was denied on June 29, 1999.

The 1989 Act requires that any determination of IR be based upon the AMA Guides. Section 408.124. Where there are sufficient questions concerning whether or not a designated doctor has properly followed the AMA Guides, the Appeals Panel has remanded to allow the hearing officer to seek clarification from the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93600, decided August 31, 1993; Texas Workers' Compensation Commission Appeal No. 931085, decided January 4, 1994; Texas Workers' Compensation Commission Appeal No. 931099, decided January 11, 1994. A designated doctor meeting the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.10(b) (Rule 126.10(b)) at the time of the examination remains the

designated doctor, even if he or she is subsequently removed from the designated doctor list. A new designated doctor should not be appointed until the designated doctor has had an opportunity to clarify. If a designated doctor cannot or refuses to comply with the requirements of the 1989 Act, a second designated doctor may be appointed. Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993.

In this case, the claimant received psychological treatment after the designated doctor's examination, and requested that the additional medical records be reviewed by the designated doctor, as well as questions asked pertaining to MMI and use of the AMA Guides in determining the IR. Rule 130.6(i) provides that after the designated doctor's examination is completed, communication with the designated doctor regarding the claimant's medical condition or history may be made only through the appropriate Commission staff members. The Commission sent only two reports to Dr. O (two critiques of his assessment of psychological IR) but no medical records. The questions the claimant requested of the designated doctor were warranted, not repetitive, and clarification was requested at the BRC. We reverse the decision and order of the hearing officer and remand the case. The designated doctor should be allowed to review the additional medical records and respond to the questions asked by the claimant in determining the date of MMI and IR. Dr. O remains the designated doctor although he is no longer on the designated doctor's list. We direct the hearing officer to forward the medical records to Dr. O for his consideration in determining when the claimant reached MMI and the IR, and seek clarification from Dr. O as requested in the claimant's Motion.

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.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge