

APPEAL NO. 991868

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 28, 1999. The issues at the CCH were whether the appellant (claimant) had disability, and whether the claimant has reached maximum medical improvement (MMI). The hearing officer determined that the claimant had disability from November 1, 1995, through February 17, 1996; that the claimant has not had disability after February 18, 1996; and that the claimant reached MMI on May 28, 1996. The claimant appeals, urging that he had disability after September 6, 1996, and that he reached MMI on September 10, 1997, according to the designated doctor's amended certification. The respondent (carrier) replies that the evidence is legally and factually sufficient to support the hearing officer's decision and it should be affirmed.

DECISION

Reversed and remanded.

The claimant testified that he sustained an injury to his left knee on _____, when he tripped over a pallet jack and hyperextended his left knee. The claimant sought medical treatment with Dr. S, who took the claimant off work and performed an anterior cruciate ligament reconstruction on November 1, 1995. Dr. S referred the claimant to Dr. Z in January 1996. The claimant had physical therapy from January through March 1996, and returned to work light duty for the employer on February 19, 1996. The claimant worked light duty for the employer at preinjury wage until September 6, 1996. The claimant testified that on September 6, 1996, he was told by his supervisor, Mr. D, that there was no more light duty available, to go home until he was released to full duty, and the carrier would begin paying him temporary income benefits (TIBS). According to the claimant, he returned to work for the employer for one day at the end of October 1996. The claimant asserts that he had disability from September 6, 1996, through the statutory date of MMI.

The carrier presented the testimony of Mr. D and submitted a Supplemental Report of Injury (TWCC-6) to support its position that the claimant did not have disability after February 19, 1996, when the claimant returned to light-duty work. The employer's TWCC-6 indicates that the claimant returned to light-duty work in February 1996, at preinjury wage; that the claimant resigned from employment on October 31, 1996; and that the reason for resignation was "employee quit coming to work." Mr. D testified that he did not tell the claimant that no light duty was available, he did not send the claimant home, and that in August or September the claimant stopped coming to work.

On May 21, 1996, the claimant began treating with Dr. M, who recommended a bone scan and indicated that the claimant may need a repeat arthroscopy to clean out scar tissue anteriorly in the joint. A bone scan conducted on June 27, 1996, was abnormal. On June 12, 1996, the claimant was examined by Dr. G, at the request of the carrier. Dr. G certified that the claimant reached MMI on May 28, 1996, with a 2% impairment rating (IR),

and noted that Dr. M's report of May 21, 1996, did not affect his MMI date. The claimant disputed Dr. G's certification and the Texas Workers' Compensation Commission (Commission) appointed Dr. C as the designated doctor.

On September 9, 1996, Dr. C examined the claimant and certified that the claimant reached MMI on May 28, 1996. The parties stipulated that the claimant's IR is 9% in accordance with the findings of Dr. C. On March 11, 1997, Dr. M wrote a letter indicating that he disagreed with Dr. C's certification of MMI, stating that the bone scan indicated osteoblastic activity showing bony inflammation. The Commission wrote a letter seeking clarification from Dr. C. Dr. C responded that he had reviewed the records of Dr. M and his opinion remained unchanged that the claimant had reached MMI on May 28, 1996, despite the positive bone scan. On July 18, 1997, Dr. M performed knee surgery, chondroplasty, with removal of cyclops lesion.

On September 11, 1997, the Commission wrote another letter to Dr. C enclosing the operative report from July 18, 1997, and additional medical records, and asking if the additional medical records changed his opinion as to the date of MMI. Dr. C's response states, "I think in equity to give this man a date of MMI of 09/10/97 would be reasonable and I will change my mind based upon re-review of all the records including the new record of [Dr. M]." He also states "If it is [Dr. M's] ascertain [sic] that he agrees with my rating of MMI but not the fact that MMI had been reached, then I will change my mind with respect to the date of MMI and make it the statutory date of 09/10/97." Dr. C further states "I am willing to change the date to the statutory date if in equity that seems reasonable." Obviously, Dr. C mistakenly assumed that statutory MMI occurred two years from the date of the injury. The hearing officer notes that a correctly calculated statutory date would have occurred on November 3, 1997.

Section 408.122(c) provides in part that the report of the designated doctor has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI on the report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has stated that, for a proper reason and within a reasonable period of time, a designated doctor may amend his IR report. Texas Workers' Compensation Commission Appeal No. 970252, decided March 31, 1997. The hearing officer made the following findings of fact to support his conclusion of law that the claimant reached MMI on May 28, 1996:

FINDINGS OF FACT

4. [Dr. C] initially found Claimant reached [MMI] May 28, 1997 [sic].
5. Because [Dr. C] amended the date of [MMI] to September 10, 1997, based upon an incorrect date of statutory [MMI] and based upon insufficient justification, the amended date is invalid.

Although not stated, it appears that the hearing officer gave presumptive weight to the designated doctor's original report. While the hearing officer did not expressly make findings of fact concerning whether the designated doctor's report was amended for a proper reason and within a reasonable time, more troublesome is the absence of any indication that the hearing officer considered whether the great weight of the other medical evidence is contrary to the designated doctor's original report. In this case, such findings are essential to a determination of the date of MMI. We reverse the hearing officer's decision and order and remand the case to the hearing officer for further consideration and development of the evidence. The hearing officer should make specific findings as to which designated doctor's report is given presumptive weight, whether the designated doctor's amendment was done for a proper reason and within a reasonable time, and whether the great weight of the medical evidence is contrary to the designated doctor's report.

Section 401.011(16) defines disability as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, the issue of disability was broadly phrased and was not limited to any specific time period. The hearing officer determined that the claimant did not have disability after February 18, 1996, and found that the claimant "voluntarily withdrew himself from the workplace and has not attempted to re-enter the workplace." The record indicates that the claimant had knee surgery on July 18, 1997. The hearing officer states that "[a]lthough there might be a short period of disability were a later finding of [MMI] proper, additional evidence would be necessary for Claimant to establish an appropriate period following the second surgery."

MMI does not end disability, rather TIBS payments cease once MMI is reached. See Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. We note that the hearing officer apparently allowed the concept of TIBS entitlement to drive the disability determination in this case in that he found no period of disability after the surgery on July 18, 1997, based on the May 28, 1996, MMI date that he determined. Given the fact that the claimant has appealed the issue of disability and we are remanding the issue of MMI, we also remand the issue of disability to the hearing officer for further consideration and development of the evidence concerning whether the claimant had disability following the surgery of July 18, 1997, and if so, for what period of time.

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:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur with the majority opinion and write separately only to point out that undergoing surgery, or any other medical treatment for the compensable injury, need not necessarily result in changing the maximum medical improvement date and/or the impairment rating. See, *e.g.*, Texas Workers' Compensation Commission Appeal No. 960820, decided June 12, 1996.

Philip F. O'Neill
Appeals Judge