

APPEAL NO. 992954

Following a contested case hearing (CCH) held on October 19, 1999, with the record closing on December 8, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent's (claimant) compensable injury of _____, includes her psychological and psychiatric condition and that she reached maximum medical improvement (MMI) on October 28, 1998, with an impairment rating (IR) of 15%. The appellant (self-insured employer) has requested our review, asserting that both determinations are against the great weight of the evidence and that the hearing officer also erred in combining the report of Dr. M, the designated doctor, who assigned a 12% IR for claimant's knees, with the report of Dr. B, a psychiatrist, who assigned a three percent IR for claimant's psychological and psychiatric condition. The file does not contain a response from claimant.

DECISION

Affirmed in part; reversed and remanded in part.

The parties stipulated that claimant sustained a compensable injury on _____; that Dr. M is the designated doctor; and that claimant is contesting the designated doctor's report of the IR and the date of MMI.

Claimant testified that years before the injury to her knees on _____, she was successfully treated by a psychiatrist and released from that provider's care; that after the first operation on her left knee by Dr. R, she was returned to work too soon, given the pain, and began to have depression caused by the pain; that she later had a CCH to determine whether her compensable injury extended to her right knee; that she later underwent surgery on the right knee by Dr. AS; and that the chronic bilateral knee pain she has had ever since resulted in her depression which is continuing. She further stated that Dr. AS assigned a 12% IR for her knees, as did the designated doctor, Dr. M, and that she does not disagree with a 12% IR for her knees; that the doctor treating her psychological/psychiatric condition, Dr. K, assigned an eight percent IR for that condition and that she agrees with that IR; and that she disagrees with the zero percent IR assigned by Dr. B. for her psychological/psychiatric condition, noting that even a carrier doctor, Dr. HS, assigned a five percent IR for her psychological/psychiatric condition. In her opening statement, claimant also indicated that she did not disagree with the designated doctor's MMI date of October 28, 1998. She stated, over objection, that the carrier had paid for some treatment for her psychological/psychiatric condition, information which the hearing officer said would receive scant weight.

Dr. AS wrote on September 8, 1997, that claimant, then 55 years of age, had slipped on water and fallen at work. He reported on March 4, 1998, that claimant has a low pain threshold, is depressed, and should continue her pain management program for another three weeks. His later notes reflect that before the surgery on the right knee, claimant was

being considered for additional surgery on the left knee. Dr. AS wrote on March 25, 1998, that claimant complains of bilateral knee pain and cannot walk for any length of time; that she is quite depressed and in need of psychiatric help; and that he has referred her to Dr. K. Dr. AS wrote on June 9, 1998, that he believes claimant's psychological condition "has at least partially to do with the prolonged pain that she has suffered as a result of her work injury," and that, given his specialty, he would defer to Dr. K's opinion in reviewing an evaluation of claimant's psychological condition.

The carrier introduced, without comment, the Report of Medical Evaluation (TWCC-69) of Dr. W, dated "4/1/97," which certified that claimant reached MMI on "3/25/97" with a 10% IR. From Dr. W's accompanying narrative report of the same date, it appears that his evaluation was performed before claimant had surgery on her right knee and the second operation on her left knee. There is no mention of her psychological/ psychiatric condition. The carrier also introduced a TWCC-69 dated "4-1-97" from Dr. R, who performed surgery on claimant's left knee on November 19, 1996, certifying that claimant reached MMI on "3-1-97" with an IR of "5%."

In his TWCC-69 dated "11/20/98," Dr. HS certified that claimant reached MMI on "102898" with an IR of 17% and Dr. AS stated his agreement on the bottom of this form. The attachment to Dr. HS's TWCC-69 reflects that Dr. HS's 17% included five percent for claimant's depression that, referring to Table 1 on page 233, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), has "mildly affected" her activities of daily living.

Dr. M reported to the Texas Workers' Compensation Commission (Commission) on February 15, 1999, that following her slip-and-fall accident at work, claimant underwent arthroscopic surgery on the left knee on November 19, 1996; underwent arthroscopic surgery on the right knee on November 28, 1997; and underwent a second operation on the left knee on June 2, 1998; that the diagnosis includes meniscal tears in both knees; and that claimant has six percent impairment in each knee for a total whole person IR of 12%, based on the AMA Guides.

The Commission wrote Dr. M on March 19, 1999, stating that he did not include claimant's psychological condition with his findings; that his TWCC-69 reflects evaluation only for claimant's knees; and that another appointment needs to be scheduled for an examination to include the psychological condition.

Dr. B, a psychiatrist and neurologist, reported to the Commission on April 12, 1999, that claimant was referred to him by the Commission for the evaluation of her psychological and psychiatric impairment related to her work-related injury of _____, and that the specific questions to be addressed include (1) whether claimant's psychiatric and psychological problems are related to the work-related injury of _____, and (2) whether further psychiatric or psychological treatment is warranted and related to the work-related injury of _____. Dr. B further wrote that his diagnosis included post traumatic stress

disorder of childhood origin, major depression with psychotic features, and "rule out" Alzheimer's early onset; and that claimant has severe mental illness which is far too serious to be explained by residual bilateral knee discomfort from the work-related injury she suffered.

Dr. M wrote an "Addendum" on April 20, 1999, stating that in addition to her knee injuries claimant also had "multiple psychological components" and it was recommended that she have a psychological evaluation; that claimant was seen by Dr. B, board certified in psychiatry and neurology; that Dr. B felt that claimant's multiple psychological problems were not related to the work injury and gave her no IR; and thus that claimant is left with his, Dr. M's, 12% IR for the knees.

Dr. K reported on June 21, 1999, that he and claimant reviewed Dr. B's report; that claimant was quite upset in that Dr. B saw her for only about 15 minutes; that Dr. B's report contains many inaccuracies; and that he, Dr. K, believes that "the psychomotor retardation is due primarily to chronic depression secondary to her pain problem and that she continues to require psychiatric support and medication management." Dr. K further stated that in his opinion, claimant's whole body IR should definitely include a percentage for mental and behavioral impairment. Dr. K wrote Dr. AS on August 9, 1999, stating that he first evaluated claimant for Dr. AS in August 1998; that claimant has had three operations on her knees; that she now has arthritis in both knees, occasional swelling in the left knee with sharp shooting pain down the leg, and low back pain; that in addition to pain, claimant has developed a Major Depressive Disorder after the injury, secondary to her pain problem; that there is definite psychomotor retardation due to chronic depression secondary to her pain problem; and that in his opinion, claimant's IR for the mental and behavioral "body part" is eight percent.

After the hearing concluded on October 19, 1999, the hearing officer, on November 3, 1999, wrote Dr. B and referred to Dr. B's examination and psychological evaluation of claimant on April 9, 1999, when he was then asked to answer two questions. The hearing officer asked Dr. B what psychologic and/or psychiatric IR he would assign to claimant assuming that her compensable knee injuries of April 18, 1998, are a producing cause (not the only cause) of her depression. The carrier wrote the hearing officer on November 19, 1999, objecting to the hearing officer's letter to Dr. B on the grounds that the hearing officer mischaracterizes Dr. B's prior correspondence, is unnecessary, is biased, and mischaracterizes the law.

In an "Addendum" letter of November 15, 1999, Dr. B responded to the hearing officer's request, stating that he reviewed claimant's independent medical examination, apparently referring to the examination he had earlier conducted; that claimant has persistent psychiatric problems with memory and frequent nightmares and some impairment in her activities of daily living; and that, making the assumption that her compensable knee injuries are a producing cause of her depression, he would assign her a three percent IR from a psychiatric standpoint.

Hearing Officer Exhibit No. 7, an exhibit not reflected in the hearing officer's Decision and Order, is the hearing officer's letter of November 21, 1999, sending to the parties a copy of Dr. B's response and giving the parties until December 1, 1999, to file with him any response thereto. The record does not contain responses from the parties in addition to the carrier's request for review.

The hearing officer found that claimant's compensable injury of _____, extends to and includes a psychological/psychiatric component. Support is found for this finding in the reports of Dr. HS, Dr. AS, and Dr. K. We are satisfied that this finding is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. (Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951)) and we affirm this finding and its corresponding conclusion of law.

Not only is there no exhibit or other evidence in the record which reflects that Dr. B's Addendum report with the three percent IR was sent to the designated doctor, Dr. M, for his consideration and adoption or rejection, but the hearing officer makes clear in his discussion of the evidence and in his factual findings, that it was he himself who simply combined Dr. M's 12% IR for the knees with Dr. B's three percent for the psychological/psychiatric component of claimant's injury, derived the 15% IR, and then described the 15% IR as that of the designated doctor, stating that it was entitled to presumptive weight. Further, the hearing officer apparently believed that claimant was referred to Dr. B by Dr. M when, as previously noted, Dr. B stated that claimant was referred by the Commission.

The Appeals Panel has held that so long as a designated doctor "does not abdicate his or her evaluative role to a consulting doctor, a designated doctor may consult with other experts concerning the IR to be assigned to the compensable injury. [Citation omitted.]" Texas Workers' Compensation Commission Appeal No. 961215, decided August 7, 1996. See also Texas Workers' Compensation Commission Appeal No. 94480, decided June 3, 1994. And see Texas Workers' Compensation Commission Appeal No. 941725, decided February 1, 1995; and Texas Workers' Compensation Commission Appeal No. 950905, decided July 6, 1995, where the Appeals Panel considered the IRs of designated doctors who were orthopedic specialists and who assigned IRs for back injuries and for the psychological/psychiatric components of those injuries. And see Texas Workers' Compensation Commission Appeal No. 972065, decided November 7, 1997, where the depression was determined not to have resulted in permanent impairment and thus not ratable for an IR. It is the designated doctor, not the hearing officer, who must determine whether claimant has impairment from her psychological/psychiatric condition (as defined in Section 401.011(23)) and, if so, the percentage.

We reverse Findings of Fact No. 4, 5, 6 and 7 and Conclusion of Law No. 3 and so much of the hearing officer's decision and order as pertains to the IR and remand for such further consideration, findings, and conclusions as are appropriate and consistent with this decision.

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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge