

APPEAL NO. 011434  
FILED AUGUST 13, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 30, 2001. With regard to the disputed issues before her, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 17% as assessed by the designated doctor's amended report of December 15, 2000, and that the claimant is entitled to supplemental income benefits (SIBs) for the first through seventh quarters.

The appellant (carrier) appeals, principally attacking the hearing officer's determination of the IR, contending that the claimant's IR should be either 7% or 10% as assessed by the designated doctor in earlier reports, and that the claimant is not entitled to SIBs even if he has a 17% IR.

DECISION

Affirmed in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable (low back) injury on \_\_\_\_\_, and that the claimant reached statutory maximum medical improvement (MMI) (see Section 401.011(30)(B)) on September 15, 1998.

The claimant was seen by a number of doctors, and a recommendation for spinal surgery in 1997 failed to obtain a second concurring opinion. A carrier required medical examination doctor certified the claimant at MMI on March 10, 1998, with a 6% IR. The claimant disputed that report, and the parties stipulated that Dr. B was the Texas Workers' Compensation Commission (Commission)-selected designated doctor. Dr. B, in a Report of Medical Evaluation (TWCC-69) and narrative report dated April 30, 1998, stated that the claimant was not at MMI and suggested additional testing. At issue is whether the claimant was under "active consideration" for spinal surgery at statutory MMI on September 15, 1998. Dr. B saw the claimant again on November 18, 1998, and certified MMI on October 12, 1998 (not realizing MMI had been reached by operation of law), and assessed a 7% IR "subject to amendment." Dr. B comments that another doctor's report "acknowledged that surgery has been recommended by several Doctors" and explained that his IR "is subject to amendment if [claimant] elects to return for another ROM [range of motion] test, or if he ends up having surgery on the L5 disc."

In March 1999, a referral doctor recommended spinal surgery (a discectomy and fusion) and at least one second opinion doctor concurred. However, because of some delays, it was not until November 9, 1999, that Dr. G performed surgery at the L5-S1 level to include insertion of a bone growth stimulator. The claimant returned to Dr. B, who, in a TWCC-69 and narrative dated April 18, 2000, certified MMI ("statute") and assessed a 10% IR, commented that "[c]linically, I do not think that it would be appropriate to declare [claimant] at MMI with a

bone growth stimulator in place, pending surgical removal in about six weeks." Dr. B invalidated ROM and based the IR solely 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). Dr. B saw the claimant for a fourth time, noting that in the prior evaluation the claimant "still had a bone growth stimulator implanted in his lower back." In a TWCC-69 and narrative dated December 15, 2000, Dr. B certified the claimant at MMI with a 17% IR, adding an 8% impairment for loss of ROM to the previously assessed 10% specific disorder using the Combined Values Table of the AMA Guides.

The hearing officer commented, and found, that at the time of statutory MMI "spinal surgery was under active consideration," and that the designated doctor amended his earlier reports "for a proper reason and within a reasonable time." The carrier cites a number of Appeals Panel decisions for the proposition that "post-certification surgery" is not, in and of itself, a basis for amending a designated doctor's report. In this case, we note that Dr. B expressed reservation about both his October 18, 1998, IR, by stating that it was subject to amendment, and the April 18, 2000, IR, by commenting that the claimant still had the bone growth stimulator implanted. We distinguish the concurring opinion in Texas Workers' Compensation Commission Appeal No. 000179, decided March 13, 2000, quoted at length by the carrier, on the facts. Nor do we consider Section 408.104, which allows for the extension of the 104-week statutory MMI date (and payment of temporary income benefits), to be controlling since it does not address the IR. Had that been the intent of the legislature, such a provision could certainly have been added. There was conflicting evidence presented at the hearing on this issue. The hearing officer weighed the credibility and inconsistencies in the evidence and the hearing officer's determination on the issue is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Regarding the SIBs issue, eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an IR of 15% or greater and who has not commuted any impairment income benefits is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work. The hearing officer's findings that the claimant's unemployment during the applicable quarters was a direct result of the impairment from the compensable injury has not been appealed and will not be discussed further.

The parties stipulated to the compensable injury. The hearing officer notes that the "parties agreed that the first three quarter filing periods fell within the parameters of the old [SIBs] rule." The stipulated filing/qualifying periods for the first quarter began on June 9, 1999, with the qualifying period for the seventh quarter ending on February 21, 2001. We disagree with the parties' understanding regarding when the new SIBs rules came into effect. The new

rules, including Rule 130.102(d)(3), became effective January 31, 1999, and Rule 130.102(d)(3) was amended to become Rule 130.102(d)(4) effective November 28, 1999. As was stated in Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished), "the new SIBs rules apply to quarters beginning on or after May 15, 1999, because the qualifying period for a quarter beginning May 15, 1999, would be from January 31 through May 1, 1999." Consequently, the parties and the hearing officer incorrectly applied the "old" rules for the first three quarters. We remand for the hearing officer and the parties to apply Rule 130.102(d)(3), which was in effect during the qualifying periods for the first two quarters, and Rule 130.102(d)(4) in effect for the third quarter qualifying period.

Regarding quarters four through seven, the claimant contends that he has a total inability to work. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any kind of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The hearing officer, in her Statement of the Evidence, comments that the claimant's treating doctor, Dr. M, "still has claimant off work, and has specifically explained why the claimant's inability to work is directly related to his impairment." In Finding of Fact No. 9, the hearing officer makes a blanket finding that "claimant has provided a narrative report from his doctor which specifically explains how his injury causes a total inability to work." While there are a number of reports from Dr. M in evidence, none appear to specifically explain how the injury causes a total inability to work. We remand the case for the hearing officer to specifically identify which report she was referring to in her Finding of Fact No. 9. Similarly, the hearing officer simply states "no other relevant records show the Claimant is able to return to work" and comments in the Statement of the Evidence:

The only medical evidence submitted by Carrier is dated March 11, 1998, prior to the statutory [MMI] date, prior to the spinal surgery, and simply states that in his opinion, [Dr. A] feels Claimant could return to medium work with restrictions noted.

The hearing officer does not even mention, much less discuss, a Work Status Report (TWCC-73) dated August 29, 2000, from Dr. G, the treating surgeon, that purports to release the claimant to return to work on September 1, 2000 (Carrier's Exhibit No. 17), or some other off-work slips in Claimant's Exhibit No. 18 that may indicate that the claimant had some ability to work. We also remand the case for the hearing officer to comment on those two exhibits and why they do not show that the claimant, at some point, had some ability to return to work.

We affirm the hearing officer's decision and order that the claimant has a 17% IR, and we reverse and remand to the hearing officer for the proper application of Rule 130.102(d)(3) or (4), as applicable, on the SIBs issue.

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 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge