APPEAL NO. 012349
FILED NOVEMBER 26, 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 September 4, 2001. The appellant (self-insured) appeals the hearing officer's determinations that the respondent (claimant) had disability from November 22, 1999, through December 28, 2000, and that the claimant reached maximum medical improvement (MMI) by operation of the 1989 Act 104 weeks after income benefits began to accrue. The self-insured argues that the second report of the designated doctor should not be given presumptive weight. The claimant files a response, urging affirmance.

DECISION

Reversed and remanded.

BACKGROUND

On November 22, 1999, the designated doctor appointed by the Texas Workers' Compensation Commission (Commission) examined the claimant for the purpose of determining whether the claimant had reached MMI. The designated doctor certified the claimant as having reached MMI on that date and assessed an impairment rating (IR) of 25%. On January 6, 2000, the Commission wrote to the designated doctor, pursuant to a request from the self-insured, and asked the designated doctor for clarification concerning the claimant's IR in light of a peer review report that was critical of this IR. On January 14, 2000, the designated doctor responded with an unsigned letter, standing by his original assessment of IR but offering to reexamine the claimant. There is no evidence that there was a further dispute of this IR.

Eleven months after the original certification of MMI/IR, on October 23, 2000, Dr. B recommended a "preoperative discogram preparatory for surgery." Dr. B also noted that he did not believe that the claimant was at MMI. On December 1, 2000, the Commission wrote to the designated doctor requesting a reexamination to reassess range of motion (ROM). Nothing in this letter requested a reevaluation of the MMI date. The designated doctor reexamined the claimant on December 19, 2000, and issued a narrative report, but sent no accompanying Report of Medical Evaluation (TWCC-69). This report begins by noting that the claimant was evaluated "for the sole purpose" of re-performing the ROM testing. However, the designated doctor also noted that the claimant had reported to him that he had been evaluated for spinal surgery. While the designated doctor reviewed copies of the peer review reports of the self-insured doctors, there is nothing to indicate that he reviewed any updated records of the claimant's treating or referral doctors. The designated doctor closed his letter by saying that the claimant did not appear to be "currently" at MMI; however, he issued a new IR of 23%. He commented that this IR was essentially the same as his previous IR.

This second report did not state that the claimant was not at MMI when previously examined or that the previous certification was expressly “revoked” by the designated doctor in his second report. On May 18, 2001, the designated doctor affirmed statutory MMI as of December 28; this letter is unsigned. There is no evidence in the record that an extension of the statutory MMI date was sought in accordance with Section 408.104, and, in fact, the second opinion process appears not to have been undertaken until well into the following year.

WHICH REPORT IS ENTITLED TO PRESUMPTIVE WEIGHT

We agree that the hearing officer applied the wrong standard in giving the second report of the designated doctor presumptive weight and by not explaining why the first report was not entitled to presumptive weight. Where the trier of fact is faced with a second report from the same designated doctor, the Appeals Panel has held that "a designated doctor may, with a proper reason and in a reasonable period of time, amend his original report of MMI and IR" and that when there is more than one report a hearing officer should make a finding of which report is accorded presumptive weight and provide a rationale for that finding. *See* Texas Workers' Compensation Commission Appeal No. 97054, decided July 7, 1997.

In giving presumptive weight to the designated doctor's letter stating that the claimant was not at MMI, the hearing officer found that the second “report” should be given presumptive weight because that “narrative report is within two years of the date of injury,” that surgery was under active consideration, and that the previous MMI was “in effect” revoked. The two-year date-of-injury “standard” alone is not the proper standard or analysis.

Where there is an arguable “amendment” to the designated doctor’s report, the first report is entitled to presumptive weight unless the amendment was made for a proper purpose and within a reasonable time. The hearing officer in Appeal No. 970954, *supra,* did not make findings of fact on proper reason for an amendment and on reasonableness of time, and the Appeals Panel reversed and remanded for further consideration. We likewise remand.

We note that in this case, the designated doctor was asked to reevaluate the IR only. Furthermore, the fact that the tested IRs were so close is some evidence that MMI was reached at the earlier date. On the other hand, whether surgery was under active consideration at the time of statutory MMI may appropriately be evaluated in light of whether an evaluative test has been requested and pursued, but is denied, by a carrier. Texas Workers' Compensation Commission Appeal No. 010065-S, decided February 13, 2001.

We reverse and remand the decision of the hearing officer for further consideration of the evidence. First, the hearing officer must determine whether the second letter of the designated doctor meets the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE

§ 130.1 (Rule 130.1), effective June 7, 2000. Second, if the hearing officer determines that the letter of the designated doctor meets these requirements, then he must make findings of fact on the questions of proper purpose or reasonable time for the designated doctor to amend his report. Consideration should be given to the reason for the reexamination. *See* Texas Workers' Compensation Commission Appeal No. 010136, decided February 27, 2001. And third, he must apply the great weight analysis to each report of the designated doctor.

DISABILITY

The hearing officer's determination on disability has not become final because it depends on the hearing officer's resolution of the issues on remand.

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.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is as follows:

SHIRLEY A. DELIBRO
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Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

CONCUR IN THE RESULT:

Gary L. Kilgore
Appeals Judge