

APPEAL NO. 022856
FILED DECEMBER 17, 2002

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 October 21, 2002. The hearing officer determined that the appellant's (claimant) impairment rating (IR) was 9% in accordance with the report of the required medical examination (RME) doctor; the hearing officer declined to give weight to a postsurgical amended report of the designated doctor because surgery was not under active consideration at the time he did his first IR. He found that maximum medical improvement (MMI) was reached on February 5, 2001. He further found that the claimant had disability for the period from July 13 through September 29, 2000.

The claimant has appealed the setting aside of the designated doctor's report, noting that an erroneous standard was applied (surgery not under active consideration). The claimant also points out that the designated doctor's report on MMI and IR was not overcome by the contrary weight of other medical evidence. Finally, the claimant appeals the disability determination, arguing that it was error to end disability because of a determination that the claimant "abandoned" her medical treatment, even though she was under active medical treatment by her treating doctor, and remained under restrictions. The respondent (carrier) responds generally that there is "some evidence" to support each of the hearing officer's findings, without addressing specific legal arguments posed by the claimant.

DECISION

Reversed and rendered.

The claimant injured her right shoulder area and upper right extremity on _____. She worked light duty until June 13, 2000, when she had surgery but had changed her treating doctor to a chiropractor with the approval of the Texas Workers Compensation Commission (Commission) on March 1, 2000. The claimant was examined by an RME doctor on February 5, 2001, who opined that the claimant was at MMI as of that date. The new treating doctor has filed reports keeping the claimant off work from her surgery through October 9, 2001. A referral doctor also concurred on March 27, 2001, with restricting the claimant from work for an indefinite period pending pain relief treatment. A peer review doctor who did not examine the claimant opined on September 5, 2002, that she should have been able to work without restrictions as of three months after her surgery date.

The claimant was examined by a designated doctor on March 30, 2000, who certified MMI on that date with an 11% IR. He rescinded his certification on November 11, 2000, when informed of the claimant's surgery. On February 12, 2002, the same designated doctor certified that the claimant was at MMI on September 5, 2001, with a 12% IR.

After his amended report was filed, the Commission specifically asked the designated doctor to address the date of MMI in light of the RME doctor's earlier certification of February 5, 2001, albeit in terms of whether the claimant could have returned to work prior to his own certified MMI date. He responded by stating his opinion that the claimant was not stable at the time of the RME's doctor's examination and that her condition worsened thereafter. He also noted that the statutory MMI date was in fact October 11, 2001, and amended his certified date to that date. The treatment notes of the treating doctor from February through September 2001 show that the same complaints by the claimant were recorded at each treatment. While the claimant was generally assessed to be "the same," there are also a number of reports in this interval that show that she was worse, or that she was improved, from the last visit.

Functional capacity evaluations (FCE) were conducted on January 12, 2001, and September 5, 2001. Each FCE reported that the claimant could work in the sedentary to light categories of work. Her improvement in ability to perform certain lifting or other functional activities had improved by the time of the second FCE. Finally, the treating doctor certified that the claimant reached MMI on October 11, 2001, with a 13% IR.

AMENDED DESIGNATED DOCTOR'S REPORT

As the claimant correctly points out, the Appeals Panel has held that 28 TEX. ADMIN. CODE §130.6(i) (Rule 130.6(i)) precludes an analysis of whether surgery was under active consideration in deciding whether to give presumptive weight to an amended report from a designated doctor that is issued as a response to a request for clarification. Texas Workers' Compensation Commission Appeal No. 020457, decided April 5, 2002. Plainly, under the rule, that response is entitled to presumptive weight unless the great weight of contrary medical evidence is against the report. The hearing officer erred by indicating otherwise. Therefore, this basis for not according presumptive weight to the designated doctor's report, as set out in Finding of Fact No. 11, is reversed and the finding of fact is omitted.

DESIGNATED DOCTOR'S IR-WHETHER AGAINST THE CONTRARY MEDICAL EVIDENCE

Alternatively, the hearing officer held that the great weight of contrary medical evidence was against the designated doctor's amended report. (The hearing officer made no assessment of whether the first report of the designated doctor was contrary to the great weight of other medical evidence.) Most of the stated reasons for so holding, however, go to whether the claimant reached MMI on the date certified by the designated doctor in his amended report. There are no articulations by the hearing officer that the 12% is wrong or against the great weight of contrary medical evidence. Because the 12% IR is the only one which considered subsequent surgery, we reverse the determination that the correct IR is 9% and render a decision that it is 12%.

DESIGNATED DOCTOR'S MMI DATE-WHETHER AGAINST THE CONTRARY MEDICAL EVIDENCE

In finding that the date of MMI certified by the designated doctor in his second report was contrary to the great weight of other medical evidence, the hearing officer noted that the treating doctor's records essentially showed over a year of failure to improve, the lack of substantive change in FCE reports over a long period of time, and evidence that her condition had plateaued long before the statutory MMI date.

It is useful to reiterate that whether the designated doctor's report may be accorded presumptive weight is not made on a preponderance of the evidence, but a great weight standard. The designated doctor stated that his review of the records showed that the claimant had not reached stability as of the RME doctor's examination and that a statutory MMI date of October 11, 2001, was appropriate. We cannot agree with the hearing officer's comparison of the FCEs as showing a lack of substantive change. Likewise, characterizing the treating doctor's records as showing a stable condition might be a matter of preponderance interpretation, but we cannot agree that these records represent a great weight of medical evidence contrary to the designated doctor's review of the records as showing even a worsening after the RME doctor's examination. Accordingly, we reverse and render the decision that the designated doctor's certification of an October 11, 2001, statutory MMI date was not entitled to presumptive weight, and we render a decision that the date of MMI is October 11, 2001.

DISABILITY

The hearing officer simply ended disability on the last day that the claimant saw her referred surgeon, or September 29, 2000, when he characterized her change as an "abandonment." Use of this terminology may be an attempt by the hearing officer to invoke Rule 130.4, relating to suspension of temporary income benefits (TIBs) for failure to attend scheduled health care treatments. We disagree that not going back to a referral doctor when one is still under active treatment by a treating doctor qualifies as "abandonment" of medical treatment. There being no other stated reason for finding an end to the claimant's period of disability, and given the evidence that the claimant continued under restrictions up until October 9, 2001, we reverse and render the decision that the claimant had disability only through September 29, 2000, as against the great weight and preponderance of the evidence so as to be manifestly unfair, and we render a decision that the claimant had disability from July 13, 2000, through October 9, 2001.

For the reasons stated above, the decision of the hearing officer on all appealed points is reversed and rendered, and the carrier is ordered to pay accrued but unpaid TIBs and impairment income benefits, together with applicable interest, in accordance with this decision.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBERT PARNELL
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231-4813.**

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Veronica Lopez
Appeals Judge