APPEAL NO. 100842
FILED AUGUST 23, 2010

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 20, 2010. The sole issue before the hearing officer as amended by the parties "[w]as [(Dr. O)] properly appointed as the designated doctor in accordance with [Section 408.0041 and 28 TEX. ADMIN. CODE § 126.7 (Rule 126.7)] or did [Dr. O] have a disqualifying association under Rule 180.21 that would prevent him from serving as [the] designated doctor in this case?" The hearing officer determined that Dr. O was properly appointed as the designated doctor in accordance with Section 408.0041 and Rule 126.7 and does not have a disqualifying association under Rule 180.21 that would prevent him from serving as the designated doctor in this case.

The appellant (claimant) appealed the hearing officer's determination, arguing that Dr. O was not properly appointed as the designated doctor and that Dr. O had a disqualifying association under Rule 180.21. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. O as the designated doctor to determine maximum medical improvement (MMI) and impairment rating (IR).

PROPER APPOINTMENT AS THE DESIGNATED DOCTOR

That portion of the hearing officer's decision that Dr. O was properly appointed as the designated doctor in accordance with Section 408.0041 and Rule 126.7 is supported by sufficient evidence and is affirmed.

DISQUALIFYING ASSOCIATION PURSUANT TO RULE 180.21

Dr. O, the designated doctor, examined the claimant on July 16, 2009, and submitted a Report of Medical Evaluation (DWC-69) and narrative report, certifying that the claimant reached MMI on June 25, 2009, with a 10% IR.

(Dr. B) at the request of the carrier performed a peer review of the medical records of the claimant and issued a report dated September 14, 2009, that the extent of the _____, compensable injury did not include any psychiatric diagnoses/condition(s).

The Division sent a letter of clarification (LOC) to Dr. O, requesting an additional IR to include depression. Dr. O responded to the LOC on September 21, 2009, indicating that he was not able to provide an IR for depression and that he was referring the claimant to Dr. B for an IR based on depression. Dr. O indicated that once he had received and reviewed Dr. B's report, then Dr. O would respond to the LOC accordingly.

Dr. B, who initially was the carrier's peer review doctor, examined the claimant at the request of the designated doctor on October 16, 2009. Dr. B indicated in a report of that same date, the claimant's depression could be rated within the range of 0% to 3% IR.

At the request of the carrier, Dr. O, the designated doctor, was sent another LOC dated October 30, 2009, to which was attached Dr. B's peer review report dated September 14, 2009, and Dr. O was asked if it changed his opinion on MMI and IR. In a response dated November 5, 2009, Dr. O responded to the Division that he agreed with Dr. B's opinion in his September 14, 2009, peer review report. However, before responding further to the LOC, Dr. O wanted to review Dr. B's report following his October 16, 2009, examination of the claimant.

Subsequently, in a response dated November 18, 2009, Dr. O amended his IR based on "[Dr. B's] impression that the [claimant] has a 3% whole person impairment" and submitted a new DWC-69, certifying that the claimant reached MMI on June 25, 2009, with a 13% IR (based on a 10% impairment under Diagnosis-Related Estimate Lumbosacral Category III: Radiculopathy combined with an additional 3% impairment for depression).

We hold that a doctor, serving in the capacity as a carrier peer review doctor or as a required medical examination (RME) doctor for the carrier, cannot serve as a referral doctor of the designated doctor for the claimant in the same claim because of the perception of a disqualifying association. In this case, the evidence reflects that Dr. O based his assigned impairment for depression on the October 16, 2009, examination/report of Dr. B. This arrangement and association may reasonably be perceived as having the potential to influence the conduct or decision of Dr. O.

Rule 126.7(h)(2) references Rule 180.21 with regard to disqualifying associations. In pertinent part, in Rule 180.21(a)(2), a disqualifying association is defined as any association that may reasonably be perceived as having the potential to influence the conduct or decision of a doctor, which may include:

* * * *

> (G) . . . any other association with the injured employee, the employer, or insurance carrier that may give the appearance of preventing the designated doctor from rendering an unbiased opinion.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Therefore, the hearing officer's determination that there was no evidence of a disqualifying association between Dr. O and Dr. B or between either of them and the claimant that would affect Dr. O's service as the designated doctor in this case is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse that portion of the hearing officer's decision that Dr. O does not have a disqualifying association under Rule 180.21 that would prevent him from serving as the designated doctor in this case and we render a new decision that Dr. O does have a disqualifying association under Rule 180.21 that would prevent him from serving as the designated doctor in this case.

SUMMARY

We affirm that portion of the hearing officer's decision that Dr. O was properly appointed as the designated doctor in accordance with Section 408.0041 and Rule 126.7.

We reverse that portion of the hearing officer's decision that Dr. O does not have a disqualifying association under Rule 180.21 that would prevent him from serving as the designated doctor in this case. We render a new decision that Dr. O does have a disqualifying association under Rule 180.21 that would prevent him from serving as the designated doctor in this case.

The true corporate name of the insurance carrier is **AMERISURE MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CINDY GHALIBAF
5221 NORTH O'CONNOR BOULEVARD, SUITE 400
IRVING, TEXAS 75039-3711.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge