

APPEAL NO. 120749
FILED JUNE 11, 2012

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 January 4, 2012, and continued on February 28, 2012, with the record closing on March 28, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) had disability from December 30, 2010, and continuing through September 15, 2011; (2) the claimant reached maximum medical improvement (MMI) on December 30, 2010; and (3) the claimant's impairment rating (IR) is 11%. The claimant appealed, disputing the hearing officer's determination that the claimant reached MMI on December 30, 2010, with an 11% IR. The respondent (carrier) responded, urging affirmance of the disputed determinations of MMI and IR.

The hearing officer's determination that the claimant had disability from December 30, 2010, through September 15, 2011, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable left shoulder sprain/strain, left shoulder impingement syndrome, and left shoulder rotator cuff tear injury on [date of injury], and that [Dr. B] was appointed as the designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) to evaluate the claimant for the compensable injury of [date of injury], to determine MMI and IR. The evidence reflects that the claimant had surgery on his left shoulder on June 30, 2010, and again on November 10, 2010. Additionally, the claimant underwent left shoulder manipulation under anesthesia and subacromial steroid injection on April 13, 2011. The claimant was released from "formal orthopedic management" regarding his left shoulder on September 15, 2011.

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the

preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors.

The designated doctor, Dr. B, examined the claimant initially on October 25, 2010, and certified that the claimant reached MMI on that date with a 7% IR, using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). The impairment assessed for the claimant's left shoulder was based on range of motion (ROM) measurements taken by Dr. B during the physical examination of the claimant. Dr. B noted in his narrative that the claimant's most recent MRI on October 6, 2010, revealed a re-tear of the rotator cuff. Dr. B stated that the claimant may be scheduled for surgical correction of this again and if so, then his MMI would change.

Dr. B examined the claimant again on December 15, 2010, and certified that the claimant was not at MMI. Dr. B noted that the claimant had surgery on his left shoulder on November 10, 2010, and that physical therapy had not yet begun after the surgery and that five weeks was too early to see the benefit of surgery.

Dr. B examined the claimant a third time on April 7, 2011, and certified that the claimant reached MMI on December 30, 2010, with an 11% IR. Dr. B noted that the impairment is calculated according to the measurements taken during his December 15, 2010, examination because the ROM measurements taken during the April 7, 2011, examination were worse due to lack of cooperation by the claimant. Dr. B stated that the December 30, 2010, date is "six months post surgery, and is more than enough time for any patient, even having worked, to resume normal activities."

A letter of clarification (LOC) dated August 29, 2011, was sent to Dr. B which stated the dates of the claimant's surgeries of June 30, 2010, and November 10, 2010, and asking about the differing opinions contained in Dr. B's reports of December 15, 2010, and his report of April 7, 2011. Dr. B responded in a letter dated August 31, 2011. In his response, Dr. B acknowledged that the claimant had another surgery on November 10, 2010, but noted that "[i]n reality the surgery of November 10, 2010, was of no significance because it was not a surgery. It was just [an] examination by arthroscope. Therefore, the surgery of November 10, 2010, did not change the [claimant's] course. Therefore, [Dr. B's] opinion regarding [MMI] on December 30, 2010, remains the same."

A second LOC was sent to Dr. B dated March 14, 2012, which informed Dr. B that the compensable injury extends to left shoulder sprain/strain, left shoulder rotator

cuff tear, and a left shoulder impingement syndrome. The LOC asked Dr. B to consider the specified conditions and provide a detailed analysis and explanation of his certification of MMI/IR. Dr. B responded in correspondence dated March 14, 2012. Dr. B stated that when he saw the claimant on April 7, 2011, there was enough time after the second surgery (five months) for the claimant to heal. However, we note that Dr. B based his certification of impairment on ROM measurements taken on December 15, 2010. Dr. B stated he gave the date of December 30, 2010, as the claimant's MMI date because the operative report of November 10, 2010, "does not state much except [the surgeon] performed debridement on an arthritic shoulder." Dr. B confirmed that his opinion of the claimant's MMI date and IR did not change from his previous certification of April 7, 2011.

The November 10, 2010, operative report is in evidence and lists as one of the procedures performed a "[r]evision of rotator cuff repair." Correspondence from the claimant's surgeon dated November 9, 2010, notes the claimant had post-operative complications and "is scheduled for a second surgery on [November 10, 2010], to attempt a repeat repair of the rotator cuff repair." Additionally, in evidence is an operative report dated April 13, 2011, which identifies the procedures performed on that date as a left shoulder manipulation under anesthesia and subacromial steroid injection. Medical records dated after April 13, 2011, document an improvement in the claimant's left shoulder ROM. In correspondence dated July 5, 2011, the claimant's surgeon stated the entire purpose of the manipulation under anesthesia was to establish full ROM which would allow the claimant to fully rehabilitate. The surgeon noted that it is not possible to fully rehabilitate the shoulder without first having good ROM.

The hearing officer found that the December 30, 2010, date of MMI and 11% IR certified by Dr. B is not contrary to the preponderance of the evidence. However, Dr. B initially acknowledged that the claimant's second surgery would be considered in determining a later date for the claimant's MMI. Dr. B's subsequent reasoning for not considering the surgery to certify a later MMI date was simply that "it was not a surgery." In his last report (April 7, 2011), Dr. B stated that five months after his second surgery was enough time for the claimant to heal; however, he utilized ROM measurements taken approximately one month after the November 10, 2010, surgery in assessing the claimant's impairment. The medical records in evidence reflect that the second surgery and manipulation under anesthesia were performed in anticipation that the procedures would allow the claimant to have further material recovery and lasting improvement from the injury. The medical records and the claimant's testimony reflect that the claimant's condition did improve. The preponderance of the other medical evidence is contrary to the designated doctor's determination that the claimant reached MMI on December 30, 2010. We reverse the hearing officer's determination that the claimant reached MMI on

December 30, 2010, as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Two other certifications were in evidence. [Dr. C], a doctor selected by the treating doctor to act in place of the treating doctor, examined the claimant on September 22, 2011. Dr. C noted that the opinions of Dr. B placing the claimant at MMI were not supported by the clinical record. Dr. C certified the claimant reached MMI on September 15, 2011, the date his surgeon released him from formal orthopedic management of his shoulder. [Dr. A], a required medical examination doctor, examined the claimant on January 13, 2012, and certified that the claimant reached MMI on September 15, 2011. Dr. A stated that the claimant reached MMI as of September 15, 2011, based on a release by the claimant's surgeon. Both Dr. C and Dr. A considered the November 10, 2010, shoulder surgery the claimant underwent as well as the manipulation under anesthesia that took place April 13, 2011, in certifying that the claimant reached MMI on September 15, 2011. Both Dr. C and Dr. A based their certification of MMI of September 15, 2011, as the date the claimant's surgeon released the claimant from the surgeon's care. We render a new decision that the claimant reached MMI on September 15, 2011, in accordance with the reports of Dr. A and Dr. C.

Dr. C assessed the claimant's impairment as 5% using the AMA Guides based on loss of ROM measurements of the claimant's left shoulder taken on the date of his examination. Dr. A assessed the claimant's impairment as 3% using the AMA Guides based on loss of ROM measurements of the claimant's left shoulder performed by a certified technician taken on the date of his examination.

The 11% IR determined by the hearing officer is based on an MMI date of December 30, 2010, which has been reversed. Therefore, the 11% IR cannot be adopted. Since there is more than one IR in evidence with the rendered MMI date, which based the IR on loss of ROM, we do not consider it appropriate to simply render a decision regarding the claimant's IR. Consequently, we must remand the IR issue to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on December 30, 2010, and render a new decision the claimant reached MMI on September 15, 2011.

We reverse the hearing officer's determination that the claimant's IR is 11% and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to 28 TEX. ADMIN. CODE § 127.5(c) Rule 127.5(c)) to determine MMI and IR for the compensable injury. The hearing officer is to advise the designated doctor that the claimant's IR for the current compensable injury (a left shoulder sprain/strain, left shoulder impingement syndrome, and left shoulder rotator cuff tear injury) must be based on the claimant's condition as of the MMI date (September 15, 2011), considering the medical record and the certifying examination. The parties must be given an opportunity to respond to any amended report of the designated doctor. The hearing officer must then make a decision regarding the claimant's IR based on the evidence, including the reports of Dr. C, Dr. A, and the amended report of Dr. B.

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 Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **SERVICE LLOYD'S INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH KELLY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY, NORTH
AUSTIN, TEXAS 78755.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Carisa Space-Beam
Appeals Judge