

APPEAL NO. 121983
FILED NOVEMBER 30, 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 (CCH) was held on February 7, 2012, reconvened on April 3, 2012, June 13, 2012, with the record closing on August 21, 2012,¹ in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) as a result of a prior decision and order, the Texas Department of Insurance, Division of Workers' Compensation (Division) does not have jurisdiction to determine the date of maximum medical improvement (MMI); (2) as a result of a prior Division determination, the respondent/cross-appellant's (claimant) date of MMI is May 7, 2003; (3) the claimant is entitled to supplemental income benefits (SIBs) for the 5th through 23rd quarters by virtue of appellant/cross-respondent's (carrier) waiver; (4) the carrier waived its right to contest the claimant's entitlement to SIBs for the 5th through 23rd quarters; (5) the claimant is not entitled to lifetime income benefits (LIBs); (6) the claimant is not entitled to have the statutory MMI date extended pursuant to Section 408.104; (7) the issue of whether the claimant is entitled to reimbursement for medical expenses cannot be decided in this indemnity dispute resolution proceeding; (8) the carrier is not entitled to reduce/suspend temporary income benefits (TIBs) to offset Social Security payments; and (9) the carrier is not entitled to reduce/suspend impairment income benefits (IIBs) to offset Social Security payments.

The carrier appealed, disputing the hearing officer's determinations that the claimant is entitled to SIBs for the 5th through 23rd quarters by virtue of carrier waiver and that the carrier waived its right to contest the claimant's entitlement to SIBs for the 5th through 23rd quarters. The claimant responded, urging affirmance.

The claimant cross-appealed, disputing the hearing officer's determinations that the claimant is not entitled to LIBs; that the claimant is not entitled to have the statutory MMI date extended pursuant to Section 408.104; and that the issue of whether the claimant is entitled to reimbursement for medical expenses cannot be decided in this indemnity dispute resolution proceeding. The carrier responded, urging affirmance of the determinations disputed by the claimant.

The hearing officer's determinations that the carrier is not entitled to reduce/suspend TIBs to offset Social Security payments and that the carrier is not

¹ The dates of May 4, 2012, and June 20, 2012, referenced as dates the CCH was reconvened in the hearing officer's decision and order are incorrect.

entitled to reduce/suspend IIBs to offset Social Security payments were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

It was undisputed that the claimant sustained a compensable injury. The claimant testified that he was injured on [date of injury], when he fell down a flight of stairs.

LIBs

The claimant contended that he is entitled to LIBs based on an aggravation of a personality disorder that resulted in an inability to obtain or retain employment. Section 408.161 specifies the criteria for which entitlement to LIBs can be established. The aggravation of a personality disorder is not one of the specified conditions for which LIBs is payable. The hearing officer's determination that the claimant is not entitled to LIBs is supported by sufficient evidence and is affirmed.

EXTENSION OF STATUTORY MMI FOR SPINAL SURGERY

Section 408.104(a) provides in part, that on application by either the claimant or the carrier, the Commissioner may extend the 104-week period described by Section 401.011(30)(B) (date of statutory MMI) if the claimant had spinal surgery, or has been approved for spinal surgery under Section 408.026 and the Commissioner rules within 12 weeks before the expiration of the 104-week period. The parties stipulated that the date of statutory MMI is July 26, 2004. In evidence is a Request for Extension of [MMI] for Spinal Surgery (DWC-57), dated February 19, 2011, and date stamped as received by the Division on March 7, 2011. The DWC-57 requests an extension of statutory MMI based on a cervical spine surgery performed on February 2, 2005. The hearing officer's determination that the claimant is not entitled to have the statutory MMI date extended pursuant to Section 408.104 is supported by sufficient evidence and is affirmed.

REIMBURSEMENT FOR MEDICAL EXPENSES

The hearing officer's determination that the issue of whether the claimant is entitled to reimbursement for medical expenses cannot be decided in this indemnity dispute resolution proceeding is supported by sufficient evidence and is affirmed.

JURISDICTION TO DECIDE MMI

The disputed issue before the hearing officer regarding jurisdiction to determine the date of MMI was as follows: “As a result of the decision and order of the [CCH] and affirmation by [the] Appeals Panel in [Appeals Panel Decision (APD)] 080435 [decided May 27, 2008], does the Division have jurisdiction to determine the date of [MMI]?” Although not discussed specifically in its appeal, the carrier appealed Conclusion of Law No. 4, which was “[t]he Division does not have jurisdiction to determine the date of [MMI].” The carrier appealed Conclusion of Law No. 5, which was “[t]he date of [MMI] is May 7, 2003.”

In evidence was a decision and order dated February 23, 2008, which determined in part that the claimant’s date of MMI is May 7, 2003, and the claimant’s impairment rating (IR) is 21%. Division records indicate that the hearing officer’s decision was allowed to become final. See Section 410.205. Because a prior determination of MMI had been made, the hearing officer in the instant case determined that the Division does not have jurisdiction to determine the date of MMI. The hearing officer additionally made a conclusion of law recognizing the prior determination that the claimant’s MMI date is May 7, 2003. The hearing officer’s determinations that the Division does not have jurisdiction to determine the date of MMI and recognizing the prior determination that the date of the claimant’s MMI is May 7, 2003, is supported by sufficient evidence and is affirmed.

SIBS AND CARRIER WAIVER

In evidence was a Decision and Order dated September 14, 2006, which determined that the claimant is not entitled to SIBs for the 2nd, 3rd, and 4th quarters. At that CCH, the parties stipulated that the claimant’s IR is 15% or more but did not stipulate to the MMI date. The parties did stipulate to the qualifying periods and quarter dates for the SIBs quarters at issue. Division records indicate that decision was appealed to the Appeals Panel and the hearing officer’s decision and order was allowed to become final. The claimant sought judicial review on the determination of non-entitlement to SIBs for the 2nd, 3rd, and 4th quarters. In evidence is an Order granting the carrier’s motion for no-evidence summary judgment on the determination of non-entitlement to SIBs for the 2nd, 3rd, and 4th quarters. The claimant requested a motion for new trial but it was denied. The evidence indicates that the qualifying periods and quarter dates for the first 4 quarters of SIBs were based on a certification of a different MMI date and a 15% IR. In evidence is a Benefit Dispute Agreement (DWC-24) that states the parties agree the Division does not have jurisdiction to re-determine entitlement to SIBs for the 1st, 2nd, 3rd, and 4th quarters.

In evidence was a Decision and Order dated February 23, 2008, in which the following issues were in dispute: (1) Did the IR and date of MMI assigned by [Dr. L] on October 1, 2005, become final under 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g))?; (2) What is the date of MMI?; and (3) What is the claimant's IR? In that decision, it was determined that the IR and MMI assigned by Dr. L on October 1, 2005, did not become final under Rule 130.102(g); that the claimant's date of MMI is May 7, 2003; and that the claimant's IR is 21%. Division records indicate that decision was appealed to the Appeals Panel and the hearing officer's decision and order was allowed to become final.

At issue in the instant case, was the claimant's entitlement to SIBs for the 5th through 23rd quarters and whether the carrier waived its right to contest the claimant's entitlement to SIBs for the 5th through 23rd quarters. The parties stipulated that 401 weeks expired for this claim on March 29, 2010.

There is evidence that the claimant filed two sets of Applications for [SIBs] (DWC-52) for the 5th through 11th quarters. There is some evidence in the record that the claimant filed the first set of SIBs applications for the 5th through 11th quarters for qualifying periods and quarter dates based on the earlier certification of a different date of MMI with a 15% IR, and that the carrier disputed entitlement to SIBs for those quarters. These applications are dated prior to the subsequent CCH held in 2008, which determined that the claimant reached MMI on May 7, 2003, with a 21% IR. However, there is insufficient evidence to establish the date the carrier received those applications. Some of the SIBs applications for the 5th through 11th quarters filed, which were based on the earlier certification of MMI and IR, contain a stamp of a date received but the stamp is illegible and it is not clear that the date receipt stamp is that of the carrier. The hearing officer failed to discuss and make findings on these SIBs applications. However, the claimant failed to provide evidence to establish the date the carrier received these SIBs applications. The claimant had the burden of proof on this issue. See APD 031326, decided July 8, 2003.

The claimant's second set of DWC-52s for the 5th through 11th quarters was based on the MMI date of May 7, 2003, with a 21% IR. As previously noted, in the decision and order decided February 23, 2008, it was determined that the claimant's date of MMI is May 7, 2003, with a 21% IR. In evidence are SIBs applications dated April 14, 2010, for the 5th through 23rd quarters based on the certification of MMI of May 7, 2003, with a 21% IR. The claimant testified that he filed all of these applications at the same time after the resolution in district court of the 2nd, 3rd, and 4th quarters of SIBs. The claimant argued that the carrier waived its right to contest entitlement to these quarters because it failed to timely request a benefit review conference (BRC) for

these SIBs applications. The carrier argued that the claimant failed to timely file his applications for the 5th through 23rd quarters.

The hearing officer based her determination that the carrier waived the right to contest the claimant's entitlement to SIBs for the 5th through 23rd quarters on the carrier's failure to deny the SIBs applications for the 5th through 23rd quarters dated April 14, 2010. The hearing officer noted that there was no evidence in the record to indicate that the claimant mailed these applications in April of 2010. In evidence are two United States Postal Service (USPS) Delivery Confirmation Receipts, one dated April 22, 2010, and one with an illegible date. A certified mail receipt dated May 13, 2011, is also in evidence but there is no evidence of delivery. None of the receipts from the USPS in evidence indicate what documents were being delivered or to whom the documents were delivered. We note that the dates of these postal receipts would not relate to the earlier filing of the SIBs applications detailed above. The hearing officer found that the carrier received the claimant's applications for SIBs for the 5th through 23rd quarters in the claimant's BRC exchange in May of 2010.

Section 408.143 provides:

- (a) After the [C]ommissioner's initial determination of [SIBs], the employee must file a statement with the insurance carrier stating:
 - (1) that the employee has earned less than 80 [%] of the employee's average weekly wage as a direct result of the employee's impairment;
 - (2) the amount of wages the employee earned in the filing period provided by Subsection (b); and
 - (3) that the employee has complied with the requirements adopted under Section 408.1415.
- (b) The statement required under this section must be filed quarterly on a form and in the manner provided by the commissioner. The commissioner may modify the filing period as appropriate to an individual case.
- (c) Failure to file a statement under this section relieves the insurance carrier of liability for [SIBs] for the period during which a statement is not filed.

Rule 130.104(c) provides in part that except as otherwise provided in this section, a DWC-52 shall be filed no later than 7 days before, and no earlier than 20

days before, the beginning of the quarter for which the injured employee is applying for SIBs.

Rule 130.105(a) provides in part that: An injured employee who does not timely file a DWC-52 with the insurance carrier shall not receive SIBs for the period of time between the beginning date of the quarter and the date on which the form was received by the insurance carrier, unless the following apply:

- (3) a finding of an [IR] of 15% or greater in an administrative or judicial proceeding when the previous [IR] was less than 15%.

The hearing officer states in her decision that: "Subsection (3) [of Rule 130.105] is an exception to the general rule that would normally apply when a person fails to timely file a [DWC-52]. Because [the] [c]laimant's case falls within one of the exceptions, the consequences for failing to timely file do not apply to this case. [The] [c]laimant's [DWC-52s] were timely."

However, as previously noted a CCH was held in 2006, to determine the claimant's entitlement to SIBs for the 2nd, 3rd, and 4th quarters. During that CCH the parties stipulated that the claimant's IR is 15% or greater. There was no evidence that the "previous IR was less than 15%." See Old Republic Insurance Company v. Rodriguez, 2004 Tex. App. LEXIS 3785 (Tex. App.-El Paso, April 29, 2004). Subsection (3) is not an exception that applies to the facts of this case and the hearing officer erred in its application to the facts of this case.

The parties stipulated that 401 weeks expired on March 29, 2010. Section 408.083 provides that an employee's eligibility for TIBs, IIBs, and SIBs terminates on the expiration of 401 weeks after the date of injury.

The hearing officer specifically found that the carrier received the claimant's DWC-52s for the 5th through 23rd quarters in the claimant's BRC exchange in May of 2010. In evidence is a SIBs calculation sheet, which reflects that the dates of the SIBs quarters are based on the 21% IR with the May 7, 2003, MMI date. The SIBs calculation sheet identifies the 23rd quarter period as beginning January 14, 2010, and ending on April 14, 2010. Any day in May of 2010 would be later than 7 days before the beginning of the quarter for which the claimant was applying for SIBs. Accordingly, the claimant would not have timely filed DWC-52s for any of the quarters at issue.

For the reasons discussed above, we reverse the hearing officer's determination that the carrier waived its right to contest the claimant's entitlement to SIBs for the 5th through 23rd quarters and render a new decision that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the 5th through 23rd quarters.

The hearing officer's findings that the claimant is not entitled to SIBs on the merits for the 5th through 23rd quarters are supported by sufficient evidence. The hearing officer's determination that the claimant is entitled to SIBs for the 5th through 23rd quarters was premised on her determination that the carrier waived its right to contest the claimant's entitlement to SIBs for the disputed quarters. Given that we have reversed the hearing officer's determination that the carrier waived its right to contest the claimant's entitlement to SIBs for the disputed quarters, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the 5th through 23rd quarters and render a new decision that the claimant is not entitled to SIBs for the 5th through 23rd quarters.

SUMMARY

We affirm the hearing officer's determination that as a result of a prior decision and order, the Division does not have jurisdiction to determine the date of MMI.

We affirm the hearing officer's determination that as a result of a prior Division determination, the claimant's date of MMI is May 7, 2003.

We affirm the hearing officer's determination that the claimant is not entitled to LIBs.

We affirm the hearing officer's determination that the claimant is not entitled to have the statutory MMI date extended pursuant to Section 408.104.

We affirm the hearing officer's determination that the issue of whether the claimant is entitled to reimbursement for medical expenses cannot be decided in this indemnity dispute resolution proceeding.

We reverse the hearing officer's determination that the carrier waived its right to contest the claimant's entitlement to SIBs for the 5th through 23rd quarters and render a new decision that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the 5th through 23rd quarters.

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the 5th through 23rd quarters by virtue of carrier waiver and render a new decision that the claimant is not entitled to SIBs for the 5th through 23rd quarters.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge