

APPEAL NO. 130157
FILED MARCH 14, 2013

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 December 6, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before her, the hearing officer determined that: (1) the [date of injury], compensable injury does not extend to left knee arthropathy of the medial femoral condyle, left knee traumatic arthropathy of the patella, synovitis of the left knee and post-traumatic tricompartmental osteoarthritis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on April 6, 2012; (3) the impairment rating (IR) is 4%; and (4) the claimant had disability from June 14, 2011, through August 6, 2012.

The claimant appealed the extent of injury, MMI and IR issues. The respondent (self-insured) responded, urging affirmance.

The hearing officer's determination that the claimant had disability from June 14, 2011, through August 6, 2012, has not been appealed and has therefore become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that she worked as a custodian for the self-insured school district and that on [date of injury], she sustained a low back and left knee injury while emptying trash into a dumpster. The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) [Dr. C] was the Texas Department of Insurance, Division of Workers' Compensation (Division) designated doctor appointed to determine MMI, IR, ability to return to work and whether disability is a direct result of the work-related injury; (3) the self-insured accepted as compensable a low back [lumbar] sprain/strain, left knee meniscus tear, left leg strain and as adjudicated a pain disorder, depression and adjustment disorder with anxiety; (4) lumbar radiculitis, L3-4, L4-5 and

L5-S1 joint effusion are not part of the compensable injury; and (5) the statutory MMI date is August 6, 2012.¹

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to left knee arthropathy of the medial femoral condyle, left knee traumatic arthropathy of the patella, synovitis of the left knee and post-traumatic tricompartmental osteoarthritis, is supported by sufficient evidence and is affirmed.

MMI AND IR

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.

In evidence are several certifications from Dr. C, the designated doctor. In the first report, after an examination on December 10, 2010, Dr. C certified MMI on that date with a 0% IR. Subsequently, the claimant had left knee surgery to include a left knee partial medial meniscectomy on January 13, 2011. In the second certification, based on a July 18, 2011, examination, Dr. C certified MMI on June 13, 2011, with a 1% IR based on a partial meniscectomy pursuant to Table 64, page 3/85, 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). Range of motion (ROM) of the left knee was invalidated as not consistent with the observed ROM.

¹ Although stipulated on the record, the hearing officer did not include the statutory MMI date in the listed stipulations.

At a prior CCH held on April 5, 2012, the hearing officer in that proceeding determined, among other matters, that the compensable injury of [date of injury], includes pain disorder, depression and adjustment disorder with anxiety and that the “[c]laimant has not yet reached MMI.”

Dr. C, based on an examination of May 16, 2012, certified MMI on June 13, 2011 with a 1% IR. Dr. C again invalidated left knee ROM based on clinical observation. Dr. C assessed a 1% impairment for a partial meniscectomy of the left medial meniscus based on Table 64 of the AMA Guides and based on Table 72, of the AMA Guides assessed Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms for 0% impairment for the lumbar condition. Regarding the depression, adjustment disorder with anxiety, and pain disorder the claimant was referred to ([Dr. B] for an assessment of those conditions. Dr. C stated that following Dr. B’s examination and report the MMI date may change based on his findings as well as the IR.

A report dated July 25, 2012, from Dr. B is in evidence. Dr. B recorded the results of the various tests, and concurred in the MMI date of June 13, 2011. Dr. B stated:

AMA Guides states that [an] impairment cannot be given for psychiatric issues. Pages [14/301/14/302] last paragraph of the AMA [G]uides 4th edition. However, Chapter 14 provides a way to look at four areas/domains of behavior and mental status functioning (activities of daily living, social functioning, concentration, and adaptation).

Dr. B discussed the four areas/domains of behavior and assessed a 0% impairment for each one. Dr. B then commented “3% whole person impairment is given based on AMA [G]uides [C]hapter 2 page [2/9] Adjustments for Effects of Treatment or Lack of Treatment secondary to various treatments provided. . . .”

In a letter of clarification (LOC) dated September 26, 2012, the hearing officer wrote Dr. C to request that he “[p]rovide a date of MMI after April 5, 2012 [the date the prior CCH had determined the claimant had not yet reached MMI], but not later than August 6, 2012 [the stipulated statutory MMI date]” related to the accepted and administratively determined conditions. The hearing officer requested Dr. C prepare an amended narrative report and a Report of Medical Evaluation (DWC-69) and “please also explain how the impairment from [Dr. B’s] report was incorporated in your rating.” Dr. C replied forwarding an amended DWC-69 which referenced the May 16, 2012, date

of examination, certified clinical MMI on April 6, 2012, and assessed a 4% IR. Dr. C further stated:

I have been asked to provide a date of MMI after [April 5, 2012], but no later than [August 6, 2012]. The date of MMI would be [April 6, 2012], as [the claimant] has had no significant treatment . . . performed since the time of my most recent evaluation on [May 16, 2012].

There was no additional narrative with the LOC response and no explanation on how Dr. B's rating was incorporated in the IR. Based on the reports in evidence, Dr. C assigned a 1% impairment for a partial meniscectomy of the left medial meniscus, invalidated left knee ROM based on clinical observation, assigned DRE Lumbosacral Category I: Complaints and Symptoms 0% impairment and adopted Dr. B's 3% impairment for Adjustments for Effects of Treatment or Lack of Treatment as provided on page 2/9 of the AMA Guides.

As previously noted, the parties stipulated that the compensable injury included, among other conditions, a left leg strain. Dr. C does not rate, or even mention the stipulated left leg strain. Therefore, Dr. C's certification of MMI and assessment of IR cannot be adopted.

Furthermore, Dr. C's assessment of a 4% IR is not in accordance with the AMA Guides because it includes 3% impairment for Adjustments for Effects of Treatment or Lack of Treatment. The Appeals Panel has previously addressed the use of the provision for Adjustments for Effects of Treatment or Lack of Treatment on page 2/9 of the AMA Guides in Appeals Panel Decision (APD) 090692-s, decided July 14, 2009.

Adjustments under Section 2.2 page 2/9 of the AMA Guides provide for additional impairment in cases where: (1) treatment of an illness results in apparent remission of symptoms but the patient has not regained his prior good health; and (2) pharmaceuticals themselves may lead to impairment. Assigning an impairment for psychiatric/mental conditions would not meet either of the examples in the AMA Guides. See APD 121157, decided August 9, 2012. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on April 6, 2012, with a 4% IR because it improperly includes 3% impairment for Adjustments for Effects of Treatment or Lack of Treatment and does not rate the entire compensable injury, the left leg strain.

Also in evidence is a report from [Dr. J] dated June 14, 2012, based on an examination of that date. Dr. J certified that the claimant was not at MMI. Dr. J's certification cannot be adopted because the certification does not consider the compensable left leg strain.

Another report in evidence is from [Dr. G] who identifies himself as a doctor selected by the treating doctor acting in place of the treating doctor. Dr. G examined the claimant on August 1, 2012, and certified statutory MMI on July 3, 2012, with a 20% IR. Dr. G's IR cannot be adopted because it certifies a statutory MMI date other than the statutory MMI date stipulated to by the parties. Dr. G also does not rate the compensable left leg strain.

Because there is no certification of MMI and assessment of IR that can be adopted, we remand the MMI and IR issues for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury does not extend to left knee arthropathy of the medial femoral condyle, left knee traumatic arthropathy of the patella, synovitis of the left knee and post-traumatic tricompartmental osteoarthritis.

We reverse the hearing officer's determination that the claimant reached MMI on April 6, 2012, and that the claimant's IR is 4% and remand the MMI/IR issues for further action consistent with this decision.

REMAND INSTRUCTIONS

The designated doctor for IR is Dr. C. On remand the hearing officer is to determine if Dr. C is still qualified and available to serve as the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed to determine the IR for the compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a stipulated low back [lumbar] sprain/strain, left knee meniscus tear, left leg strain, as well as pain disorder, depression and adjustment disorder with anxiety as administratively determined. Further, the hearing officer is to advise the designated doctor that the [date of injury], compensable injury does not extend to left knee arthropathy of the medial femoral condyle, left knee traumatic arthropathy of the patella, synovitis of the left knee and post-traumatic tricompartmental osteoarthritis, and as agreed to lumbar radiculitis, L3-4, L4-5 and L5-S1 joint effusion.

We note that for reasons discussed above, the portion of the AMA Guides relied upon by Dr. B, and adopted by Dr. C, to assess 3% impairment for “Adjustments for Effects of Treatment or Lack of Treatment” is not applicable in the claimant’s circumstances.

The designated doctor’s report is to be made available to the parties and the parties are to be allowed an opportunity to comment. The hearing officer is then to make a determination of MMI and IR that is supported by the evidence and is consistent with this decision.

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 APD 060721, decided June 12, 2006.

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

[NAME]
[ADDRESS]
[CITY, TEXAS ZIP].

Thomas A. Knapp
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge