APPEAL NO. 142601
FILED JANUARY 26, 2015

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 October 9, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [Date of Injury], does not extend to cervical stenosis at C5-7, cervical kyphosis, cervical radiculopathy, cervical herniated nucleus pulposus (HNP), lumbar HNPs at L4-S1, disc herniations at L5-S1, lumbar disc abnormalities at L5-S1, and lumbar radiculopathy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on February 5, 2013; (3) the claimant's impairment rating (IR) is 14%; (4) the claimant had disability resulting from the compensable injury of [Date of Injury], during the period beginning February 21 through October 7, 2012, but she did not have disability during the period beginning February 6 through May 5, 2013 (the disability periods at issue); and (5) the claimant did not have good cause for failing to submit to the designated doctor's examination on February 27, 2012, and is not entitled to temporary income benefits (TIBs) during the period beginning February 27, 2012, and continuing through February 19, 2013. We note that the hearing officer's decision states a different zip code for the address of the respondent's (carrier) registered agent for service of process than is contained on the carrier information form in evidence.

The claimant appealed all of the hearing officer's determinations essentially on a sufficiency of the evidence point of error. The carrier responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part, affirmed as reformed in part, and reversed and rendered in part.

The parties stipulated in part that the claimant sustained a compensable injury on [Date of Injury], at least in the form of a cervical sprain/strain, lumbar sprain/strain, right hip sprain/strain, right elbow sprain/strain, and right elbow contusion. The claimant testified that she was injured when she slipped and fell on ice.

MOTION FOR CONTINUANCE

The hearing officer noted in her decision that the claimant requested after the CCH held on October 9, 2014, to leave the record open for two weeks so that she could obtain additional medical evidence to support her position regarding the extent-of-injury

issue. The hearing officer further noted that the claimant did not provide any additional medical evidence, and therefore closed the record on October 23, 2014.

The claimant contends in her appeal that she obtained a letter from her doctor after the hearing officer closed the record. The claimant attached a copy of a letter from (Dr. M), dated November 20, 2014, in which Dr. M states that the cause of his delay in submitting the claimant's letter of causation was "[d]ue to my surgical teaching obligations, personal family vacation, and extensive surgical practice. . . ."

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ) *see also* APD 101100, decided October 13, 2010. In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* APD 051405, decided August 9, 2005. We do not agree that the documents submitted by the claimant for the first time on appeal meet the requirements for newly discovered evidence. The documents could have been discovered prior to the CCH, were in part cumulative of other evidence admitted at the CCH, and were not so material that it would probably result in a different decision. Therefore, the documents attached to the claimant's appeal were not considered by the Appeals Panel.

FINDING OF FACT NO. 1.F.

The parties stipulated on the record that (Dr. G), the designated doctor for purposes of MMI and IR, certified that the claimant reached MMI as of July 17, 2012, with a 14% IR for the accepted compensable injury. However, the decision incorrectly states in Finding of Fact No. 1.F. that "[o]n February 19, 2013, [Dr. G] certified that [the] [c]laimant reached MMI as of February 5, 2013, with a 14% IR for the accepted compensable injury." We reform the hearing officer's decision by amending Finding of Fact No. 1.F. to read as follows below, to comply with the actual stipulation made by the parties at the CCH:

Dr. G certified that the claimant reached MMI as of July 17, 2012, with a 14% IR for the accepted compensable injury.

EVIDENCE PRESENTED

At the CCH Claimant's Exhibits 1 through 14 were admitted into evidence, as were Carrier's Exhibits A through S. However, the decision incorrectly reflects that Claimant's Exhibits 1 through 16 were admitted, as were Carrier's Exhibits A through Q. We reform the hearing officer's decision to show that Claimant's Exhibits 1 through 14 and Carrier's Exhibits A through S were admitted to reflect the correct exhibits offered by the claimant and the carrier and admitted into evidence at the CCH.

EXTENT OF INJURY, MMI, IR, AND DISABILITY

The hearing officer's determinations that the compensable injury of [Date of Injury], does not extend to cervical stenosis at C5-7, cervical kyphosis, cervical radiculopathy, cervical HNP, lumbar HNPs at L4-S1, disc herniations at L5-S1, lumbar disc abnormalities at L5-S1, and lumbar radiculopathy; the claimant reached MMI on February 5, 2013; the claimant's IR is 14%; and that the claimant had disability resulting from the compensable injury of [Date of Injury], during the period beginning February 21 through October 7, 2012, but she did not have disability during the period beginning February 6 through May 5, 2013, are supported by sufficient evidence and are affirmed.

GOOD CAUSE FOR FAILING TO SUBMIT TO THE DESIGNATED DOCTOR'S EXAMINATION AND ENTITLEMENT TO TIBS

The issue before the hearing officer as listed on the Benefit Review Conference (BRC) report and agreed to by the parties is the following:

Did the claimant have good cause for failing to submit to the designated doctor's appointment on February 21, 2012, and if so, is the claimant entitled to [TIBs] from December 4, 2012,[1] through March 12, 2013?

The hearing officer determined that the claimant did not have good cause for failing to submit to the designated doctor's examination on February 27, 2012, and is not entitled to TIBs during the period beginning February 27, 2012, and continuing through February 19, 2013.

We note that the issue before the hearing officer was whether the claimant had good cause for failing to submit to the designated doctor's appointment on February 21, 2012, not February 27, 2012. However, the hearing officer found in an unappealed finding of fact that the February 21, 2012, designated doctor appointment was

[1] We note that the decision incorrectly identifies the beginning date of the period of TIBs entitlement as January 4, 2012, rather than December 4, 2012, as listed on the BRC report and agreed to by the parties at the CCH.

rescheduled to February 27, 2012. It was undisputed that the claimant failed to attend the designated doctor appointment scheduled for February 27, 2012, and that the claimant did not submit to a designated doctor examination until February 19, 2013. The record reflects, and the parties litigated at the CCH, that the date of the designated doctor examination in question was February 27, 2012, rather than February 21, 2012. The hearing officer's determination that the claimant did not have good cause for failing to submit to the February 27, 2012, designated doctor examination is supported by sufficient evidence and is affirmed.

As noted above, the hearing officer also determined that the claimant is not entitled to TIBs during the period beginning February 27, 2012, and continuing through February 19, 2013, because of her failure to attend the February 27, 2012, designated doctor examination.

The rule governing the claimant's failure to attend the February 27, 2012, designated doctor appointment in this case is 28 TEX. ADMIN. CODE § 127.25 (Rule 127.25), effective from [Date of Injury], through August 31, 2012. That rule provides the following:

(a) An insurance carrier may suspend [TIBs] if an injured employee, without good cause, fails to attend a designated doctor examination.

(b) In the absence of a finding by the [Texas Department of Insurance, Division of Workers' Compensation (Division)] to the contrary, an insurance carrier may presume that the injured employee did not have good cause to fail to attend the examination if by the day the examination was originally scheduled to occur the injured employee has both:

(1) failed to submit to the examination; and

(2) failed to contact the designated doctor's office to reschedule the examination.

(c) If, after the insurance carrier suspends TIBs pursuant to this subsection, the injured employee contacts the designated doctor to reschedule the examination, the designated doctor shall schedule the examination to occur as soon as possible, but not later than the 21st day after the injured employee contacted the doctor. The insurance carrier shall reinstate TIBs effective as of the date the injured employee submitted to the examination unless the report of the designated doctor indicates that the injured employee has reached MMI or is otherwise not eligible for income benefits. The re-initiation of TIBs shall occur no later than the seventh day following:

(1) the date the insurance carrier was notified that the injured employee submitted to the examination; or

(2) the date that the insurance carrier was notified that the [D]ivision found that the injured employee had good cause for not attending the examination.

(d) An injured employee is not entitled to TIBs for a period during which the insurance carrier suspended benefits pursuant to this subsection unless the injured employee later submits to the examination and the [D]ivision finds or the insurance carrier determines that the injured employee had good cause for failure to attend the examination.

(e) This section becomes effective on [Date of Injury].

As noted above, the issue before the hearing officer as reflected on the BRC report and agreed to by the parties at the CCH was whether the claimant was entitled to TIBs from December 4, 2012, through March 12, 2013. The hearing officer's determination that the claimant is not entitled to TIBs during the period beginning February 27, 2012, and continuing through February 19, 2013, does not address the entire period before the hearing officer. However, Rule 127.25 provides that an insurance carrier may suspend TIBs when an injured employee, without good cause, fails to attend a designated doctor examination as of the date the injured employee failed to attend the designated doctor examination. As previously discussed, the date of the designated doctor examination in question was February 27, 2012. The carrier in this case is unable to suspend TIBs under Rule 127.25 for any period prior to February 27, 2012. Furthermore, Rule 127.25(c) provides that the carrier shall reinstate TIBs effective as of the date the injured employee submitted to the examination unless the report of the designated doctor indicates that the injured employee has reached MMI or is otherwise not eligible for income benefits. It is undisputed that the claimant attended the February 19, 2013, designated doctor examination. Under the circumstances in this case, the hearing officer should have amended the issue to determine whether the claimant is entitled to TIBs from February 27, 2012, through February 18, 2013, to reflect the actual time period in dispute. Any period outside February 27, 2012, through February 18, 2013, would not fall under Rule 127.25, and as such cannot be addressed by that rule.

We have affirmed the hearing officer's determination that the claimant did not have good cause for failing to submit to the February 27, 2012, designated doctor examination. Section 408.101(a) and Rule 129.2(a) provide that once an injured employee reaches MMI, he or she is no longer entitled to TIBs.

We affirm that portion of the hearing officer's determination that the claimant is not entitled to TIBs beginning February 27, 2012. We have affirmed the hearing officer's determination that the claimant reached MMI on February 5, 2013. Therefore, even though the claimant attended the February 19, 2013, designated doctor examination, which under Rule 127.25 could allow reinstatement of TIBs as of that date, the claimant would not be entitled to TIBs after February 5, 2013. We reverse that portion of the hearing officer's determination that the claimant is not entitled to TIBs continuing through February 19, 2013, and we render a new decision that the claimant is not entitled to TIBs continuing through February 18, 2013.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [Date of Injury], does not extend to cervical stenosis at C5-7, cervical kyphosis, cervical radiculopathy, cervical HNP, lumbar HNPs at L4-S1, disc herniations at L5-S1, lumbar disc abnormalities at L5-S1, and lumbar radiculopathy.

We affirm the hearing officer's determination that the claimant reached MMI on February 5, 2013.

We affirm the hearing officer's determination that the claimant's IR is 14%.

We affirm the hearing officer's determination that the claimant had disability resulting from the compensable injury of [Date of Injury], during the period beginning February 21 through October 7, 2012, but she did not have disability during the period beginning February 6 through May 5, 2013.

We affirm that portion of the hearing officer's determination that the claimant is not entitled to TIBs beginning February 27, 2012.

We reverse that portion of the hearing officer's determination that the claimant is not entitled to TIBs continuing through February 19, 2013, and we render a new decision that the claimant is not entitled to TIBs continuing through February 18, 2013.

We reform the hearing officer's decision by amending Finding of Fact No. 1.F. to read as follows below, to comply with the actual stipulation made by the parties at the CCH:

Dr. G certified that the claimant reached MMI as of July 17, 2012, with a 14% IR for the accepted compensable injury.

We reform the hearing officer's decision to show that Claimant's Exhibits 1 through 14, and Carrier's Exhibits A through S were admitted to reflect the correct exhibits offered by the claimant and the carrier and admitted into evidence at the CCH.

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

CT CORPORATION
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge