APPEAL NO. 150718
FILED MAY 28, 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 November 25, 2014, with the record closing on March 17, 2015, in Lubbock, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the [date of injury], compensable injury does not extend to the right shoulder diagnoses of reflex sympathetic dystrophy (RSD), SLAP tear, rotator cuff tear, and impingement; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. C), the treating doctor, on October 10, 2012, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the appellant (claimant) reached MMI on September 26, 2012; (4) the claimant's IR is six percent; and (5) the claimant had disability resulting from the compensable injury from [date of injury], and not thereafter through the date of the CCH.

The claimant appealed all of the hearing officer's extent of injury, MMI, and IR determinations, arguing that they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The claimant also appealed that portion of the hearing officer's disability determination that was not favorable to her. The respondent (carrier) responded, urging affirmance of all the disputed determinations.

The hearing officer's determinations that: (1) the first certification of MMI and assigned IR from Dr. C, the treating doctor, on October 10, 2012, did not become final under Section 408.123 and Rule 130.12, and (2) the claimant had disability resulting from the compensable injury from January 23 through September 26, 2012, were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that she injured herself when her pant leg got caught on a buffer machine and she caught herself before falling to the floor injuring her right shoulder on [date of injury]. The hearing officer states in the Discussion portion of the decision that the carrier has accepted as compensable a right shoulder sprain/strain and a right foot contusion. On May 3, 2012, the claimant underwent right shoulder surgery in the form of an excision of the distal clavicle, acromioplasty, and rotator cuff repair. The post-operative diagnoses were right shoulder hypertrophy distal clavicle, impingement syndrome, and rotator cuff tear. The hearing officer determined that the

impingement and rotator cuff tear were not part of the compensable injury, and a distal clavicle condition was not actually litigated or administratively determined to be part of the compensable injury.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to the right shoulder diagnoses of RSD, SLAP tear, rotator cuff tear, and impingement is supported by sufficient evidence and is affirmed.

DISABILITY

That portion of the hearing officer's determination that the claimant did not have disability resulting from the compensable injury from September 27, 2012, through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI/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 Texas Department of Insurance, Division of Workers' Compensation (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. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

As previously mentioned, the hearing officer determined that the first certification of MMI and assigned IR from Dr. C, the treating doctor, on October 10, 2012, did not become final under Section 408.123 and Rule 130.12, and that determination was not appealed and became final pursuant to Section 410.169.

At the CCH held on November 25, 2014, Dr. C's certification of MMI/IR was the only certification in evidence for the hearing officer to consider in making a determination on the issues of MMI and IR. The hearing officer determined that Dr. C's

certification of MMI is supported by the evidence; however, Dr. C's assignment of IR did not include contusion of the right foot, a condition accepted by the carrier as part of the compensable injury. Given that the issue of IR was in dispute and there was no other certification of MMI/IR in evidence, the hearing officer requested that a designated doctor be assigned to determine IR as of the date of MMI of September 26, 2012.

With regard to the hearing officer's MMI determination, the hearing officer relied on Dr. C's certification of MMI/IR. Dr. C examined the claimant on October 10, 2012, and certified on that same date, that the claimant reached MMI on September 26, 2012, with a six percent 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).

Dr. C states in his narrative report dated October 10, 2012, that the claimant reached MMI on September 26, 2012, which is the date of a functional evaluation examination (FCE) revealing she had met her physical demand level. In evidence is an FCE dated September 26, 2012, from Dr. C in which he notes that the claimant underwent right shoulder surgery on May 3, 2012, with excision of distal clavicle, acromioplasty, and rotator cuff repair, and that the claimant had completed 26 sessions of post-surgical rehabilitation. The hearing officer determined, and we have affirmed in this decision, that the [date of injury], compensable injury does not extend to the right shoulder diagnoses of RSD, SLAP tear, rotator cuff tear, and impingement. As previously mentioned, the hearing officer states that the claimant's compensable injury is a right shoulder sprain/strain and right foot contusion. Dr. C considered conditions that were not part of the compensable injury in determining the claimant's date of MMI.

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).

In applying this standard to the facts of this case, the hearing officer's determination that the claimant reached MMI on September 26, 2012, based on Dr. C's certification of MMI, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust because Dr. C considered conditions that are not part of the compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on September 26, 2012.

With regard to the hearing officer's IR determination, the hearing officer relied on the designated doctor's certification dated January 28, 2015. In this case the hearing officer requested that the Division appoint a designated doctor to determine only the

claimant's IR. The hearing officer's request stated that the IR should be based on an MMI date of September 26, 2012. Subsequently, the Division appointed a designated doctor for purposes of IR only, the designated doctor examined the claimant, the designated doctor provided a certification of MMI/IR, and the parties had an opportunity to respond to the designated doctor's certification at a CCH held on March 17, 2015.

At the request of the hearing officer, the Division appointed (Dr. K) as designated doctor to determine the claimant's IR based on an MMI date of September 26, 2012. Dr. K examined the claimant on January 28, 2015, and certified that the claimant reached MMI on September 26, 2012, and assigned a six percent IR. Dr. K states in his narrative report dated January 28, 2015, that the clinical date of MMI has been determined by the Division. Dr. K states that the claimant's compensable injury is a right shoulder sprain/strain and right foot contusion. Dr. K assessed a zero percent whole person impairment (WPI) for a right ankle contusion, rather than a right foot contusion. Also, Dr. K assessed a six percent WPI based on Table 27, page 3/61, for a distal clavicle arthroplasty. As previously discussed, a distal clavicle condition was not actually litigated or administratively determined to be part of the compensable injury. The compensable injury is to a right shoulder sprain/strain and right ankle contusion. Dr. K's certification cannot be adopted given that we have reversed the hearing officer's determination that the claimant reached MMI on September 26, 2012, and also the six percent IR is based on a condition that is not compensable. Accordingly, we reverse the hearing officer's determination that the claimant's IR is six percent.

Since there is no other certification of MMI and IR that we can adopt, we remand the issues of MMI and IR to the hearing officer to make a determination that is consistent with this decision.

Furthermore, we note that there is no evidence that a designated doctor was appointed to opine on the disputed issue of MMI. Section 408.1225(c) which 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. Although the issue of MMI was in dispute, the hearing officer requested that a designated doctor be appointed only for the dispute issue of IR. The Appeals Panel has stated that "[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant's IR because there is no report from a designated doctor." See Appeals Panel Decision (APD) 020385, decided March 18, 2002. *See also* APD 142008, decided November 5, 2014, and APD 132423, decided December 19, 2013, in which the issues of MMI and IR were in dispute, and a designated doctor had not been appointed to opine on the issues of MMI and IR. In both APD 142008 and APD 132423,

the Appeals Panel reversed the hearing officer's decision and remanded for a designated doctor to be appointed on the issues of MMI and IR.

SUMMARY

We affirm the hearing officer's determination that the compensable injury does not extend to the right shoulder diagnoses of RSD, SLAP tear, rotator cuff tear, and impingement.

We affirm the hearing officer's determination that the claimant did not have disability resulting from the compensable injury from September 27, 2012, through the date of the CCH.

We reverse the hearing officer's determination that the claimant reached MMI on September 26, 2012, with a six percent IR and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to determine whether a designated doctor has been appointed to determine both issues of MMI and IR. If a designated doctor has not been appointed, then the hearing officer is to appoint a designated doctor to determine whether the claimant reached MMI, and if so, assign the claimant's 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], extends to: (1) a right shoulder sprain/strain, and (2) a right foot contusion.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], does not extend to the right shoulder diagnoses of: (1) RSD; (2) SLAP tear; (3) rotator cuff tear; and (4) impingement.

The hearing officer is then to request that the designated doctor determine whether the claimant reached MMI, and if so, assign an IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of the MMI date, considering the claimant's medical record and the certifying examination in accordance with Rule 130.1(c)(3).

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR supported by the evidence and 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 **TEXAS HOSPITAL INSURANCE EXCHANGE** and the name and address of its registered agent for service of process is

TESS FRAZIER, PRESIDENT/CEO/CFO
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Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge