APPEAL NO. 100796
FILED AUGUST 26, 2010

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 May 12, 2010. With regard to the two issues before her the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on the statutory date of November 12, 2008, and that the claimant's impairment rating (IR) is 18%.

The appellant (carrier) appealed, contending that the June 11, 2008, MMI date and 10% IR certified by the designated doctor in an amended Report of Medical Evaluation (DWC-69) dated June 11, 2008, should have been adopted. The appeal file does not contain a response from the claimant.

DECISION

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

The parties stipulated that: the claimant sustained a compensable injury on _____; the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor was (Dr. B) for MMI and IR; Dr. B certified that the claimant reached MMI on June 11, 2008, with a 26% whole person IR; Dr. B amended his rating to 10% in response to a request for a letter of clarification (LOC); (Dr. M), a referral doctor, certified that the claimant reached MMI on the statutory date of November 12, 2008,[1] with an IR of 18%; and that the date of statutory MMI is November 12, 2008. The medical records reflect that the claimant sustained a left wrist injury. No witnesses testified at the CCH.

MMI

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.

Dr. B, the designated doctor, initially certified that the claimant reached clinical MMI on June 11, 2008, and assessed a 26% IR on a DWC-69. In a peer review report dated August 29, 2008, (Dr. C) took issue with Dr. B's IR (to be discussed later) and a LOC was sent to Dr. B enclosing Dr. C's peer review report. Dr. B responded in a letter

[1] The hearing officer incorrectly stated that the claimant reached MMI on the statutory date of September 12, 2008, in the decision and order when the parties actually stipulated the correct November 12, 2008, date.

dated "January 6, 2008 [sic should be 2009]" stating that he was changing the IR "due to [range of motion (ROM)] impairments that were found on the date of examination of [the claimant]." Dr. B attached an amended DWC-69, again certifying clinical MMI on June 11, 2008.

Subsequently, the claimant was examined by Dr. M, a referral doctor, on June 22, 2009, over six months after statutory MMI, and over a year after Dr. B had certified MMI on June 11, 2008. Dr. M certified the claimant at statutory MMI on November 12, 2008. What treatment, if any, the claimant received after June 11, 2008, is not evident in the medical records. The treating doctor in a report dated July 13, 2009, only addresses the IRs given by the various doctors and does not mention MMI or any continued treatment.

The hearing officer, in her Background Information, commenting on the MMI date certified by Dr. M, states that the examination performed by Dr. M on June 22, 2009 (after statutory MMI) "revealed continued [ROM] and grip strength deficits although improvement was shown since June of 2008."[2] The hearing officer apparently compared the "32 pounds" "grip strength on the left" found in Dr. B's June 11, 2008, exam with the "18.33 kg" (18.33 kilograms which converts to 40.33 pounds) left hand grip strength found by Dr. M on June 22, 2009 (over a year later and seven months after statutory 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).

Section 401.011(30) defines MMI as the earlier of: (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue. In this case, there is no evidence as to what degree, if any, the claimant's grip strength improved from the date of the designated doctor's examination on June 11, 2008, to the November 12, 2008, statutory date of MMI. There is no medical evidence from any of the doctors indicating that the claimant's left UE strength or ROM has materially improved since the designated doctor's June 11, 2008, certification of MMI.

We hold that the hearing officer's comment regarding improvement in the claimant's condition, and the hearing officer's finding that Dr. B's MMI date was not made in accordance with 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) and is contrary to a preponderance of the evidence, to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We further note that the

[2] Dr. M did not rate loss of ROM and based his entire rating on upper extremity (UE) strength loss.

AMA Guides are not applicable in determining the date of MMI. *See* Appeals Panel Decision (APD) 93482, decided July 29, 1993, citing APD 93035, decided February 24, 1993. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on the statutory date of November 12, 2008, and we render a new decision that the claimant reached MMI on June 11, 2008, as certified by the designated doctor.

IR

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. 28 TEX. ADMIN. CODE § 130.1(c)(3) (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 noted, Dr. B, the designated doctor, initially assessed a 26% IR which was based on a 10% impairment for loss of ROM and an 18% impairment for loss of grip strength. Dr. C, the carrier's peer review doctor, in a report dated August 29, 2008, noted that Dr. B had improperly converted the UE impairment to whole person impairments before combining all the UE impairments and then converting to a whole person impairment. Dr. C commented that had Dr. B used the correct methodology he would have converted a 41% UE impairment to a 25% IR. Dr. C also criticized the grip strength testing in that Dr. B had failed to use the Jamar Dynamometer, had not performed testing at all five standard positions, and had not performed validity testing required by the AMA Guides. Dr. C concluded " . . . the only portion of this rating [Dr. B's initial June 11, 2008, report] that I can confirm as accurate would be the 10% whole person for ROM."

Dr. C's peer review report dated August 29, 2008, was sent to Dr. B. Dr. C criticized Dr. B's methodology in rating grip strength of the left wrist injury. Dr. B responded stating:

> I have reviewed my findings of this patient and I agreed with [Dr. C] that a 10% impairment is the appropriate impairment as at the proper methodology was not used in order to determine the grip strength or strength of the extremity as determined and set out in the guides.
>
> Therefore, I think that [the claimant's] original 26% whole person [IR] should be changed to 10% whole person impairment due to [ROM] impairments that were found on the date of examination of [the claimant].

Dr. B submitted an amended DWC-69 with the June 11, 2008, MMI date with a 10% IR. The carrier urges us to reverse the hearing officer's determination of an 18% IR and render the 10% IR in Dr. B's amended report.

Dr. C, in his peer review report did not say that the claimant only had a 10% IR; he only said that he could only confirm as accurate the 10% impairment for loss of ROM. Dr. C also does not state that rating grip strength was improper; rather, he only said the methodology was wrong. Dr. B, in his amended report, does not rate loss of grip strength or explain why he was omitting a rating for grip strength. *See* APD 091437, decided November 20, 2009, where a wrist injury has been rated for both loss of ROM and loss of grip strength. We do not hold that grip strength must be rated in this case; however, because Dr. B originally included a rating for grip strength then later omitted a rating for it without explanation or indication why grip strength was omitted, we cannot render a 10% IR.

We reverse the hearing officer's determination that the claimant's IR is 18%. Because we have reversed the hearing officer's determination that MMI was reached on November 12, 2008, and Rule 130.1(c)(3) requires that the assignment of an IR based on the claimant's condition on the MMI date, there is no IR that can be adopted.

Accordingly, we reverse the hearing officer's determination that the claimant's IR is 18% and we remand the case to the hearing officer. The designated doctor in this case is Dr. B. On remand the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor, and if so, request that Dr. B rate the entire compensable injury in accordance with the AMA Guides based on the claimant's condition as of the June 11, 2008, date of MMI considering the medical record, the certifying examination, and the rating criteria in the AMA Guides. The hearing officer is to request that if Dr. B does not rate grip strength he is to provide an explanation why it has been omitted. The hearing officer is to provide the LOC and the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the IR. If Dr. B is no longer qualified and available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's IR as of the June 11, 2008, MMI date.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on the statutory date of November 12, 2008, and we render a new decision that the claimant reached MMI on June 11, 2008.

We reverse the hearing officer's determination that the claimant's IR is 18% and remand the IR issue to the hearing officer.

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 MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Carisa Space-Beam
Appeals Judge