APPEAL NO. 101618
FILED DECEMBER 27, 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 September 30, 2010. With regard to the disputed issues before her the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on July 25, 2009, with an impairment rating (IR) of 20% as certified by the designated doctor.

The appellant (carrier) appealed both the date of MMI and IR, contending that the only "valid" rating 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) was (Dr. F), a post-designated doctor required medical examination (RME) doctor, certification of MMI on February 17, 2010, with a 5% IR. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The medical records reflect that on _____, the claimant fell off a ladder six to eight feet landing on his buttocks. The medical records[1] further reflect that the claimant had spinal surgery in the form of a decompression laminotomy at L3-4 and bilateral foraminotomies at L3-4 on November 21, 2008. The claimant had a second spinal surgery on July 24, 2009, in the form of an "anterior lumbar diskectomy L2-4, anterior fusion L2-4, application of PEEK interbody device, L2-4, screw fixation, L2-4."

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 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.

[1] There was no testimony at the CCH.

(Dr. P), the designated doctor, appointed to determine MMI and IR, initially examined the claimant on June 27, 2009. In a report dated July 17, 2009, Dr. P certified the claimant at clinical MMI on June 27, 2009, with a 5% IR. Dr. P re-examined the claimant on October 31, 2009. In a report dated October 31, 2009, Dr. P certified the claimant at clinical MMI on July 25, 2009 (the day following the claimant's diskectomy and fusion at L2-4) with a 20% IR. Dr. P based the July 25, 2009, MMI date on his opinion that the claimant "does not have any planned, pending or pre-authorized treatment or other procedures" and that the claimant "has reached a plateau in his recovery."

The carrier argued that the preponderance of the other medical evidence is contrary to the MMI date certified by the designated doctor because the designated doctor herself had characterized the claimant's second spinal surgery on July 24, 2009, as "an extreme lateral anterior lumbar discectomy and fusion at levels L2-3 and L3-4" and that it was illogical for the claimant be placed "at clinical MMI one day post discectomy and fusion" without allowing sufficient time for tissue healing and repair. Also, Dr. F, a post-designated doctor RME doctor, in a report dated February 17, 2010, commented that the claimant had surgery in the form of "two-level extreme lateral fusion" and obviously the claimant "could not be at MMI if that surgery was performed under the auspices of this claim" the day following the surgery. The only other certification of MMI is from Dr. F and he certified that the claimant reached clinical MMI on February 17, 2010, noting the claimant was "approximately seven months out from a fusion . . . ."

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).

We hold that Dr. P's certification of MMI on July 25, 2009 (the day after spinal surgery) is contrary to the preponderance of the other medical evidence. We hold that the hearing officer's determination that the claimant reached MMI as certified by Dr. P as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the claimant reached MMI as certified by Dr. P on July 25, 2009, and render a new decision that the claimant reached MMI on February 17, 2010, as certified by Dr. F.

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.

In assessing the 20% IR the designated doctor stated that since "spinal surgery of his lumbosacral spine was performed, [the claimant] would qualify for [Diagnosis-Related Estimates (DRE) Lumbosacral Category] II: [Minor Impairment], [DRE] III [Lumbosacral Category III: Radiculopathy], or [DRE] IV [Lumbosacral Category IV: Loss of Motion Segment Integrity] . . . ." Dr. P, in a response to a letter of clarification, dated April 19, 2010, states that he "was unable to specifically place [the claimant] into one of the prescribed DRE categories from Table 70, page 108, [of the AMA Guides] being categories II, III, or IV." Dr. P states that DRE Lumbosacral Category II: Minor Impairment would not be appropriate for the claimant because "several surgical procedures were performed . . . ."

Dr. P also states that the claimant's "findings were suggestive of some adverse neurological involvement, but not specific to the [deep tendon reflexes (DTR)] and circumferential measurements listed in DRE [C]ategory III." Dr. P further comments that the claimant "does not meet the DTR and circumferential measurement criteria for [Lumbosacral] DRE [C]ategory III, but there are other clinical and objective findings in this case that could support radiculopathy, which are present." Dr. P does not indicate what those "other clinical and objective findings" are.

Dr. P also stated in the April 19, 2010, response, that the claimant "did not have a loss of motion segment integrity or bilateral multilevel radiculopathy as described in DRE [C]ategory IV." Dr. P does not give any medical rationale why he would potentially consider the claimant eligible for DRE Lumbosacral Category IV: Loss of Motion Segment Integrity, other than it has an impairment of 20% which most closely matches the impairment based on Dr. P's range of motion (ROM) measurements (which we note are also inaccurate and should actually be higher than the 22% WP impairment Dr. P found).

The Appeals Panel has held that the use of the ROM Model could be used as a differentiator or if none of the eight categories of the DRE Model on page 3/108 of the AMA Guides are applicable. *See* Appeals Panel Decision (APD) 022509-s, decided November 21, 2002; APD 030288-s, decided March 18, 2003; and APD 090332, decided April 23, 2009. In this case, Dr. P does not explain why the claimant does not meet the criteria of DRE Lumbosacral Category II: Minor Impairment other than to say the claimant has had several surgical procedures; nor does Dr. P give a justification for the use of the ROM Model either as a differentiator or as a substitute for the DRE Model. APD 022509-s, decided November 21, 2002. The AMA Guides do not preclude the use of DRE Lumbosacral Category II: Minor Impairment based on one or more spinal surgeries. Dr F, and even Dr. P, state that none of the criteria for DRE Lumbosacral Category III: Radiculopathy and DRE Lumbosacral Category IV: Loss of Motion Segment Integrity are present in this case.

We hold that Dr. P's assigned IR of 20% is contrary to the preponderance of the medical evidence and therefore cannot be adopted. We further note that we have rendered a new decision that the claimant reached MMI on February 17, 2010, and therefore Dr. P's MMI certification of July 25, 2009, would preclude the adoption of the 20% IR. *See* Rule 130.1(c)(3).

The only other doctor to assign an IR was Dr. F, the carrier's RME doctor. Dr. F certified MMI on February 17, 2010, an MMI date which we have adopted, and assessed a 5% IR, based on DRE Lumbosacral Category II: Minor Impairment consistent with the AMA Guides. Dr. F found no criteria for placing the claimant in DRE III or DRE IV. Dr. F's assigned 5% IR is in accordance with the AMA Guides.

We reverse the hearing officer's determination that the claimant's IR is 20% and render a new decision that the claimant's IR is 5%.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on July 25, 2009, with a 20% IR.

We render a new decision that the claimant reached MMI on February 17, 2010, with a 5% IR.

The true corporate name of the insurance carrier is **VALLEY FORGE 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.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge