

APPEAL NO. 180872
FILED JUNE 5, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 5, 2018, with the record closing on March 6, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), does not extend to a right shoulder acromioclavicular joint sprain; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on August 26, 2016; (3) the claimant's impairment rating (IR) is 19%; (4) the claimant is entitled to supplemental income benefits (SIBs) for the first quarter, from September 30 through December 29, 2017; and (5) the first certification of MMI and assigned IR from (Dr. M) on October 10, 2016, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). We note that the stipulations contained in Finding of Fact No. 1 are listed as A through E and G through J.

The claimant appealed, disputing the ALJ's determination that the compensable injury does not extend to a right shoulder acromioclavicular joint sprain. The respondent/cross-appellant (carrier) responded, urging affirmance of the ALJ's extent-of-injury determination. The carrier cross-appealed, disputing the ALJ's MMI, IR, and SIBs determinations. The claimant responded, urging affirmance of those determinations.

The ALJ's determination that the first certification of MMI and assigned IR from Dr. M on October 10, 2016, did not become final under Section 408.123 and Rule 130.12 was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of a right shoulder rotator cuff tear. The claimant testified that he was injured while attempting to prevent a heavy bundle of wood from falling off a cart.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error,

unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to a right shoulder acromioclavicular joint sprain 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 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.

The ALJ found that the preponderance of the other medical evidence is not contrary to the MMI/IR certification by Dr. M, the designated doctor, and therefore determined that the claimant reached MMI on August 26, 2016, with a 19% IR. Dr. M initially examined the claimant on June 11, 2016, and certified on July 1, 2016, that the claimant had not reached MMI but was expected to do so on or about November 11, 2016. Dr. M's attached narrative report reflects that he considered the right shoulder acromioclavicular joint sprain in his MMI/IR certification.

Dr. M next examined the claimant on October 1, 2016, and certified on October 10, 2016, that the claimant reached MMI on August 26, 2016, with a 19% 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) (AMA Guides). Dr. M assessed 24% upper extremity impairment for loss of range of motion of the claimant's right shoulder, and 10% upper

extremity impairment per Table 27 on page 3/61 of the AMA Guides for a distal clavicle resection that was performed for the compensable injury, for a combined whole person IR of 19%. We note that Dr. M stated in his narrative report that there “is also notation of a right shoulder arthroscopy with rotator cuff repair performed on [March 3, 2016]; this operative report was not [received].” Dr. M’s attached narrative report reflects that he considered the right shoulder acromioclavicular joint sprain in his MMI/IR certification. As noted above, we have affirmed the ALJ’s determination that the compensable injury does not extend to a right shoulder acromioclavicular joint sprain as being supported by the evidence. Dr. M’s MMI/IR certification considers and rates a condition that has been determined to not be part of the compensable injury, and as such it cannot be adopted. Accordingly, we reverse the ALJ’s determinations that the claimant reached MMI on August 26, 2016, with a 19% IR.

There are other MMI/IR certifications in evidence, which are from (Dr. W), the post-designated doctor required medical examination doctor. Dr. W examined the claimant on February 17, 2017, and certified on February 27, 2017, that the claimant reached MMI on July 29, 2016, with a 7% IR. Dr. W’s narrative report makes clear that this MMI/IR certification is based on a right rotator cuff tear and a right shoulder acromioclavicular joint sprain; because this MMI/IR certification considers and rates a noncompensable injury it cannot be adopted. On May 25, 2017, Dr. W amended the MMI/IR certification that was based on a right rotator cuff tear and a right shoulder acromioclavicular joint sprain, to certify that the claimant reached MMI on July 29, 2016, with an 11% IR. We note that the amended Report of Medical Evaluation (DWC-69) incorrectly states Dr. W examined the claimant on February 27, 2017. Because the amended MMI/IR certification considers and rates a noncompensable injury it cannot be adopted.

Dr. W also certified on February 27, 2017, that the claimant reached MMI on July 29, 2016, with a 7% IR, and made clear in her narrative report that this MMI/IR certification is based solely on a right shoulder rotator cuff tear, which is the compensable injury in this case. Dr. W noted in her narrative report that the claimant underwent right shoulder surgery on September 22, 2015, to repair a torn rotator cuff, which included a distal clavicle resection, and another right shoulder surgery on March 3, 2016, to again repair a rotator cuff tear. Dr. W also noted that there was a follow-up appointment with (Dr. S) on July 29, 2016, and that the claimant still had some therapy visits left but was “apparently not making progress.” Dr. W opined July 29, 2016, was the earliest date after which no further material recovery could be anticipated.

In evidence is the office note from Dr. S dated July 29, 2016. On that date Dr. S noted the claimant had increased pain and recurrent full thickness tear of the rotator cuff tendon, and opined that the claimant would benefit from right shoulder arthroscopy with

debridement, rotator cuff repair, postoperative immobilization and therapy for 6 weeks. Also in evidence is an office note from Dr. S dated October 7, 2016, in which Dr. S opined the claimant would benefit from right shoulder percutaneous neurostimulation. In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI was not whether the claimant actually recovered or improved during the period at issue, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held that it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition if improvement could reasonably be anticipated. See also APD 110670, decided July 8, 2011; APD 120071, decided March 9, 2012. Dr. W's July 29, 2016, date of MMI is not supported by the evidence.

As there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SIBs

Because we have reversed the ALJ's MMI and IR determinations and have remanded those issues to the ALJ, we also reverse the ALJ's determination that the claimant is entitled to SIBs for the first quarter, from September 30 through December 29, 2017, and we remand this issue to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a right shoulder acromioclavicular joint sprain.

We reverse the ALJ's determination that the claimant reached MMI on August 26, 2016, and we remand the issue of the claimant's date of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 19%, and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant is entitled to SIBs for the first quarter, from September 30 through December 29, 2017, and we remand this issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand the ALJ is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the compensable injury.

Section 401.011(30) provides MMI means 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; or (C) the date determined as provided by Section 408.104. The ALJ is to either take a stipulation from the parties or make a finding as to the date of statutory MMI.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a right shoulder rotator cuff tear, and does not extend to a right shoulder acromioclavicular joint sprain. The ALJ is also to ensure all of the medical records, including the March 3, 2016, operative report, are sent to the designated doctor. The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The ALJ is also to inform the designated doctor of the date of statutory MMI, and that the date of MMI cannot be after the statutory date of MMI. The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on MMI, IR, and whether the claimant is entitled to SIBs for the first quarter, from September 30 through December 29, 2017.

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 ALJ, 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 **ACCIDENT FUND INSURANCE COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

A handwritten signature in black ink, appearing to read "Carisa Space-Beam", written over a horizontal line.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge