APPEAL NO. 182095
FILED NOVEMBER 6, 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 August 8, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to a non-displaced left ankle fracture; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 10, 2017; (3) the claimant's impairment rating (IR) is four percent; (4) the claimant had disability from July 19, 2017, through November 10, 2017, resulting from the compensable injury of (date of injury); and (5) the claimant did not have disability from November 11, 2017, through July 25, 2018, resulting from the compensable injury of (date of injury).

The claimant appealed the ALJ's extent of injury, MMI, and IR determinations. The respondent (carrier) responded, urging affirmance of the ALJ's determinations. The ALJ's disability determinations have not been appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the carrier accepted a left ankle sprain/strain as the compensable injury; (Dr. O) was the first designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI, IR, and return to work; and (Dr. L) was the second designated doctor appointed by the Division to address extent of injury. The claimant sustained an injury to his left ankle when he was pinned between two pallets at work.

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 non-displaced left ankle fracture 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 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. 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.

Dr. O, the designated doctor, examined the claimant on November 3, 2017, and certified on November 10, 2017, that the claimant reached MMI on November 10, 2017, with a four percent IR for the compensable injury 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. O states that the date of November 10, 2017, was chosen because it is the most recent date of available medical evaluation and documentation of the claimant's physical findings that support the assertion that he is at MMI.

On April 4, 2018, a benefit review officer sent a letter of clarification (LOC) to Dr. O informing him that his certification contains a prospective date of MMI. We note that the Appeals Panel has stated that "[t]he key consideration is that the date of MMI was not after the date of certification, that is, signature of the certifying doctor, on the [Report of Medical Evaluation (DWC-69)]." *See* Appeals Panel Decision (APD) 100636-s, decided July 16, 2010; APD 160636, decided May 31, 2016.

On April 6, 2018, Dr. O responded that his intention was to note the date of his examination, November 3, 2017, as the MMI date with a four percent IR. Dr. O issued an amended certification of MMI and IR. Dr. O certified on April 6, 2018, that the

claimant reached MMI on November 3, 2017, with a four percent IR, based on his examination on November 3, 2017.

The ALJ states in the discussion of the decision that "[Dr. O] stated that he chose the date of his examination because it was the most recent date of a medical evaluation and documentation of [the] [c]laimant's physical exam findings that support a finding of [MMI]." We note that the ALJ mistakenly states in the discussion that Dr. O examined the claimant on November 10, 2017; however, the evidence reflects that Dr. O examined the claimant on November 3, 2017. The ALJ found that the preponderance of the other medical evidence is not contrary to Dr. O's certification of MMI and IR; however, the ALJ determined that the claimant reached MMI on November 10, 2017. Given that Dr. O amended his certification of MMI and IR to correctly reflect that the claimant reached MMI on November 3, 2017, as explained in his response to an LOC, and the evidence established that Dr. O examined the claimant on November 3, 2017, we reverse the ALJ's determination that the claimant reached MMI on November 10, 2017. Accordingly, we render a new decision that the claimant reached MMI on November 3, 2017.

Dr. O assessed a four percent IR for the compensable left ankle sprain/strain. The ALJ determined that the claimant's IR is four percent and that determination is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a non-displaced left ankle fracture.

We affirm the ALJ's determination that the claimant's IR is four percent.

We reverse the ALJ's determination that the claimant reached MMI on November 10, 2017, and we render a new decision that the claimant reached MMI on November 3, 2017.

The true corporate name of the insurance carrier is **NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge