

APPEAL NO. 200483
FILED MAY 18, 2020

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 January 29, 2020, with the record closing February 13, 2020, 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 appellant's (claimant) average weekly wage (AWW) is \$575.95; (2) benefits began to accrue on May 17, 2016; (3) the claimant had disability from February 8, 2016, through July 20, 2017, but did not have disability from July 21 through December 4, 2017, or from December 5, 2017, through February 20, 2018; (4) the claimant was not a seasonal employee; and (5) the claimant's injury protection payments under his Collective Bargaining Agreement for the 2016-2017 NFL season do not constitute post-injury earnings.

The claimant appealed the ALJ's determinations on AWW, benefits accrual date, and the periods of disability that were not favorable to him. The respondent (carrier) responded, urging affirmance. The ALJ's determinations that the claimant was not a seasonal employee and that the claimant's injury protection payments under his Collective Bargaining Agreement for the 2016-2017 NFL season do not constitute post-injury earnings were resolved by stipulation of the parties at the CCH, were not appealed, and have become final pursuant to Section 410.169.

DECISION

Affirmed in part, reversed by striking in part, and reversed and rendered in part.

The parties stipulated, in part, that on (date of injury), the claimant was the employee of (employee), and that the claimant sustained a compensable injury on that date. The claimant testified he injured his left knee during training camp.

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).

AWW

The ALJ's determination that the claimant's AWW is \$575.95 is supported by sufficient evidence and is affirmed.

DISABILITY

It was undisputed that prior CCHs in this case with a different ALJ were held on December 4, 2017, and January 30, 2018, with the record closing on February 13, 2018, over the issue of disability, among other issues. The ALJ issued a decision signed on February 20, 2018, in which she determined, in pertinent part, that the claimant did not have disability from (date of injury), through the date of the CCH. The claimant timely appealed the ALJ's decision to the Appeals Panel. A written decision by the Appeals Panel on the claimant's appeal was not issued by the 45th day after the response was due or filed with the Texas Department of Insurance, Division of Workers' Compensation (Division); therefore, the ALJ's decision that the claimant did not have disability from (date of injury), through the date of the CCH became final and is the final decision of the Appeals Panel pursuant to Section 410.204(c) and 28 TEX. ADMIN. CODE § 143.5(b) (Rule 143.5(b)).

The Appeals Panel decision was then appealed to district court. In evidence is a district court final judgment filed December 5, 2019, in which it was ordered, adjudged, and decreed by the court, in pertinent part, that the claimant had disability from February 8, 2016, through July 20, 2017. The record reflects the carrier has appealed the district court judgment.

Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal under Subchapter F or G (relating to Judicial Review). In *Lopez v. Texas Workers' Comp. Ins. Fund*, 11 S.W.3d 490 (Tex. App.—Austin 2000, pet. denied), the court held that Section 410.205(b) clearly provides that the ultimate administrative ruling, whether granting or denying benefits, remains in effect until overturned by a final and enforceable judicial decision. The claimant in *Lopez* argued that the decision of the Appeals Panel denying benefits remains in effect only until the district court renders a decision, but that the trial court's decision awarding benefits then becomes effective without regard to further appellate review. The court disagreed, noting that the text of the Labor Code did not support the claimant's interpretation. The court noted that the claimant would have the district court's decision enforced even though it is not yet final and still on appeal, and that "[n]owhere does the statute expressly provide for such an outcome." The court in *Lopez* stated "[w]e believe the statute as written reflects the State's policy that benefits should be payable or not in accordance with the [A]ppeals [P]anel's decision until a final judicial decision rules otherwise."

The Appeals Panel's prior decision that the claimant did not have disability from (date of injury), through the date of the CCH is binding until there is a final, non-appealable judgment in this case. See Appeals Panel Decision 142336, decided December 5, 2014.

In the case on appeal the carrier contended at the CCH that the Appeals Panel's decision that the claimant did not have disability from (date of injury), through the date of the prior CCH is binding on the ALJ. The carrier is correct. Pursuant to Section 410.205(b), the decision that the claimant did not have disability from (date of injury), through the date of the CCH is binding, and the Division does not have jurisdiction to reconsider the issue of disability from (date of injury), through February 13, 2018, the date the record closed in the prior CCH. Given that the Division does not have jurisdiction to make a new determination on disability from (date of injury), through February 13, 2018, the ALJ erred in making some of his disability determinations.

The ALJ found that pursuant to the judgment in this case, the claimant had disability from February 8, 2016, through July 20, 2017, and therefore determined that the claimant had disability for that period. Because the Division does not have jurisdiction to reconsider this period of disability, we reverse the ALJ's decision by striking the determination that the claimant had disability from February 8, 2016, through July 20, 2017.

The ALJ also determined that the claimant did not have disability from July 21 through December 4, 2017. Because the Division does not have jurisdiction to reconsider this period of disability, we reverse the ALJ's decision by striking the determination that the claimant did not have disability from July 21 through December 4, 2017.

The ALJ also determined that the claimant did not have disability from December 5, 2017, through February 20, 2018. The Division does not have jurisdiction to reconsider disability from (date of injury), through February 13, 2018. We therefore reverse the ALJ's decision by striking that portion of the determination that the claimant did not have disability from December 5, 2017, through February 13, 2018.

Section 410.207 provides that during judicial review of an Appeals Panel decision on any disputed issue relating to a workers' compensation claim, the Division retains jurisdiction of all other issues related to the claim. The issue of disability from February 14 through February 20, 2018, has not been litigated or determined by the Division prior to this CCH. Therefore, the Division does have jurisdiction to determine disability for that period. That portion of the ALJ's determination that the claimant did not have disability from February 14 through February 20, 2018, is supported by sufficient evidence and is affirmed.

ACCRUAL DATE

The ALJ found that the claimant's first day of disability was May 9, 2016, which was the day after his termination, and that the eighth day of disability was May 17, 2016. The ALJ therefore determined that benefits began to accrue on May 17, 2016. We note the evidence reflects the claimant was terminated on May 9, 2016, not May 8, 2016, as indicated by the ALJ in his finding of fact.

Section 408.082(a) provides that income benefits may not be paid for an injury that does not result in disability for at least one week. Rule 124.7(a) provides in part that "accrual date" means the day an injured worker's income benefits begin to accrue, and that "day of disability" means a day when the worker is unable to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Rule 124.7(b) provides that an injured worker's accrual date is the worker's eighth day of disability.

The Appeals Panel's decision that the claimant did not have disability from (date of injury), through February 13, 2018, is binding pursuant to Section 410.205(b), and we have affirmed that portion of the ALJ's determination that the claimant did not have disability from February 14 through February 20, 2018. The claimant has not sustained disability for at least one week. Pursuant to Section 408.082(a), the claimant is not entitled to be paid temporary income benefits (TIBs) for the compensable injury; therefore, there is no accrual date for TIBs in this case. Accordingly, we reverse the ALJ's determination that benefits began to accrue on May 17, 2016, and we render a new decision that there is no accrual date for TIBs in this case.¹

SUMMARY

We affirm the ALJ's determination that the claimant's AWW is \$575.95.

We reverse the ALJ's decision by striking the determination that the claimant had disability from February 8, 2016, through July 20, 2017.

We reverse the ALJ's decision by striking the determination that the claimant did not have disability from July 21 through December 4, 2017.

We reverse the ALJ's decision by striking that portion of the determination that the claimant did not have disability from December 5, 2017, through February 13, 2018.

¹ Our holding in this case is specific to TIBs. The claimant's entitlement, if any, to impairment income benefits and supplemental income benefits is not addressed in this decision.

We affirm that portion of the ALJ's determination that the claimant did not have disability from February 14 through February 20, 2018.

We reverse the ALJ's determination that benefits began to accrue on May 17, 2016, and we render a new decision that there is no accrual date for TIBs in this case.

The true corporate name of the insurance carrier is **GREAT DIVIDE INSURANCE COMPANY** 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge