APPEAL NO. 200637
FILED JUNE 1, 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 was held on March 11, 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 compensable injury of (date of injury), does not extend to C4-5 stenosis or a right medial meniscus tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on March 4, 2019; and (3) the claimant's impairment rating (IR) is 5%.

The claimant appealed the ALJ's extent of injury, MMI, and IR determinations. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

DECISION

Affirmed in part, and reversed and remanded in part.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury in the form of a left bicep tendon disruption with a mild strain and a right thigh bruise and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. B) as the designated doctor to address the issues of extent of injury, MMI, and IR. The claimant was injured while he was lowering himself off the bumper of a truck and his right foot slipped. He was holding onto a rail and swung down injuring his left shoulder and right thigh. The evidence reflects that the claimant had surgery to his left shoulder on December 12, 2018.

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).

NEWLY DISCOVERED EVIDENCE

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; *Black v. Wills*, 758 S.W.2d 809

(Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* APD 051405, decided August 9, 2005. The claimant submits for the first time on appeal an affidavit dated February 3, 2020, signed by the employer's assistant manager, the claimant's answers to the carrier's interrogatories, a timeline of the claimant's medical treatment, a report from (Dr. A) dated January 29, 2020, a report from (Dr. Br) dated January 29, 2020, a report from (Dr. Mu) dated March 5, 2020, and a report from (Medical Center Rehabilitation Spine Center) dated April 1, 2019 . Also submitted were an Employee's Claim for Compensation for a Work-Related Injury or Occupational Disease (DWC-41) and an updated DWC-41 dated (date of injury), and November 5, 2018, respectively, an email from the carrier's adjuster dated October 1, 2018, with a handwritten notation, a Commissioner Order Relating to a Second Benefit Review Conference dated November 19, 2019, two letters from the claimant to the employer dated March 15, 2019, and April 25, 2019, and a termination form dated September 16, 2018, from the employer. We do not agree that the documents submitted by the claimant for the first time on appeal meet the requirements for newly discovered evidence. Therefore, the documents attached to the claimant's appeal were not considered by the Appeals Panel.

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to C4-5 stenosis or a right medial meniscus tear 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, in part, 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. B examined the claimant on August 28, 2019, and December 13, 2019, and certified that the claimant reached MMI on March 4, 2019, with a 4% IR for the compensable injury. We note that Dr. B mistakenly noted the IR on the December 13, 2019, Report of Medical Evaluation (DWC-69), to be 6% rather than 4% as indicated in his narrative report. Dr. B stated in his narrative reports, that the claimant reached MMI on March 4, 2019, because it was the date of the claimant's last physical therapy visit and there had not been any significant objective changes to the claimant's symptoms since that date. Dr. B further stated that his examination findings were similar to the objective findings on the date of MMI. Dr. B assigned a 0% impairment for the right knee based on range of motion (ROM) measurements taken on the dates of examination. Additionally, he assigned 4% impairment based on the claimant's ROM measurements of his left shoulder that were also taken on the dates of examination.

(Dr. M), a doctor selected by the treating doctor to act in his place, also rated the compensable injury. Dr. M examined the claimant on September 16, 2019, and certified that the claimant reached MMI on March 4, 2019, with a 5% IR. In a narrative report of the same date, Dr. M explained that he awarded the claimant a 2% whole person impairment due to atrophy in the right thigh under Table 37 on page 3/77 of 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). In addition, Dr. M awarded the claimant 3% whole person impairment based on ROM measurements of the left shoulder. He stated that any ROM-based IR calculated from the non-injured side would be subtracted from that calculated on the injured side. Using the ROM measurements from his exam, Dr. M found that the claimant's non-injured, or right shoulder, resulted in a 6% upper extremity impairment and the claimant's injured, or left shoulder, resulted in an 11% upper extremity impairment. He then subtracted the 6% impairment from the 11% impairment for a 5% upper extremity impairment for the left shoulder, which converts to a 3% whole person impairment. Combining the 2% impairment for the thigh atrophy and the 3% impairment for the left shoulder resulted in the 5% IR.

In the Discussion section of the Decision and Order, the ALJ stated that, "[Dr. M] assigned [the] [c]laimant a 5% IR due to a reduced left arm [ROM] based on measurements taken on March 4, 2019." As noted above, Dr. M's IR assignment was calculated by combining 2% impairment for thigh atrophy and a 3% impairment for left

shoulder ROM deficits. She additionally stated that, "Dr. [B's] certification is unadoptable because he does not use measurements taken on [the] March 4, 2019, MMI date to assign [the] [c]laimant's IR. Dr. [B] used measurements take[n] at the September 18, 2019 [designated doctor] examination to assign IR." However, as explained above, a review of the records reflects that both Dr. M and Dr. B used measurements taken from their exam dates. Additionally, Dr. B examined the claimant on August 28, 2019, and December 13, 2019, and not on September 18, 2019, as indicated by the ALJ. The ALJ's statements that Dr. M's IR was based on measurements taken on the date of MMI and that the 5% IR is solely based on left arm ROM deficits are misstatements of the evidence that the ALJ based her decision on. While the ALJ can accept or reject in whole or, in part, the evidence regarding the compensable injury, her decision in this case is based, in part, upon a misstatement of the medical evidence in the record.

Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on March 4, 2019, and the claimant's IR is 5%, and we remand the issues of MMI and IR 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 C4-5 stenosis or a right medial meniscus tear.

We reverse the ALJ's determination that the claimant reached MMI on March 4, 2019, and we remand the MMI issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 5%, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to correct her misstatement of the medical evidence in the record. The ALJ shall consider all the evidence and make a determination on the issues of MMI and IR.

Dr. B is the designated doctor in this case. If necessary, on remand the ALJ is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B is no longer qualified or available to serve as the designated doctor and it is necessary for the ALJ to obtain a new MMI/IR certification, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury. The designated doctor is to be informed that the compensable injury of (date of injury), is a left bicep tendon disruption with a mild strain and a right

thigh bruise. The parties are to be provided with the designated doctor's new certification of MMI and IR and are to be allowed an opportunity to respond. The ALJ is then to make a determination on MMI and IR consistent with this decision.

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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **SERVICE LLOYDS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JOSEPH KELLEY-GRAY, CEO
6907 NORTH CAPITAL OF TEXAS HIGHWAY
AUSTIN, TEXAS 78731.

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge