APPEAL NO. 200691
FILED JULY 6, 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 2, 2020, with the record closing on April 1, 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 does not extend to a lumbar herniated disc at L2-3, L4-5, and L5-S1; lumbar disc displacement; lumbar radiculopathy; sciatica; fractured coccyx; bilateral hip injury; left knee injury; right shoulder partial thickness tear of anterior supraspinatus articular fibers; or subscapularis tendinosis without discrete tear; (2) the respondent (claimant) reached maximum medical improvement (MMI) on March 1, 2017; and (3) the claimant's impairment rating (IR) is 10%.

The appellant (carrier) appeals the ALJ's determinations of the MMI date and IR. The appeal file does not contain a response from the claimant. The ALJ's determination that the compensable injury does not extend to a lumbar herniated disc at L2-3, L4-5, and L5-S1; lumbar disc displacement; lumbar radiculopathy; sciatica; fractured coccyx; bilateral hip injury; left knee injury; right shoulder partial thickness tear of anterior supraspinatus articular fibers; or subscapularis tendinosis without discrete tear 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), and the compensable injury includes a lumbar sprain and an L3-4 disc herniation. The claimant testified that she was injured when she sat down in her chair and it was lower than expected. Medical records in evidence reflect that on October 6, 2016, the claimant had surgery for the L3-4 level of her lumbar spine.

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).

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.

The Division appointed (Dr. B) as designated doctor for the purposes of MMI and IR. Dr. B initially examined the claimant on June 10, 2016, and opined that the claimant had not yet reached MMI. Dr. B noted that a CT of the lumbar spine he ordered reflected that the claimant had a herniation at the L3-4 level and the claimant needed different treatment than she had received for a lumbar sprain. Dr. B examined the claimant again on October 5, 2016, and opined that the claimant had still not reached MMI, noting the claimant was scheduled for lumbar surgery for the L3-4 herniation on October 6, 2016.

Dr. B also examined the claimant on May 10, 2017, and certified that the claimant reached MMI on March 1, 2017, the date of her last physical therapy session after surgery. The ALJ's determination that the claimant reached MMI on March 1, 2017, is supported by sufficient evidence and is affirmed.

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.

The ALJ determined that the 10% IR certified by Dr. B was not contrary to the preponderance of the other medical evidence. Based on his examination on May 10, 2017, Dr. B certified that the claimant reached MMI on March 1, 2017, and certified that the claimant's IR is 10%, 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. B

placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy. In his narrative report, Dr. B noted that he placed the claimant in Category III for "radiculopathy validated by a measured unilateral atrophy equal to or greater than 2 mm (sic) above or below the knee and loss of relative (sic) reflexes." The AMA Guides provide that to be placed in DRE Lumbosacral Category III: Radiculopathy the patient has significant signs of radiculopathy, such as loss of *relevant* reflex(es), or measured unilateral atrophy of greater than 2 *cm* above or below the knee, compared to measurements on the contralateral side at the same location (emphasis added). The Appeals Panel has held that, to receive a rating for radiculopathy under DRE Lumbosacral Category III: Radiculopathy, the claimant must have significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location. See Appeals Panel Decision (APD) 072220-s, decided February 5, 2008. Dr. B's narrative report states that the claimant's thigh measurements at 10 cm above the "patellar pole" measured 58 cm on the left and 60.5 cm on the right.

However, as noted above the ALJ's determination that the compensable injury does not extend to lumbar radiculopathy was not appealed and has become final. Under the facts of this case, the IR includes a condition that has specifically been determined to not be part of the compensable injury. Accordingly, we reverse the ALJ's determination that the claimant's IR is 10%. *See* APD 132028, decided October 14, 2013.

There are four other certifications in evidence. Two of the certifications of MMI and IR are from (Dr. M), a carrier-selected required medical examination doctor. Dr. M examined the claimant on August 30, 2016, and certified that the claimant reached MMI on April 29, 2016, and certified the claimant had an IR of 5%. Dr. M provided two Reports of Medical Evaluation (DWC-69). One of the DWC-69s considered and rated only a lumbar sprain. This certification cannot be adopted because it did not consider and rate an L3-4 disc herniation, which the parties stipulated is part of the compensable injury. The alternate rating provided by Dr. M also noted that the claimant reached MMI on April 29, 2016, with an IR of 5%. Dr. M's narrative only addressed a lumbar sprain and specifically stated that the MMI date of April 29, 2016, was for a lumbar sprain. Dr. M did not consider and rate the L3-4 disc herniation and his certification cannot be adopted. Further, as noted above the MMI date of March 1, 2017, determined by the ALJ has been affirmed.

(Dr. W), a referral doctor acting in place of the treating doctor, examined the claimant on August 20, 2019, and certified that the claimant reached MMI on March 1, 2017, with a 10% IR. Dr. W provided alternate certifications. However, in both

certifications Dr. W placed the claimant in DRE Lumbosacral Category III: Radiculopathy. As previously noted, the ALJ determined that lumbar radiculopathy was not part of the compensable injury and that determination has become final. Accordingly, the certifications from Dr. W cannot be adopted.

There are no other certifications in evidence. Accordingly, we reverse the ALJ's determination that the claimant's IR is 10% and remand the IR issue to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the claimant reached MMI on March 1, 2017.

We reverse the ALJ's determination that the claimant's IR is 10% and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. 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, then another designated doctor is to be appointed to opine on the issue of IR for the (date of injury), compensable injury.

On remand the ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a lumbar sprain and an L3-4 disc herniation but does not include a lumbar herniated disc at L2-3, L4-5, and L5-S1; lumbar disc displacement; lumbar radiculopathy; sciatica; fractured coccyx; bilateral hip injury; left knee injury; right shoulder partial thickness tear of anterior supraspinatus articular fibers; or subscapularis tendinosis without discrete tear. The ALJ is then to request that the designated doctor assign an IR for the compensable injury based on the injured employee's condition as of the MMI date of March 1, 2017, considering the medical record and the certifying examination.

The parties are to be provided with the ALJ's letter to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. If another designated doctor is appointed, the parties are to be provided with the Presiding Officer's Directive to Order Designated Doctor Examination, the designated doctor's report, and are to be allowed an opportunity to respond. The ALJ is to make determinations which are supported by the evidence on the IR issue 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* APD 060721, decided June 12, 2006.

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

RICHARD J. GERGASKO, PRESIDENT
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge