

APPEAL NO. 210284
FILED APRIL 30, 2021

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 11, 2021, with the record closing on January 15, 2021, 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 respondent (claimant) had good cause for failing to submit to the designated doctor's referral examination of June 18, 2020, and the claimant is entitled to temporary income benefits (TIBs) from July 16, 2020, through the date of the CCH; and (2) the claimant had disability beginning July 16, 2020, and continuing through the date of the CCH resulting from an injury sustained on (date of injury). The appellant (self-insured) appealed the ALJ's determinations. The claimant responded, urging affirmance of the ALJ's determinations.

DECISION

Affirmed as clarified.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); that the Texas Department of Insurance, Division of Workers' Compensation (Division) selected (Dr. O) as the designated doctor to determine maximum medical improvement (MMI) and impairment rating (IR); and that the self-insured suspended payment of TIBs to the claimant effective July 16, 2020. The record established that the claimant, a former police officer for the City of (city), was injured on (date of injury), when she was physically assaulted by a suspect while responding to a robbery.

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).

DISABILITY

The ALJ's determination that the claimant had disability beginning July 16, 2020, and continuing through the date of the CCH resulting from an injury sustained on (date of injury), is supported by sufficient evidence and is affirmed.

GOOD CAUSE FOR FAILING TO SUBMIT TO DESIGNATED DOCTOR'S REFERRAL EXAMINATION

The issue as stated at the CCH and agreed to by the parties was whether the claimant had good cause for failing to submit to the designated doctor examination on June 18, 2020, and if so, is the claimant entitled to TIBs from July 16, 2020, to the present. However, the ALJ amended that issue to reflect the issue as actually litigated by the parties at the CCH. The issue as actually litigated and amended by the ALJ is whether the claimant had good cause for failing to submit to the designated doctor's referral examination of June 18, 2020, and if so, is claimant entitled to TIBs from July 16, 2020, to the present. It was undisputed by the parties that the June 18, 2020, examination was with a referral doctor referred by the designated doctor for him to address the issues of MMI and IR.

Dr. O, the designated doctor appointed by the Division to address MMI and IR, examined the claimant on March 4, 2020. Dr. O certified on June 24, 2020, that the claimant had not reached MMI but was expected to do so on or about August 4, 2020. In an attached narrative report Dr. O stated the following:

The following is a detailed list of all additional diagnostic testing conducted and reviewed as part of the evaluation including the type of testing, date testing performed, identity of any and all referral healthcare providers utilized to perform additional testing. An explanation of the purpose and necessity of these tests will be further explained in the determinations listed below.

I recommended the [claimant] undergo Psychological Testing/Evaluation which was scheduled on [March 18, 2020], however the [claimant] did not attend the appointment. This was rescheduled to [June 18, 2020], however the [claimant] again did not show for the evaluation.

On August 25, 2020, a letter of clarification was sent to Dr. O requesting him to explain how he was able to reach a determination on MMI and IR without the requested psychological testing/evaluation he had previously indicated was necessary to determine MMI and IR. Dr. O responded on December 1, 2020. Dr. O stated that multiple attempts had been made to contact the claimant by telephone to schedule the testing per her telephone number listed on the Request for Designated Doctor Examination (DWC-32) with no response. Dr. O further stated that since the psychological testing could not be scheduled, the determination that the claimant had not reached MMI was made as the claimant "was undergoing active treatment for her psychological issues at the time of my evaluation" and "[t]herefore, with reasonable anticipation of further improvement with no other objective information to consider, she

was placed [n]ot at MMI.” Based upon the claimant’s failure to attend the referral examinations on March 18, 2020, and June 18, 2020, the self-insured suspended the claimant’s TIBs.

The ALJ determined that the claimant had good cause for failing to submit to the designated doctor’s referral examination of June 18, 2020, and that the claimant is entitled to TIBs from July 16, 2020, through the date of the CCH. The ALJ noted in her discussion that the claimant did not receive notice of the two designated doctor referral examinations, and that this failure to receive notice would constitute good cause. The ALJ was persuaded by the evidence that the claimant had good cause for failing to attend the designated doctor referral examinations, and that portion of the ALJ’s determination that the claimant had good cause for failing to submit to the designated doctor’s referral examination of June 18, 2020, is supported by sufficient evidence.

However, the ALJ made statements in the discussion that require clarification. The ALJ referenced 28 TEX. ADMIN. CODE § 127.10 (Rule 127.10) and Rule 127.25 in her discussion, and stated that “[n]either Rule 127.10 nor Rule 127.25 impose a ‘good cause’ requirement for failing or refusing to attend a referral examination, or for suspension of [TIBs] for failure or refusing to attend a referral examination.” The ALJ further stated that, under the circumstances of this case, “there is no provision allowing for [the self-insured] to suspend [TIBs] based on [the] [c]laimant’s failure to attend a referral examination, and [the] [c]laimant was not required to demonstrate that she had good cause for failing to attend a referral examination.” We disagree.

Rule 127.25 provides the following:

(a) An insurance carrier may suspend [TIBs] if an injured employee, without good cause, fails to attend a designated doctor examination.

(b) In the absence of a finding by the [D]ivision to the contrary, an insurance carrier may presume that the injured employee did not have good cause to fail to attend the examination if by the day the examination was originally scheduled to occur the injured employee has both:

(1) failed to submit to the examination; and

(2) failed to contact the designated doctor's office to reschedule the examination.

(c) If the injured employee contacts the designated doctor within 21 days of the scheduled date of the missed examination to reschedule the examination, the designated doctor shall schedule the examination to

occur as soon as possible, but not later than the 21st day after the injured employee contacted the doctor.

(d) If the injured employee fails to contact the designated doctor within 21 days of the scheduled date of the missed examination but wishes to reschedule the examination, the injured employee must request a new examination under §127.1 of this title (relating to Requesting a Designated Doctor Examination).

(e) The insurance carrier shall reinstate TIBs effective as of the date the injured employee submitted to the rescheduled examination under subsection (c) of this section or the examination scheduled pursuant to the injured employee's request under subsection (d) of this section unless the report of the designated doctor indicates that the injured employee has reached MMI or is otherwise not eligible for income benefits. The re-initiation of TIBs shall occur no later than the seventh day following:

(1) the date the insurance carrier was notified that the injured employee submitted to the examination; or

(2) the date that the insurance carrier was notified that the [D]ivision found that the injured employee had good cause for not attending the examination.

(f) An injured employee is not entitled to TIBs for a period during which the insurance carrier suspended benefits pursuant to this section unless the injured employee later submits to the examination and the [D]ivision finds or the insurance carrier determines that the injured employee had good cause for failure to attend the examination.

(g) This section will become effective September 1, 2012.

Rule 127.10(c) provides in pertinent part the following:

The designated doctor shall perform additional testing when necessary to resolve the issue in question. The designated doctor shall also refer an injured employee to other health care providers when the referral is necessary to resolve the issue in question and the designated doctor is not qualified to fully resolve the issue in question.

If the injured employee fails or refuses to attend the designated doctor's requested additional testing or referral examination within 15 working days or within the additional time approved by the [D]ivision, the designated doctor shall complete the doctor's report based on the designated doctor's examination of the injured employee, the medical records received, and other information available to the doctor and indicate the injured employee's failure or refusal to attend the testing or referral examination in the report.

The preamble to Rule 127.10(c) discusses, in part, the Division's response to concerns regarding the necessity or reasonableness of designated doctor referrals for testing and notes that "referrals for additional testing are often absolutely necessary for and thus essentially part of the designated doctor's examination of an injured employee." See 35 Tex. Reg. 11325, December 17, 2010.

In Appeals Panel Decision 140790, decided June 6, 2014, the designated doctor appointed by the Division to determine the extent of the claimant's compensable injury stated in his report that the claimant needed an orthopedic evaluation and diagnostic studies because he was unable to determine the extent of the claimant's compensable injury based on his examination alone. However, the designated doctor was unaware that he was required to refer the claimant for testing as opposed to referring to an orthopedic doctor to test the claimant and the testing was not ordered. The Appeals Panel in that case noted that "[t]he plain language of Rule 127.10(c) provides that when additional testing is necessary to resolve the issue in question, the designated doctor shall perform additional testing or if he is not qualified to do so, refer the injured employee to other health care providers to conduct such testing." The Appeals Panel pointed out that the designated doctor clearly stated that the claimant needed an orthopedic evaluation and diagnostic studies to determine the extent of the claimant's compensable injury, and that this established a necessity to refer the claimant for additional testing pursuant to Rule 127.10(c).

In the case on appeal, Dr. O stated in his June 24, 2020, report that he recommended the claimant to undergo psychological testing/evaluation as additional testing necessary to determine MMI and IR. Because the referral appointment was necessary for Dr. O to determine the Division-appointed issues of MMI and IR, the referral appointment, by extension, is a part of his examination to determine MMI and IR. Therefore, the claimant's failure to attend Dr. O's referral appointment, if she did not have good cause for that failure, could be subject to the self-insured suspending TIBs under Rule 127.25. However, as previously noted the ALJ was persuaded by the evidence that the claimant did not receive notice of the referral appointments, which she stated in her discussion would constitute good cause. That portion of the ALJ's

determination that the claimant had good cause for failing to submit to the designated doctor's referral examination of June 18, 2020, is supported by sufficient evidence. Therefore, we affirm the ALJ's determination that the claimant had good cause for failing to submit to the designated doctor's referral examination of June 18, 2020, and the claimant is entitled to TIBs from July 16, 2020, through the date of the CCH.

SUMMARY

We affirm the ALJ's determination that the claimant had disability beginning July 16, 2020, and continuing through the date of the CCH resulting from an injury sustained on (date of injury),

We affirm as clarified the ALJ's determination that the claimant had good cause for failing to submit to the designated doctor's referral examination of June 18, 2020, and the claimant is entitled to TIBs from July 16, 2020, through the date of the CCH.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**NAME
ADDRESS
CITY, TEXAS ZIP CODE.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge