

APPEAL NO. 210843
FILED JULY 28, 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 was held on May 5, 2021, with the record closing on May 11, 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 compensable injury sustained on (date of injury), does not extend to depression, anxiety, mental anguish, stress, somatic symptom disorder, intervertebral disc disorder of the lumbar region, lumbar strain, or lumbar radiculopathy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 24, 2018; (3) the claimant's impairment rating (IR) is 5%; and (4) the claimant did not have disability from June 1, 2019, to January 22, 2020. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, IR, and disability. The respondent (self-insured) responded, urging affirmance of the disputed determinations.

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); the compensable injury extends to a lumbar sprain; and (Dr. C) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor to address MMI and IR. The claimant testified that she was injured when carrying out bags of trash.

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 depression, anxiety, mental anguish, stress, somatic symptom disorder, intervertebral disc disorder of the lumbar region, lumbar strain, or lumbar radiculopathy is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant did not have disability from June 1, 2019, to January 22, 2020, resulting from the compensable injury of (date of injury), is supported by sufficient evidence and is affirmed.

MMI/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.

The ALJ found that the preponderance of the other medical evidence is contrary to the certification of MMI and assigned IR from Dr. C, the designated doctor. The ALJ adopted the certification of MMI and assigned IR from (Dr. D), a carrier-selected required medical examination doctor. Dr. D examined the claimant on February 5, 2021. Dr. D provided two alternate certifications. In the first certification, Dr. D certified that the claimant reached MMI on July 24, 2018, with a 5% IR 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. D placed the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category II: Minor Impairment. In his narrative report, Dr. D specifically states that he is assessing impairment for a lumbar strain. As previously noted, the ALJ determined that the claimant's compensable injury does not extend to a lumbar strain. That determination has been affirmed. Dr. D specifically rated a condition the ALJ determined was not part of the compensable injury of (date of injury). Accordingly, we reverse the ALJ's determination that the claimant reached MMI on July 24, 2018, and that the claimant's IR is 5%.

Dr. D provided an alternate certification in which he certified that the claimant reached MMI on January 15, 2020, and assessed an IR of 5%. The alternate certification considered and rated a lumbar strain, lumbar radiculopathy, and an L3-4 and L4-5 laminectomy and discectomy. The parties stipulated that the compensable injury of (date of injury), includes a lumbar sprain. The ALJ's determination that the compensable injury of (date of injury), does not extend to a lumbar strain or lumbar radiculopathy has been affirmed. Dr. D's alternate certification does not rate the compensable injury and rates conditions that have been determined are not part of the compensable injury. Accordingly, Dr. D's alternate certification cannot be adopted.

There are two certifications from (Dr. V), a referral doctor acting in place of the treating doctor. Dr. V examined the claimant on November 18, 2020. In the first certification, Dr. V certified that the claimant reached MMI on January 15, 2020, with a 10% IR using the AMA Guides, placing the claimant in Lumbosacral DRE Category III: Radiculopathy. Dr. V considered and rated intervertebral disc disorder with radiculopathy, lumbar region. As previously noted, the ALJ determined that the compensable injury of (date of injury), did not extend to intervertebral disc disorder of the lumbar region or lumbar radiculopathy. Accordingly, the first certification from Dr. V cannot be adopted.

Dr. V provided an alternate certification based on his examination of November 18, 2020. In the alternate certification, Dr. V certified that the claimant reached MMI on January 15, 2020, with a 19% IR. Dr. V considered and rated intervertebral disc disorder with radiculopathy, lumbar region and somatic symptom disorder. As previously noted, the ALJ determined that the compensable injury of (date of injury), does not extend to intervertebral disc disorder of the lumbar region, lumbar radiculopathy, or somatic symptom disorder. Accordingly, the alternate certification from Dr. V cannot be adopted.

Dr. C, the designated doctor, examined the claimant on September 1, 2020, and certified that the claimant reached MMI on January 15, 2020, with a 10% IR using the AMA Guides, placing the claimant in Lumbosacral DRE Category III: Radiculopathy. Dr. C considered and rated a lumbar sprain, lumbar radiculopathy, and "lumbar post laminectomy." As previously noted, the ALJ's determination that the compensable injury of (date of injury), does not extend to lumbar radiculopathy has been affirmed. Accordingly, the certification from Dr. C cannot be adopted.

On March 24, 2021, a letter of clarification (LOC) was sent to Dr. C which noted that the correct date of statutory MMI was January 22, 2020, rather than January 15, 2020, and requested a certification of MMI/IR that considered only the lumbar sprain. On April 6, 2021, Dr. C responded to the LOC. Dr. C provided two certifications: one

considering a lumbar sprain and a second certification that considered the same conditions as his previous certification: lumbar sprain, lumbar radiculopathy, and “lumbar post laminectomy.” In both certifications, Dr. C certified that the claimant reached MMI on January 22, 2020, the statutory date of MMI, and assessed a 10% IR. Dr. C placed the claimant in Lumbosacral DRE Category III: Radiculopathy, noting that the claimant’s history and exam findings after the statutory MMI date, indicates a lumbar radiculopathy.

However, as noted above the ALJ’s determination that the compensable injury does not extend to lumbar radiculopathy was affirmed. Under the facts of this case, the certification of MMI/IR includes a condition that has specifically been determined to not be part of the compensable injury. Accordingly, Dr. C’s certification of MMI/IR cannot be adopted. See Appeals Panel Decision (APD) 132028, decided October 14, 2013.

There are no other certifications of MMI/IR in evidence. Accordingly, 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 depression, anxiety, mental anguish, stress, somatic symptom disorder, intervertebral disc disorder of the lumbar region, lumbar strain, or lumbar radiculopathy.

We affirm the ALJ’s determination that the claimant did not have disability from June 1, 2019, to January 22, 2020, resulting from the compensable injury of (date of injury).

We reverse the ALJ’s determination that the claimant reached MMI on July 24, 2018, and remand the issue of MMI to the ALJ for further action consistent with this decision.

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

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issues of MMI and 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 but does not extend to depression, anxiety, mental anguish, stress, somatic symptom disorder, intervertebral disc disorder of the lumbar region, lumbar strain, or lumbar radiculopathy and that the date of statutory MMI is January 22, 2020. The ALJ is then to request that the designated doctor rate the entire compensable injury, considering the claimant's medical record and the certifying examination and in accordance with Rule 130.1(c)(3).

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 on the MMI and IR issues which are supported by the evidence and 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 **(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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge