APPEAL NO. 210927
FILED AUGUST 19, 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 February 10, 2021, and concluded on April 22, 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 (date of injury), compensable injury extends to bilateral articular recess stenosis at L3-4 and L4-5; (2) the compensable injury of (date of injury), does not extend to lumbar radiculopathy at L4; (3) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. E) on June 24, 2019, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (4) the respondent (claimant) reached MMI on September 22, 2020; (5) the claimant's IR is 10%; and (6) the claimant had disability resulting from the compensable injury sustained on (date of injury), from October 3, 2019, through September 22, 2020. The appellant (carrier) appeals the ALJ's determinations of finality of the first certification, disability, MMI, IR, and that portion of the extent-of-injury determination that was favorable to the claimant. The appeal file does not contain a response from the claimant. The ALJ's determination that the compensable injury does not extend to lumbar radiculopathy at L4 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: (1) the claimant sustained a compensable injury on (date of injury), which extends to a lumbar strain; (2) Dr. E was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to determine MMI, IR, and extent of injury; and (3) the date of statutory MMI is September 22, 2020. The claimant testified that he was injured on (date of injury), when he was unloading a box of food from the back of a truck onto a dolly.

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), extends to bilateral articular recess stenosis at L3-4 and L4-5 is supported by sufficient evidence and is affirmed.

FINALITY OF THE FIRST CERTIFICATION

The ALJ's determination that the first certification of MMI and assigned IR from Dr. E on June 24, 2019, did not become final under Section 408.123 and Rule 130.12 is supported by sufficient evidence and is affirmed. The fact that another fact finder may have drawn different inferences from the evidence which would have supported a different result does not provide a basis for us to disturb the challenged determination. *Salazar v. Hill*, 551 S.W.2d 518 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

DISABILITY

The ALJ's determination that the claimant had disability, resulting from the compensable injury of (date of injury), from October 3, 2019, through September 22, 2020, is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) provides that MMI is 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. 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. E, the designated doctor, examined the claimant on November 20, 2020, and provided two certifications of MMI and 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). In one of the certifications, Dr. E only rated a lumbar strain. This certification did not rate the entire compensable injury and cannot be adopted. In the second certification, Dr. E considered and rated a lumbar strain as well as bilateral articular recess stenosis at L3-4 and L4-5. In the second certification, Dr. E opined that the claimant did not reach clinical MMI but reached statutory MMI on September 22, 2020. The ALJ found that the second certification from Dr. E certifying that the claimant reached MMI on September 22, 2020, with an IR of 10% is not contrary to the preponderance of the other medical evidence. Dr. E placed the claimant in Diagnosis Related Estimate (DRE) Lumbosacral Category III: Radiculopathy of the AMA Guides. Dr. E cited treatment notes from (Dr. Z) stating the claimant's left L4 reflex is noted to be hyperactive when compared to the opposite side. Dr. E then went on to state that along with the right decreased reflex, it is noted throughout the records and on the designated doctor's examination that the claimant has decreased strength in the right lower extremity which is also consistent with a right L4 radiculopathy. As previously noted, the ALJ's determination that the compensable injury of (date of injury), does not extend to lumbar radiculopathy at L4 became final. In the certification of MMI and assigned IR adopted by the ALJ, Dr. E specifically rated L4 radiculopathy. Accordingly, the ALJ's determination that the claimant reached MMI on September 22, 2020, with an IR of 10% is reversed.

None of the other certifications provided by Dr. E based on examinations of July 30, 2020, or June 14, 2019, can be adopted because they either do not consider the entire compensable injury or opine that the claimant has not yet reached MMI. As previously noted, the statutory date of MMI for this claim is September 22, 2020.

The only other doctor to provide certifications of MMI and assigned IR is (Dr. Er), the carrier-selected required medical examination doctor. Dr. Er examined the claimant on January 18, 2021, and provided three certifications of MMI and assigned IR. In two of the certifications, Dr. Er opined that the claimant reached MMI on April 11, 2019, with a 0% IR, considering only a lumbar strain. However, neither certification rates the entire compensable injury. In the third certification, Dr. Er opines that the claimant reached MMI on September 22, 2020, with a 0% IR. In that certification, Dr. Er considered and rated conditions that have not been determined to be part of the compensable injury, including retrolisthesis at L4-5, multi-level lumbar spondylosis, moderate central canal stenosis at L3-4, and mild central spinal canal stenosis at L4-5. Therefore, Dr. Er's certifications cannot be adopted. There are no other certifications in evidence. Accordingly, the issues of MMI and IR are remanded to the ALJ for further action consistent with this opinion.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), extends to bilateral articular recess stenosis at L3-4 and L4-5.

We affirm the ALJ's determination that the first certification of MMI and assigned IR from Dr. E on June 24, 2019, did not become final under Section 408.123 and Rule 130.12.

We affirm the ALJ's determination that the claimant had disability, resulting from the compensable injury of (date of injury), from October 3, 2019, through September 22, 2020.

We reverse the ALJ's determination that the claimant reached MMI on September 22, 2020, and 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 10% and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. E is the designated doctor in this case. The ALJ is to determine whether Dr. E is still qualified and available to serve as designated doctor. If Dr. E is no longer qualified or available, then another designated doctor is to be appointed.

The ALJ is to advise the designated doctor of the date of statutory MMI and request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury which includes a lumbar strain and bilateral articular recess stenosis at L3-4 and L4-5 but does not extend to lumbar radiculopathy at L4 in accordance with the AMA Guides considering the medical record and the certifying examination. The date of MMI cannot be after the date of statutory MMI.

The parties are to be provided with the designated doctor's new MMI/IR certification 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 **SENTRY INSURANCE A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge