

APPEAL NO. 211764
FILED DECEMBER 9, 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 October 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 of (date of injury), does not extend to lumbar radiculopathy, aggravation of disc bulges at L3-4 and L4-5, or disc protrusion at L3-4; (2) the appellant (claimant) reached maximum medical improvement (MMI) on April 17, 2021; (3) the claimant's impairment rating (IR) is 10%; and (4) the claimant had disability beginning April 18, 2021, and continuing through the date of the CCH, resulting from the compensable injury of (date of injury).

The claimant appealed the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) urged affirmance of the appealed determinations. The ALJ's determination that the claimant had disability beginning April 18, 2021, and continuing through the date of the CCH, resulting from the compensable injury of (date of injury), 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), in the form of a lumbar sprain/strain and right elbow strain/sprain, and the Texas Department of Insurance, Division of Workers' Compensation (Division) selected (Dr. D) as the designated doctor to determine MMI and IR. The claimant testified that on (date of injury), he injured his low back while working as an installation technician. The claimant testified that he was pulling three bags of salt up three steps using a dolly and felt pain in his back while going up the third step.

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 lumbar radiculopathy, aggravation of disc bulges at L3-4 and L4-5, or disc protrusion at L3-4 is supported by sufficient evidence and is affirmed.

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 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.

Dr. D examined the claimant on April 17, 2021, and certified that the claimant reached MMI on that same date. In his narrative report, Dr. D explained that the claimant had reached MMI on the date of his exam because the claimant completed appropriate Official Disability Guidelines treatment for his accepted compensable injuries and appeared to have reached a static condition at that time. The ALJ's determination that the claimant reached MMI on April 17, 2021, 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, 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 determined that the 10% IR certified by Dr. D was not contrary to the preponderance of the other medical evidence. Based on his examination on April 17, 2021, Dr. D certified that the claimant reached MMI on that date, and certified that the claimant's IR is 10%, for the compensable lumbar sprain/strain and right elbow sprain/strain 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 assigned 0% impairment for the right elbow based on range of motion. Dr. D then placed the

claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy. In his narrative report, Dr. D noted that the claimant qualified for a DRE Lumbosacral Category III impairment due to exam findings. 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. 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. D's narrative report notes left calf atrophy and states that the claimant's calf measurements measured 38.6 cm on the left and 41.6 cm on the right.

However, as noted above, we have affirmed the ALJ's determination that the compensable injury does not extend to lumbar radiculopathy. 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 200691, decided July 6, 2020.

There is one other certification in evidence. (Dr. H), a doctor selected by the treating doctor to act in his place, examined the claimant on July 16, 2021, and determined that the claimant had not reached MMI. However, we have affirmed the ALJ's determination that the claimant reached MMI on April 17, 2021; therefore, this certification 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 compensable injury of (date of injury), does not extend to lumbar radiculopathy, aggravation of disc bulges at L3-4 and L4-5, or disc protrusion at L3-4.

We affirm the ALJ's determination that the claimant reached MMI on April 17, 2021.

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. D is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. D is still qualified and available to be the designated doctor. If Dr. D 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/strain and right elbow strain/sprain but does not include lumbar radiculopathy, aggravation of disc bulges at L3-4 and L4-5, or disc protrusion at L3-4. 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 April 17, 2021, 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 **BRIDGEFIELD CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3140.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge