

APPEAL NO. 220810
FILED JULY 22, 2022

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 April 12, 2022, with the record closing on May 2, 2022, 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 appellant (claimant) reached maximum medical improvement (MMI) on April 28, 2021; and (2) the claimant's impairment rating (IR) is zero percent. The claimant appealed, disputing the ALJ's determinations of MMI and IR. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the compensable injury is a left hip contusion, left hip sprain/strain, and a lumbar sprain/strain; and the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor, (Dr. W), addressed the issues of MMI and IR. The claimant was injured on (date of injury), when she tripped going upstairs and fell onto the steps.

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

The ALJ's determination that the claimant reached MMI on April 28, 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 claimant's IR is zero percent as certified by Dr. W, the designated doctor, in an amended certification. Dr. W examined the claimant on April 28, 2021, considering the compensable conditions of a left hip contusion, left hip sprain/strain, and a lumbar sprain/strain. Dr. W opined the claimant reached MMI on April 28, 2021, and assigned a zero percent IR. Dr. W placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category I of 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), and assigned zero percent impairment for the lumbar sprain/strain. Dr. W also assigned zero percent impairment for the claimant's left hip strain/sprain and contusion based on range of motion (ROM) measurements taken during the examination.

In his narrative report, Dr. W provided a chart that notated hip ROM measurements and included one column of measurements for the right hip as well as another column of measurements labeled "04/28/21." There is no column labeled for the left hip ROM. The following hip ROM measurements and resulting impairments using Table 40 on page 3/78 of the AMA Guides were notated under this column: 113(110) of flexion for zero percent impairment; 34(30) of extension for zero percent impairment; 43(40) of abduction for zero percent impairment; 27(30) of adduction for zero percent impairment; 21(20) of internal rotation for zero percent impairment; and 30(30) of external rotation for zero percent impairment. We note that there is no provision in the AMA Guides that states the ROM measurements of the lower extremities should be rounded. However, Table 40 on page 3/78 provides 20° of hip internal rotation results in two percent impairment, not zero percent as assigned by Dr. W, and 30° of hip external rotation results in two percent impairment, not zero percent as assigned by Dr. W.

In Section 3.2e, titled "[ROM]," page 3/77, the AMA Guides provides, in part, that "[e]valuating permanent impairment of the lower extremity according to its [ROM] is a suitable method." Section 3.2e does not require that a certifying doctor must only use the most severe impairment for an individual direction of motion within the same table [Tables 40 through 43]. See Appeals Panel Decision (APD) 110741, decided July 25, 2011.

The Appeals Panel has held there is no specific provision in the AMA Guides in the Lower Extremity section that requires ROM deficits be utilized to increase the impairment for a single joint, and it is within the certifying doctor's discretion as a matter of medical judgment to use or not use the different angles of loss of ROM in a single joint. See APD 132734, decided January 9, 2014. Dr. W did not accurately reflect the impairment assessed for the left hip internal rotation and external rotation ROMs he measured, and because of this error it cannot be determined whether Dr. W would have used both planes of ROM deficits for the claimant's left hip or only one plane of ROM deficits. Additionally, it is not clear whether the ROM measurements listed under the "04/28/21" column are for the left hip. Accordingly, we reverse the ALJ's determination that the claimant's IR is zero percent.

We have affirmed the ALJ's determination that the claimant reached MMI on April 28, 2021, and there is no other certification in evidence that certifies the claimant reached MMI on that date. Accordingly, we 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 April 28, 2021.

We reverse the ALJ's determination that the claimant's IR is zero percent, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case. On remand the ALJ is to determine whether Dr. W is still qualified and available to be the designated doctor. If Dr. W is still qualified and available, the ALJ is to advise Dr. W to clarify the ROM measurements for the left hip and inform him that the AMA Guides do not state that lower extremity measurements are to be rounded. Additionally, Dr. W should be advised of his errors in calculating the impairment for hip internal rotation and external rotation based on Table 40 of the AMA Guides.

The ALJ is to request the designated doctor to rate the entire compensable injury based on the claimant's condition as of April 28, 2021, the date of MMI, in accordance with Rule 130.1(c)(3) and considering the medical records, the certifying examination, and rating criteria in the AMA Guides. The ALJ should inform the designated doctor that the compensable injury is a left hip contusion, left hip sprain/strain, and a lumbar sprain/strain.

The parties are to be provided with the designated doctor's new certification and allowed an opportunity to respond. The ALJ is then to make a determination of the claimant's 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 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.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge