

APPEAL NO. 220948
FILED JULY 29, 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 (CCH) was held on May 11, 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 compensable injury of (date of injury), extends to a right side hemothorax; (2) the compensable injury of (date of injury), does not extend to post-concussion syndrome, panic attack, anxiety, periodontal disease, temporomandibular joint dysfunction, pulpitis, L5-S1 disc protrusion/herniation, retrolisthesis of L5-S1, aggravation of degenerative disc disease at L5-S1, lumbar radiculitis, or lumbar radiculopathy; (3) the appellant (claimant) reached maximum medical improvement (MMI) on October 28, 2020; (4) the claimant's impairment rating (IR) is 10%; (5) the claimant had disability beginning on October 29, 2020, and continuing through March 26, 2021; and (6) the claimant did not have disability beginning on March 27, 2021, and continuing through the date of the CCH.

The claimant appealed the ALJ's determinations of MMI and IR and that portion of the ALJ's disability and extent-of-injury determinations that were adverse to him. The respondent (carrier) responded, urging affirmance. Those portions of the ALJ's determinations that the compensable injury of (date of injury), extends to a right side hemothorax and that the claimant had disability beginning on October 29, 2020, and continuing through March 26, 2021, were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed as reformed in part, reversed and remanded in part, and reversed and rendered in part.

The claimant testified that he was injured when the ladder he was climbing malfunctioned, causing him to fall. The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the carrier has accepted a small right-side pneumothorax, multiple right rib fractures at the 8th through 11th ribs, and an L2-3 fracture; and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. B) as designated doctor for the purposes of MMI, IR, and extent of the claimant's compensable injury. We note that a review of the record reflects that the parties stipulated that the L2-3 fracture was specifically an L2-3 transverse process fracture.

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 post-concussion syndrome, panic attack, anxiety, periodontal disease, temporomandibular joint dysfunction, pulpitis, L5-S1 disc protrusion/herniation, retrolisthesis of L5-S1, aggravation of degenerative disc disease at L5-S1, lumbar radiculitis, or lumbar radiculopathy is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ determined that the claimant did not have disability beginning on March 27, 2021, and continuing through the date of the CCH resulting from the compensable injury sustained on (date of injury). In her discussion of the evidence the ALJ stated the claimant did not receive any medical treatment for several months after March 26, 2021, because he was living in Louisiana and was unable to find a doctor to treat him. The ALJ further stated that the claimant eventually began treating with (Dr. H) on November 23, 2021. However, in evidence is a medical record dated November 9, 2021, that reflects the claimant saw Dr. H for medical care on that date. Additionally, the medical record dated November 23, 2021, states the claimant "presents in office today for a 2 week follow up on work injury that occurred...." The ALJ's statements that the claimant eventually began treating with Dr. H on November 23, 2021, is a misstatement of the evidence. While the ALJ can accept or reject in whole or in part the evidence presented, the ALJ's decision in this case is based, in part, on a misstatement of the medical evidence in the record. Accordingly, we reverse the ALJ's determination that the claimant did not have disability beginning on March 27, 2021, and continuing through the date of the CCH resulting from the compensable injury of (date of injury), and remand that issue to the ALJ for further action consistent with this decision.

MMI

The ALJ determined that the claimant reached MMI on October 28, 2020, as certified by Dr. B. As discussed below Dr. B did not rate the entire compensable injury and rated conditions that were not yet considered to be part of the compensable injury.

The ALJ found the preponderance of the other medical evidence is not contrary to Dr. B's certification of MMI on October 28, 2020, and assignment of a 10% IR. That finding is reversed. In evidence is a certification from (Dr. M), the post-designated doctor required medical examination (RME) doctor, certifying that the claimant reached MMI on October 28, 2020. The narrative report from Dr. M reflects that Dr. M considered a small right-side pneumothorax, multiple rib fractures on the right side, hemothorax of the right side, and an L2-3 fracture, which is the compensable injury in this case. Dr. M's certification that the claimant reached MMI on October 28, 2020, is based on the compensable injury and is supported by sufficient evidence. Therefore, we affirm as reformed the ALJ's determination that the claimant reached MMI on October 28, 2020, as certified by Dr. M.

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 found that the preponderance of the other medical evidence is not contrary to Dr. B's certification of MMI on October 28, 2020, and assignment of 10% IR. Dr. B examined the claimant on September 17, 2021. Dr. B provided three alternate certifications. In the first scenario, Dr. B considered and rated the following conditions which he understood were compensable: L2-3 transverse process fractures; temporomandibular joint subluxation, multiple rib fractures on the right side, and a small right pneumothorax. Dr. B certified that the claimant reached MMI on October 28, 2020, and assigned a 10% 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. B rated the right rib fractures, temporomandibular joint subluxation, and small right pneumothorax 0% impairment. Dr. B placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy based on atrophy and assigned 10% IR. Dr. B assessed a 10% IR for lumbar radiculopathy, a condition the ALJ determined not to be part of the compensable injury. See Appeals Panel Decision (APD) 132028, decided October 14, 2013; and APD 211764, decided December 9, 2021. We note that the AMA Guides provide that DRE Lumbosacral Category III:

Radiculopathy provides that structural inclusions would meet the criteria: (1) 25% to 50% compression of one vertebral body; (2) posterior element fracture, but *not* [emphasis in the original] fracture of transverse or spinous process, *with* [emphasis in the original] displacement disrupting the spinal canal, healed without loss of structural integrity.

As previously noted, the claimant's fracture at L2-3 was a transverse process fracture. Additionally, in this scenario, Dr. B considered and rated a condition that has not yet been determined to be part of the compensable injury (a temporomandibular joint subluxation) and did not consider a right side hemothorax which has been determined to be part of the compensable injury. Accordingly, we reverse the ALJ's determination that the claimant's IR is 10%.

In both of the other certifications, Dr. B certified that the claimant had not yet reached MMI. However, both certifications considered conditions that have been determined not to be part of the compensable injury, including: L5-S1 disc protrusion, panic attack, post-concussion syndrome, and pulpitis. Additionally, as noted above we have affirmed as reformed the ALJ's determination that the claimant reached MMI on October 28, 2020. Accordingly, these certifications cannot be adopted.

The only other certifications in evidence are from the carrier selected RME doctor, Dr. M. Dr. M examined the claimant on February 25, 2022, and provided four alternate certifications. In the second and fourth scenarios, Dr. M certified that the claimant had not reached MMI. These certifications consider conditions that have been determined not to be part of the compensable injury. Additionally, as noted above we have affirmed as reformed the ALJ's determination that the claimant reached MMI on October 28, 2020. Accordingly, these certifications cannot be adopted.

In the first scenario Dr. M certified that the claimant reached MMI on October 28, 2020, with a 5% IR. Dr. M considered and rated the following conditions: L2-3 fracture; temporomandibular joint subluxation, multiple rib fractures on the right side, and a small right pneumothorax. This certification cannot be adopted because it rates and considers temporomandibular joint subluxation which has not yet been determined to be part of the compensable injury and fails to rate a right side hemothorax which has been determined to be part of the compensable injury.

In the third scenario, Dr. M considers and rates the following conditions: L2-3 fracture, multiple rib fractures on the right side, hemothorax of the right side, and small right pneumothorax. Dr. M certified that the claimant reached MMI on October 28, 2020, noting that his fractures had completely healed, the lumbar spine had plateaued, and there were no lung complications following the hemo/pneumothorax. Dr. M assessed 5% impairment, placing the claimant in DRE Lumbosacral Category II: Minor

Impairment for the spinous transverse process fractures and assessed 0% for the rib fractures and hemo/pneumothorax because they healed uneventfully with no loss of function. Dr. M's narrative report reflects he considered and rated the entire compensable injury and his assigned IR complies with the AMA Guides. We therefore render a new decision that the claimant's IR is 5% as certified by Dr. M.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to post-concussion syndrome, panic attack, anxiety, periodontal disease, temporomandibular joint dysfunction, pulpitis, L5-S1 disc protrusion/herniation, retrolisthesis of L5-S1, aggravation of degenerative disc disease at L5-S1, lumbar radiculitis, or lumbar radiculopathy.

We affirm as reformed the ALJ's determination that the claimant reached MMI on October 28, 2020, as certified by Dr. M.

We reverse the ALJ's determination that the claimant's IR is 10%, and render a new decision that the claimant's IR is 5%.

We reverse the ALJ's determination that the claimant did not have disability beginning on March 27, 2021, and continuing through the date of the CCH resulting from the compensable injury of (date of injury), and remand that issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to correct the misstatement regarding the claimant's medical records. The ALJ shall consider all of the evidence and make a determination whether the claimant had disability from March 27, 2021, through May 11, 2022.

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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge