

APPEAL NO. 221983
FILED FEBRUARY 3, 2023

This appeal arises pursuant to the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 *et seq.* (1989 Act). Contested case hearings (CCH) were held on August 22, 2022, and October 26, 2022, with the record closing on November 10, 2022, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). With regard to Docket No. (Docket No. 1) the ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to a concussion or post-traumatic stress disorder (PTSD); (2) the appellant (claimant) had disability resulting from an injury sustained on (date of injury), from May 20, 2021, through December 19, 2021; (3) the claimant's post-injury earnings (PIE) from May 20, 2021, through December 19, 2021, were \$0.00; (4) the claimant is not entitled to income benefits from June 1, 2021, through November 30, 2021, under Section 405.044(d)(6) due to the compensable injury of (date of injury); and (5) the claimant is entitled to income benefits from May 20, 2021, through May 31, 2021, and from December 1, 2021, through December 19, 2021, under Section 405.044(d)(6), due to the compensable injury of (date of injury). With regard to Docket No. (Docket No. 2) the ALJ resolved the disputed issues by deciding that: (1) (Dr. K) was not properly appointed as designated doctor in accordance with 28 Tex. Admin. Code § 127.140(a)(6) (Rule 127.140(a)(6)); (2) the claimant reached maximum medical improvement (MMI) on October 1, 2021; and (3) the claimant's impairment rating (IR) is zero percent.

We note the ALJ added the issue of whether the claimant is entitled to temporary income benefits (TIBs) from May 20, 2021, through December 19, 2021, under Section 405.044(d)(6) due to the compensable injury of (date of injury), because that issue was litigated by the parties at the CCH. The actual issue litigated was whether the claimant is entitled to income benefits from May 20, 2021, through December 19, 2021, under Section 501.044, which is the applicable law regarding that issue. We reform all references of Section 405.044 to read Section 501.044.

The ALJ's determinations in Docket No. 1 that the claimant had disability resulting from an injury sustained on (date of injury), from May 20, 2021, through December 19, 2021, the claimant's PIE from May 20, 2021, through December 19, 2021, was \$0.00, and the claimant is entitled to income benefits from May 20, 2021, through May 31, 2021, and from December 1, 2021, through December 19, 2021, under Section 501.044 due to the compensable injury of (date of injury), were not appealed and have become final pursuant to Section 410.169. The ALJ's determination in Docket No. 2 that Dr. K was not properly appointed as designated doctor in accordance with

Rule 127.140(a)(6) was not appealed and has become final pursuant to Section 410.169.

DECISION

Reformed in part, 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 facial bone fracture, and the claimant's average weekly wage is \$1,362.86. The claimant was injured on (date of injury), when he was assaulted by a juvenile inmate.

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).

ENTITLEMENT TO INCOME BENEFITS

As previously noted, the ALJ's determination that the claimant is entitled to income benefits from May 20, 2021, through May 31, 2021, and from December 1, 2021, through December 19, 2021, was not appealed and has become final pursuant to Section 410.169. The ALJ's determination that the claimant is not entitled to income benefits from June 1, 2021, through November 30, 2021, is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to a concussion or PTSD 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 Texas Department of Insurance, Division of Workers' Compensation (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.

The ALJ found the preponderance of the other medical evidence is contrary to the certification of the designated doctor, (Dr. C), that the claimant reached MMI on March 3, 2022, with a zero percent IR, and determined the claimant reached MMI on October 1, 2021, with a zero percent IR as certified by (Dr. O), the post-designated doctor required medical examination doctor. The ALJ stated in the discussion portion of the decision that “[Dr. C’s] certification was unpersuasive to establish that the compensable injury improved beyond October 1, 2021.”

In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel stated that a focus on and requirement of material recovery or lasting improvement in determining MMI is misplaced, and the question regarding whether an injured employee has reached MMI is not whether the injured employee actually recovered or improved but whether, based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. In the case on appeal the ALJ rejected Dr. C’s certification because she found it did not establish the claimant’s compensable injury actually improved after an earlier date of MMI. The ALJ based her MMI determination on whether the claimant’s condition had improved since October 1, 2021, rather than on the definition of MMI set out in Section 401.011(30)(A). See APD 012284, *supra*; see also APD 120071, decided March 9, 2012. Accordingly, we reverse the ALJ’s determination that the claimant reached MMI on October 1, 2021, and we remand the issue of MMI to the ALJ for further action consistent with this decision.

Because we have reversed and remanded the ALJ’s MMI determination, we also 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.

SUMMARY

We reform all references to Section 405.044 to read Section 501.044.

We affirm the ALJ's determination that the claimant is not entitled to income benefits from June 1, 2021, through November 30, 2021.

We affirm the ALJ's determination the compensable injury of (date of injury), does not extend to a concussion or PTSD.

We reverse the ALJ's determination that the claimant reached MMI on October 1, 2021, and we 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 zero percent, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to apply the proper legal standard in determining whether the claimant has reached MMI, and if so on what date, and to determine the claimant's IR that is supported by the evidence.

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

For service in person the address is:

(NAME)
(ADDRESS)
(CITY), (STATE) (ZIP CODE).

For service by mail the address is:

(NAME)
(ADDRESS)
(CITY) (STATE) (ZIP CODE).

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge