

APPEAL NO. 230102  
FILED MARCH 13, 2023

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 November 29, 2022, with the record closing on December 14, 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 September 9, 2022; and (2) the claimant's impairment rating (IR) is 5%. The claimant appealed, disputing the ALJ's determinations of MMI and IR. The respondent (self-insured) responded, urging affirmance of the disputed MMI and IR determinations.

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), that extends to tinnitus, dyspnea, and COVID-19; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. R) as designated doctor to address the issues of MMI and IR; the Division subsequently appointed (Dr. M) as designated doctor to address the issues of MMI and IR; and the date of statutory MMI in this case is September 9, 2022. The claimant testified that he sustained a compensable injury on (date of injury), while in the course and scope of his employment as a certified nurse anesthetist.

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).

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.

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 pertinent part, that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination, and the doctor assigning the IR shall:

- (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;
- (B) document specific laboratory or clinical findings of an impairment;
- (C) analyze specific clinical and laboratory findings of an impairment;
- (D) compare the results of the analysis with the impairment criteria and provide the following:
  - (i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and
  - (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter 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)]. The doctor's inability to obtain required measurements must be explained.

Dr. R, the initial designated doctor, examined the claimant on September 2, 2021, and certified that the claimant reached MMI on September 2, 2021, and assessed an IR of 0% using the AMA Guides. Dr. R considered and rated tinnitus and dyspnea but did not consider and rate COVID-19, which the parties have stipulated is part of the compensable injury. The ALJ noted that a Presiding Officer's Directive was sent to Dr. R because she "was missing a considerable amount of medical records and did not rate all of the compensable conditions." Dr. R was no longer available to perform the examination, and Dr. M was appointed designated doctor for the issues of MMI and IR.

Dr. M examined the claimant on August 27, 2022. Dr. M sent the claimant for an audiologic evaluation report and a pulmonary function test. Dr. M reviewed both the

audiologic report and pulmonary function test results and certified on November 17, 2022, that the claimant reached MMI on the statutory date of September 9, 2022, with a 5% IR. The ALJ found that Dr. M's certification is not contrary to the preponderance of the other medical evidence. The ALJ's determination that the claimant reached MMI on the statutory date of September 9, 2022, is supported by sufficient evidence and is affirmed.

Dr. M assigned a 5% IR for tinnitus based on 0% for hearing loss and assigned 5% specifically for tinnitus based on page 9/224 of the AMA Guides. Dr. M placed the claimant in class 1 of Table 8, Classes of Respiratory Impairment, page 5/162 of the AMA Guides, for 0% impairment for respiratory impairment for the COVID-19/dyspnea. Dr. M noted the claimant had a forced vital capacity (FVC) value of 96% forced expiratory volume in the first second (FEV1) value of 100% of predicted, and the ratio of these measurements, an (FEV1/FVC) of 110%. Dr. M did not note the results for diffusing capacity of carbon monoxide (Dco).

The AMA Guides provide on page 5/163 that, Table 8 presents criteria for estimating the extent of permanent impairment and that spirometry and single breath Dco must be performed. The AMA Guides provide that for an assignment of 0% impairment under Class 1 of Table 8 on page 5/162 of the AMA Guides, all of the listed criteria except for measured exercise capacity (VO<sub>2</sub>) max must be met. Dr. M did not provide a value for VO<sub>2</sub> max. The required methodology includes, in part, measurements made from at least three acceptable spirometric tracings of forced expiration: FVC, FEV<sub>1</sub>, and the FEV<sub>1</sub>/FVC, a predicted normal single-breath Dco Value for an individual according to age, and utilization of Table 8 (page 5/162) for estimating the extent of permanent impairment. As noted above, Dr. M failed to state the value of Dco in assessing the claimant's IR. Accordingly, Dr. M's assessment of IR cannot be adopted. See Appeals Panel Decision (APD) 112026, decided April 5, 2012.

There are four other certifications in evidence. The previously mentioned certification from Dr. R, the initial designated doctor, cannot be adopted because she did not rate the entire compensable injury.

On January 6, 2022, (Dr. N), a treating doctor referral, examined the claimant and certified that the claimant reached MMI on September 2, 2021, with a 34% IR. Dr. N assessed 30% for dyspnea and 5% for tinnitus. This certification did not consider and rate COVID-19, which the parties have stipulated is part of the compensable injury. Accordingly, this certification cannot be adopted. Additionally, the ALJ's determination that the claimant reached MMI on September 9, 2022, has been affirmed.

On May 16, 2022, Dr. N again examined the claimant for MMI and IR. We note that the Report of Medical Evaluation (DWC-69) notes the date of exam was June 16,

2022. Dr. N certified that the claimant reached MMI on September 2, 2021, and assessed a 37% IR, using the AMA Guides. Dr. N assessed 30% impairment for dyspnea, placing the claimant in Class 3 of Table 8 on page 5/162 of the AMA Guides. Dr. N assessed 1% for the claimant's hearing loss, 5% for tinnitus, and 3% for COVID-19/headaches. As previously noted, the ALJ's determination that the claimant reached MMI on September 9, 2022, has been affirmed. Accordingly, Dr. N's certification of MMI/IR cannot be adopted.

(Dr. E), a post-designated doctor required medical examination doctor, examined the claimant on September 26, 2022, and certified that the claimant reached MMI on September 2, 2021, and assessed an IR of 0%. Dr. E noted in his narrative report that "[t]here is no documentation of the acute onset of hearing loss or tinnitus during the active infection period of this case." Further, Dr. E stated that dyspnea has been accepted "...but cannot be rated as the evaluations to date revealed lung function abnormalities that are not explained by the COVID infection." As previously noted, the ALJ's determination that the claimant reached MMI on September 9, 2022, has been affirmed. Accordingly, Dr. E's certification of MMI/IR cannot be adopted.

There are no other certifications in evidence. Accordingly, we reverse the ALJ's determination that the claimant's IR is 5% and 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 the statutory date of September 9, 2022.

We reverse the ALJ's determination that the claimant's IR is 5% and remand the IR issue to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. M is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Division rules to determine the IR for the compensable injury. The ALJ is to advise the designated doctor that the compensable injury of (date of injury), extends to tinnitus, dyspnea, and COVID-19. The designated doctor is then to be requested to assess impairment for the entire compensable injury in accordance with the AMA Guides based on the claimant's conditions as of September 9, 2022, the date of MMI, considering the medical record, the certifying examination, and the rating criteria in the AMA Guides.

The parties are to be provided with the ALJ's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond.

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

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

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge