

APPEAL NO. 231491
FILED NOVEMBER 30, 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 September 5, 2023, 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 October 27, 2022; and (2) the claimant's impairment rating (IR) is three percent. The claimant appealed, disputing the ALJ's determinations of MMI and IR. The respondent (carrier) 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), in the form of at least the carrier-accepted conditions of left shoulder sprain, left shoulder superior glenoid labrum tear, and left shoulder acromioclavicular joint separation, and (Dr. W) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor on the issues of MMI and IR. The claimant testified that he was injured when he slipped and fell directly on his left shoulder. The evidence reflects that the claimant had left shoulder surgery on July 15, 2022.

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 October 27, 2022, 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.

Dr. W, the designated doctor, initially examined the claimant on December 15, 2022, and certified that the claimant reached MMI on October 27, 2022, and assigned a five percent IR. However, in his narrative report, Dr. W only considers a left shoulder sprain and left superior glenoid labrum tear. In his initial certification, Dr. W failed to consider and rate a left shoulder acromioclavicular joint separation. The ALJ correctly notes in his discussion of the evidence that this certification from Dr. W could not be adopted because it did not consider and rate the entire compensable injury.

Dr. W subsequently examined the claimant on June 22, 2023, and certified that the claimant had not yet reached MMI. The ALJ correctly noted that Dr. W stated the claimant had not reached MMI as of that time because of possible biceps tendon attachment failure and adhesive capsulitis and that this certification could not be adopted because it considered diagnoses which have not yet been accepted or determined to be compensable.

(Dr. S), a carrier-selected required medical examination doctor, examined the claimant on August 2, 2023, and certified that the claimant reached MMI on October 27, 2022, and assigned a three percent 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). In his narrative report, Dr. S stated that range of motion (ROM) was performed and compared to ROM measurements at the time of MMI. Dr. S notes that five percent upper extremity (UE) impairment was noted for losses in abduction. However, in his narrative, Dr. S documents loss of ROM of abduction as 100° which would result in four percent UE impairment according to Figure 41, page 3/44 of the AMA Guides. In evidence is a physical therapy note dated October 27, 2022, which reflects that the claimant's loss of ROM of abduction was 144°. Figure 41 on page 3/44 of the AMA Guides provides that loss of abduction ROM of 140° results in two percent UE impairment and loss of abduction ROM of 150° results in one percent UE impairment. Dr. S did not reference the specific ROM measurements he used to compare with the ROM measurements he found in his examination. Additionally, the ROM measurements he utilized from his examination would not result in the three percent IR

he assessed. Accordingly, we reverse the ALJ's determination that the claimant's IR is three percent.

The only other certification in evidence is from (Dr. We), a referral doctor acting in place of the treating doctor. Dr. We examined the claimant on June 21, 2023, and certified that the claimant had not yet reached MMI. The ALJ's determination that the claimant reached MMI on October 27, 2022, has been affirmed. There is no other certification in evidence. Consequently, we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case. The ALJ is to determine whether Dr. W is still qualified and available to serve as designated doctor. If Dr. W is no longer qualified or available, then another designated doctor is to be appointed to determine the claimant's IR for the compensable injury of (date of injury). The ALJ is to advise the designated doctor that the compensable injury of (date of injury), includes a left shoulder sprain, a left shoulder superior glenoid labrum tear, and a left shoulder acromioclavicular joint separation. The assignment of IR is required to be based on the claimant's condition as of October 27, 2022, the date of MMI in this case, in accordance with the AMA Guides considering the medical record and the certifying examination. The doctor should specify the ROM measurements used to assess impairment.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge