

APPEAL NO. 071087-s
FILED AUGUST 10, 2007

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 December 14, 2006. The hearing officer resolved the disputed issues determining that: 1) the appellant (claimant) reached maximum medical improvement (MMI) on November 21, 2003; 2) the impairment rating (IR) is 10%; 3) the first certification of MMI and assigned IR became final pursuant to Section 408.123; and 4) the claimant had disability beginning _____, and ending November 21, 2003. The claimant appealed all of the disputed issue determinations including the disability issue, citing evidence in the record of disability after the ending date found by the hearing officer.

In Appeals Panel Decision (APD) 070139, decided March 29, 2007, the Appeals Panel affirmed the determinations on MMI/IR and finality pursuant to Section 408.123 but reversed the hearing officer's determination that the claimant's disability ended on November 21, 2003 (the date of MMI) as not being supported by the evidence and remanded the case for an ending date of disability that is supported by the evidence.

The hearing officer in the decision and order after remand dated May 7, 2007, states that no CCH after remand was conducted. The hearing officer then used the Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, LTD. (MDA) in determining that the claimant's "disability should cease 140 days after surgery (if the surgery is construed as an open rotator cuff repair) and that date is November 12, 2003." The hearing officer determined that the claimant had disability beginning _____, and ending November 12, 2003.

The claimant appeals, contending that the MDA was not before the parties at the December 14, 2006, CCH, that the MDA was not in effect at the time of the CCH and that the claimant "had no notice of, nor opportunity to comment" on the application or content of the MDA. The carrier responded urging affirmance of the hearing officer's decision as being supported by sufficient evidence.

DECISION

Reversed and a new decision rendered.

In APD 070139, *supra*, the Appeals Panel discussed the definitions of disability in Section 401.011(16) and MMI in Section 401.011(30). We commented that disability can continue after MMI is reached but pursuant to Section 408.101(a) the claimant would not be entitled to temporary income benefits (TIBs) after the November 21, 2003, date of MMI. We also pointed out several medical records and reports after the November 21, 2003, MMI date which indicated that the claimant had continuing disability.

The parties had stipulated that the claimant had sustained a compensable right shoulder torn rotator cuff injury on _____, at the December 14, 2006, CCH. The claimant had a right shoulder mini-open rotator cuff repair with subacromial decompression and acromioplasty on June 25, 2003. The hearing officer applied the MDA referenced in 28 TEX. ADMIN. CODE § 137.10 (Rule 137.10) in calculating 140 days after the June 25, 2003, surgery to arrive at the November 12, 2003, end date of disability.

Rule 137.10(a) provides that insurance carriers, health care providers, and employers shall use the disability duration values in the current edition of the MDA (Division return to work guideline) as guidelines for the evaluation of expected or average return to work time frames. Rule 137.10(c) provides that the Texas Department of Insurance, Division of Workers' Compensation (Division) return to work guidelines shall be presumed to be a reasonable length of disability duration and explains how health care providers, insurance carriers, employers, and injured employees are to use the guidelines. However, Rule 137.10(e) clarifies that the disability duration values in the guidelines are not absolute values and do not represent specific lengths or periods of time at which an injured employee must return to work. Rule 137.10(g) provides that Rule 137.10, which was adopted January 18, 2007, is effective on or after May 1, 2007. Rule 137.1(b) adopted January 18, 2007, provides in part that disability management tools, such as return to work guidelines, may be used by the Division to resolve income benefit disputes.

Rule 137.10, which adopted the MDA as the Division return to work guidelines, was not in effect during any of the claimed period of disability. We hold that the hearing officer erred in applying the MDA in this case for the following reasons: 1) the MDA was not in evidence; 2) no notice was given to the parties at either the original CCH or at the time of the decision after remand that the MDA would be considered; and 3) the entire period of disability at issue was prior to the May 1, 2007, effective date of Rule 137.10.

Because Section 410.203(c) does not allow the Appeals Panel to remand a case more than once, we look to the evidence of record to determine an ending date of disability supported by the evidence. The designated doctor in his report of June 6, 2006, notes the June 25, 2003, surgery and explains that Dr. DG is currently (in 2006) treating the claimant conservatively and that a post-operative MRI on January 17, 2006, showed "an AC joint complex cystic lesion and a probable recurrent rotator cuff tear." In APD 070139, *supra*, we noted in evidence were: a Work Status Report dated November 7, 2003, taking the claimant off work from November 7 through December 3, 2003, due to the rotator cuff repair; a report dated February 23, 2004, from Dr. DG which notes that the claimant "remains off work due to being unable to use his [right] upper extremity," as well as reports dated May 11, 2004, and May 25, 2004, which reference the claimant's two shoulder surgeries, comment that the claimant "remains unable to work" and prescribe medication. The last report which addresses the ability to work is the May 25, 2004, report. The next report dated August 18, 2004, states that the claimant is doing reasonably well and can be seen on an as needed basis. Subsequent medical records dated December 15, 2005, January 17, 2006, and October

9, 2006, do not touch on the claimant's inability, because of the compensable injury, to obtain and retain employment. Section 401.011(16). A carrier peer review report dated December 8, 2006, answers questions about the MMI date but does not address disability.

We reverse the hearing officer's determination that the claimant had disability ending on November 12, 2003. Because we cannot remand a case more than once, we render a new decision that the claimant had disability, beginning _____, and ending on August 18, 2004, the date Dr. DG stated the claimant was doing reasonably well and would be seen on an as needed basis thereafter. However, the claimant is not entitled to TIBs after he reached MMI on November 21, 2003. Section 408.101(a) and 408.102(a).

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge