

APPEAL NO. 033203
FILED FEBRUARY 3, 2004

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 12, 2003. The hearing officer decided that: (1) the date of maximum medical improvement (MMI) and impairment rating (IR) cannot be determined; and (2) the appellant/cross-respondent (claimant) had disability from June 4, 2002, through October 15, 2003. The claimant appeals the MMI/IR determination, asserting that presumptive weight should be given to the report of the second designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The claimant also appeals the period of disability on sufficiency of the evidence grounds, asserting that disability continued through the date of the hearing. The respondent/cross-appellant (carrier) urges affirmance, asserting that the second designated doctor was not properly appointed and that the claimant did not have disability through the date of the hearing. The carrier cross-appeals the hearing officer's determination that the claimant had disability from June 4, 2002, through October 15, 2003, on sufficiency of the evidence grounds. The claimant cross-responds, urging affirmance.

DECISION

Affirmed.

MMI/IR

The parties stipulated that the claimant sustained a compensable injury on _____. While the full extent of the injury is unclear, it is undisputed that the compensable injury included the claimant's neck, low back, left knee, and right ankle. He received conservative treatment, including chiropractic treatment, physical therapy, and pain medication. On September 11, 2002, the claimant underwent MRIs for the cervical spine, thoracic spine, lumbar spine, left knee, and right ankle. The MRI reports indicate disc bulges at C2-3, C3-4, and C6-7, a disc herniation at C4-5, a disc bulge at L4-5, and a tear of the medial meniscus of the left knee, among other conditions.

On September 13, 2002, the claimant was examined by Dr. L, a Commission-appointed designated doctor for purposes of MMI/IR. Dr. L, an orthopedic surgeon, certified the claimant at MMI on September 13, 2002, with a zero percent IR for multiple strain injuries. Dr. L's report reveals that the claimant's MRIs were not considered in evaluating MMI/IR.

The claimant disputed the designated doctor's report and continued treatment for his injuries. The claimant was referred to an orthopedic surgeon, who recommended arthroscopic surgery to repair his torn left meniscus.

On May 14, 2003, the Commission requested clarification of the designated doctor's MMI/IR certification, in view of the claimant's MRIs and other medical records. The designated doctor responded, "It is my recommendation, that I be permitted to re-examine [the claimant] and correlate the new diagnostic studies with his current physical findings." Prior to scheduling a reexamination, the Commission required the claimant to submit a new Request for Designated Doctor (TWCC-32), in furtherance of Section 408.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(d)(2) (Rule 130.5(d)(2)), regarding designated doctor qualifications. Upon receipt of the TWCC-32, the Commission appointed a second designated doctor, Dr. B. The benefit review conference (BRC) report indicates that Dr. L was not chosen by the Commission due to treatment the claimant was allegedly receiving for chronic pain. Dr. B examined the claimant on July 30, 2003, and certified that he was not at MMI. In view of the MRIs, Dr. B agreed that the claimant required surgery to his left knee.

The claimant was subsequently examined by the carrier's required medical examination (RME) doctor, who certified the claimant at MMI on September 13, 2002, with a zero percent IR. In an amended report, the RME doctor clarifies that "there appeared to be no treatment for chronic pain management."

The BRC report, in evidence, indicates that as of September 1, 2003, Dr. L is no longer certified to perform designated doctor examinations.

The hearing officer found that Dr. L was qualified to serve as designated doctor when reexamination was requested, and Dr. B should not have been appointed. Dr. B's report, therefore, was not entitled to presumptive weight. Because Dr. L had requested to reexamine the claimant, the hearing officer decided that the claimant's MMI/IR could not be determined at this time. The hearing officer ordered that the claimant be scheduled for reexamination by Dr. L, or if Dr. L is no longer available, that a new designated doctor be appointed.

The hearing officer did not err in deciding that the claimant's MMI and IR cannot be determined. It is the claimant's position that Dr. L was no longer available or qualified to serve as designated doctor under Section 408.0041 and Rule 130.5(d)(2), and, therefore, Dr. B's certification is entitled to presumptive weight. Section 408.0041(b) provides in relevant part that the designated doctor should be one:

[W]hose credentials are appropriate for the issue in question and the injured employee's medical condition. The designated doctor doing the review must be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and the treatment and procedures performed must be within the scope of practice of the designated doctor.

Rule 130.5(d)(2)(C) provides that:

If at the time the request is made, the commission has previously assigned a designated doctor to the claim, the commission shall use that doctor again, if the doctor is still qualified as described in this subsection and available. Otherwise, the commission shall select the next available doctor on the commission's Designated Doctor List who...has credentials appropriate to the issue in question, is trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and whose scope of practice includes the treatment and procedures performed. In selecting a designated doctor, completed medical procedures may be considered secondary selection criteria.

The claimant provided no evidence to show that Dr. L was not available or was not qualified to serve as designated doctor at the time the request for reexamination was made. In view of the evidence above, we cannot conclude that the hearing officer erred in determining that Dr. B was improperly appointed. Accordingly, we find no merit in the claimant's assertion that Dr. B's MMI/IR certification is entitled to presumptive weight.

The claimant also argues, "the [c]arrier did not object to the selection of Dr. [B] as the new designated doctor until after it received his report." The claimant did not raise this argument at the hearing below, and we will not address it for the first time on appeal.

DISABILITY

The hearing officer did not err in determining that the claimant had disability from June 4, 2002, through October 15, 2003. This determination involved a question of fact for the hearing officer to resolve. The hearing officer 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 including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer believed the RME doctor's report that the claimant could return to full-duty work as of October 15, 2003. In view of the evidence presented, we cannot conclude that the hearing officer's determination is 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).

The decision and order of the hearing officer is affirmed.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Edward Vilano
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge