First District Court of Appeal
State of Florida

No. 1D19-0500

Angel Olvera,

Appellant,

v.

Hernandez Construction of SW Florida Inc. and U.S. Administrator Claims,

Appellees.

On appeal from an order of the Judge of Compensation Claims.
Frank Clark, Judge.

Date of Accident: May 21, 2015.

November 15, 2019

Per Curiam.

Angel Olvera (Claimant) appeals the Judge of Compensation Claim's order denying his claim for temporary partial disability (TPD) benefits under section 440.15(4), Florida Statutes (2014). In the order, the judge (JCC) found that Claimant was not entitled to these benefits because the expert medical advisor (EMA) opined that Claimant reached maximum medical improvement (MMI) as of May 31, 2016, and remained at MMI "unless and until" he underwent additional surgery. We reverse because the JCC's interpretation of the EMA's testimony is not supported by competent substantial evidence and ignores his unambiguous and

presumptively correct opinion that Claimant is not at MMI because he needs surgery. Accordingly, we find it unnecessary to address the other arguments raised in this appeal.

I

Claimant, a carpenter/roofer, sustained a severe fracture to his left arm when he fell from a roof on May 21, 2015. The Employer/Carrier (E/C) accepted compensability of Claimant's workplace injuries and authorized medical care with Dr. Leach, an orthopedic surgeon. Dr. Leach performed two surgeries, but Claimant continued to have numbness, tingling, and pain in the left arm. On May 31, 2016, Dr. Leach placed Claimant at MMI and assigned a permanent impairment rating along with permanent restrictions of no lifting in excess of 20 pounds and limited carrying/pulling/pushing up to 40 pounds, infrequently. Dr. Leach did not recommend any further treatment. Claimant did not return to work.

In June 2018, Claimant underwent an independent medical examination by Dr. Hussamy, another orthopedic surgeon. As a result of this exam, Dr. Hussamy concluded that Claimant is not yet at MMI and is incapable of working. He recommended electrodiagnostic studies (EMG/NCVs) of the upper extremities to determine the degree of ulnar neuropathy on the left side. He also indicated that Claimant could require additional surgery to include submuscular ulnar nerve transposition and capsular release of the left elbow.

In July 2018, Claimant filed a petition for benefits (PFB) seeking, among other things, payment of TPD benefits from May 31, 2016, to the present. The E/C defended the TPD claim on the ground that Claimant was at MMI per Dr. Leach. The JCC appointed an expert medical advisor (Dr. Klein) to resolve the conflict in medical opinion. The JCC requested Dr. Klein address specific questions including whether Claimant requires additional treatment or diagnostic testing, what treatment or testing is recommended, and whether Claimant has reached at MMI.

In his report, Dr. Klein stated that he recommended electrodiagnostic studies and additional surgery. Based on these recommendations, he also answered "no" to the question whether

Claimant has reached MMI. When deposed, Dr. Klein confirmed the opinions expressed in his report. In fact, by this time, the electrodiagnostic studies had been completed and, according to Dr. Klein, the results confirmed his opinion on surgery.[*] However, when asked a leading question by the E/C's attorney, he agreed that Claimant would be at MMI in May 2016 "if he does not have surgery."

At the final hearing, Claimant testified that he wishes to undergo the surgery. In the final order, the JCC recited the EMA's testimony and concluded that "it is Dr. Klein's opinion that Claimant remains at MMI as of May 31, 2016 unless or until he undergoes more surgery." In reaching this conclusion, he found that Claimant's desire to have surgery was "not dispositive." In an order denying Claimant's subsequent motion for rehearing, the JCC elaborated further that he did not find the EMA's opinion to be clear and unequivocal. According to the JCC, Dr. Klein had two opinions regarding MMI, "each dependent upon whether Claimant did or did not have surgery." Based on this testimony, the JCC found "Claimant remains at MMI until the issue of surgery is decided."

II

Claimant here had the burden to prove entitlement to the claimed workers' compensation benefits. *See, e.g.*, *Fitzgerald v. Osceola Cty. Sch. Bd.*, 974 So. 2d 1161, (Fla. 1st DCA 2008). Section 440.15(4)(1) Florida Statutes (2014) provides that TPD benefits shall be payable to an injured worker if overall MMI has not been reached and the medical conditions resulting from the accident create restrictions on the injured employee's ability to return to work. *See, e.g., Wyeth/Pharma Field Sales. v. Toscano*, 40 So. 3d 795, 799 (Fla. 1st DCA 2010). Thus, to prove entitlement to the claimed TPD benefits, Claimant had the burden to show that he had not reached overall MMI during the relevant time period.

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[*] Although skeptical about the continuing need for care, even Dr. Leach, after receiving the EMG/NVC test results, recommended a referral to another physician for further evaluation for surgery.

The date of MMI is statutorily defined as "the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based on reasonable medical probability." *See* § 440.20(10), Fla. Stat. (2014). Whether a claimant has reached MMI "is a medical question and should be based on a clear, explicit expression in the medical records or medical opinion testimony." *Lemmer v. Urban Elec., Inc.*, 947 So. 2d 1196, 1198 (Fla. 1st DCA 2007) (citing *Kilbourne & Sons v. Kilbourne*, 677 So. 2d 855, 859 (Fla. 1st DCA 1995)). *See also Buttrick v. By the Sea Resorts, Inc.*, 108 So. 3d 658, 659 (Fla. 1st DCA 2013). "Because the question of whether a claimant has reached MMI is essentially a medical question, it should be answered by medical experts." *Lemmer*, 947 So. 2d at 1198 (citing *Scotty's, Inc., v. Sarandrea*, 645 So. 2d 121, 122 (Fla. 1st DCA 1994)).

In *Fitzgerald*, this court found that the black-letter rules (affording the presumption of correctness to EMA opinion in the absence of clear and convincing evidence) did not apply because the EMA in that case did not offer a definitive opinion on the contested issue of major contributing cause. 974 So. 2d at 1163. But as this Court explained later, nothing in statute or in the *Fitzgerald* opinion allows a JCC to disregard the presumed correctness of an *unequivocal* EMA opinion without first making a finding of clear and convincing evidence contradicting the presumed correctness. *See Amos v. Gartner*, 17 So. 3d 829, 832 (Fla. 1st DCA 2009).

III

To the extent this issue turns on a resolution of the facts, our standard of review is CSE; to the extent it involves an interpretation of law, the standard is de novo. *See Benniefield v. City of Lakeland*, 109 So. 3d 1288, 1290 (Fla. 1st DCA 2013); *see also Lemmer*, 947 So. 2d at 1198 (holding JCC's finding of MMI will be affirmed if supported by CSE).

Section 440.13(9)(c) mandates the appointment of an EMA when a disagreement exists between the opinions of two healthcare providers. The statute further provides that the EMA's opinion is "presumed to be correct unless there is clear and

convincing evidence to the contrary as determined by the [JCC]." Clear and convincing evidence is evidence "of a quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitancy, as to the truth of the allegation sought to be established." *McKesson Drug Co. v. Williams*, 706 So. 2d 352, 353 (Fla. 1st DCA 1998). This heightened standard of proof, however, does not change this court's standard of review. *Id.* "Accordingly, the appellate court's function is not to conduct a *de novo* proceeding or reweigh the evidence by determining independently whether the evidence as a whole satisfies the clear and convincing standard, but to determine whether the record contains [CSE] to meet the clear and convincing evidence standard." *Id.* at 353-54.

IV

From the outset, we note that the E/C defended the TPD claim solely on the issue of MMI. Ultimately, our review of the record reveals no CSE to support the JCC's finding that the EMA expressed two MMI opinions concerning Claimant's *current* status or that his opinion that Claimant is not MMI because he needs surgery is ambiguous. The EMA's purported second MMI opinion was offered in response to the E/C's hypothetical question. Because the E/C never established the underlying facts supporting this hypothetical, the EMA's testimony on this point was nothing more than speculation. Thus, the JCC erred when he found, based on this testimony, that the EMA opined that Claimant is at MMI "unless and until" he has surgery. Because the record is devoid of clear and convincing evidence contrary to the EMA's opinion that Claimant is not MMI, the presumption of correctness applies.

We, therefore, REVERSE the order denying TPD benefits because Claimant is at MMI and REMAND for further proceedings in accordance with this opinion.

MAKAR, BILBREY, and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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