

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RICHARD F. CRUZ,

Appellant,

v.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D14-4419

STATE OF FLORIDA,
DEPARTMENT OF LEGAL
AFFAIRS/DIVISION OF RISK
MANAGEMENT,

Appellees.

Opinion filed August 19, 2015.

An appeal from an order of the Judge of Compensations Claims.
Ellen H. Lorenzen, Judge.

Date of Accident: August 5, 2012.

Bill McCabe, Longwood, and Tonya A. Oliver, Trinity, for Appellant.

Curt L Harbsmeier of Harbsmeier, P.A., Lakeland, and Terry P. Roberts of the Law
Office of Terry P. Roberts, Tallahassee, for Appellees.

MARSTILLER, J.

Richard F. Cruz (“Claimant”) appeals that portion of a final compensation order denying him continued temporary total disability (“TTD”) and/or temporary partial disability (“TPD”) benefits after January 5, 2014. In the order, the Judge of Compensation Claims (“JCC”) found Claimant had reached overall maximum medical improvement (“MMI”) by December 31, 2013, and, for that reason, no longer qualified for disability benefits. The JCC did, however, award Claimant an evaluation by a gastroenterologist, recommended by his authorized treating cardiologist to assess Claimant’s acid reflux complaints.

On appeal, Claimant argues the JCC erred by finding him at overall MMI and denying disability benefits because, like the claimant in *Ruiz v. Bellsouth Credit & Collections*, 994 So. 2d 1220 (Fla. 1st DCA 2008), he still had yet to undergo the evaluation by a gastroenterologist. As explained below, we find *Ruiz* distinguishable from this case, and conclude that Claimant indeed can be found to have reached overall MMI, notwithstanding the referral for evaluation by a gastroenterologist. We therefore affirm the JCC’s denial of TTD or TPD benefits.

Here are the pertinent factual findings and legal conclusions from the JCC’s final compensation order. The findings are not assailed on appeal for lack of evidentiary support:

There was no disagreement among the cardiologists that claimant was at MMI physically. Dr. Weston [the

treating cardiologist] placed claimant at MMI 12/31/2013.

...

My review of Dr. Weston's treatment after 12/31/13 led me to find, factually, that claimant had no remedial cardiological medical care after that date[.] . . . I found, factually, that claimant reached physical MMI on 12/31/13.

Based on the testimony of Drs. Szabo and Pandya, claimant's psychiatrists, I found factually claimant reached MMI psychiatrically on 6/5/13. Combining the date of physical MMI with the date of psychiatric MMI, I found, factually, claimant reached over-all MMI on 12/31/13. Because claimant reached over-all MMI on 12/31/13, he was not, as a matter of law, entitled to any temporary benefits after that date.

Claimant argued the [sic] he could not be at over-all MMI because E/SA^[1] had never provided him with an evaluation by a gastroenterologist. I rejected this argument because **neither Dr. Weston nor Dr. Mathias [cardiac IME²] testified that claimant's gastric condition needed to be evaluated or treated before claimant could recover physically from his heart attack**; in other words, neither testified that claimant's aggravation of his pre-existing acid reflux disorder was a hindrance to recovery. [Footnote omitted.] . . .

. . . Dr. Weston agreed claimant should be seen by a gastroenterologist but testified that the referral was not medically necessary because of claimant's heart condition. Dr. Mathias [a cardiac IME] testified that the aspirin and Plavix claimant was prescribed by Dr. Weston could aggravate pre-existing gastroesophageal reflux disease (GERD). Dr. Nocero [a cardiac IME] thought

¹ Employer/servicing agent.

² Independent medical examiner.

there was no relationship between claimant's heart condition and his GERD. . . .

I determined factually that claimant was prescribed daily aspirin and Plavix because of his compensable heart disease and that these medications could aggravate pre-existing gastric pain. Based on these facts, I concluded as a matter of law that claimant was entitled to an evaluation by a gastroenterologist to determine if claimant's use of aspirin and Plavix on a daily basis had caused an aggravation of claimant's pre-existing condition[.] Where a compensable injury leads to a different injury or condition, which requires medical care, then the injured employee is entitled to that care or, at the very least, an evaluation to determine whether there is some connection between the compensable injury and the symptoms the employee has. [Citations omitted.] . . .

(Emphasis supplied.)

MMI is statutorily defined as the point "after which further recovery from, or lasting improvement to, [the] injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability." § 440.02(10), Fla. Stat. (2012). A claimant being treated for compensable injuries in more than one medical specialty is not at MMI until so deemed by each treating physician in each specialty. *See, e.g., Sapp v. Berman Bros.*, 884 So. 2d 1080, 1082 (Fla. 1st DCA 2004); *Greber v. Tallahassee Dev. Ctr.*, 778 So. 2d 999, 1000 (Fla. 1st DCA 2000). Here, the injuries Claimant suffered, for which he had received and was seeking extended disability benefits, were cardiac and psychiatric. The authorized physicians treating him for those injuries opined unequivocally that Claimant is at MMI for both.

Having reached MMI from the perspective of each treating specialty, Claimant is no longer entitled to temporary disability benefits. *See* § 440.15 (2), (4), Fla. Stat. (2012).

In *Ruiz*, the case Claimant relies on, we reversed the JCC’s finding of overall MMI because it was not supported by competent, substantial evidence. 994 So. 2d at 1222. The claimant in that case fell down a flight of stairs at work and subsequently complained of headaches, ankle pain, neck pain, back pain, depression and anxiety. *Id.* at 1221. The employer/carrier authorized Dr. Hershman, a gerontologist/internist, to treat the claimant’s injuries. *Id.* Dr. Hershman could find no objective basis for the complaints; so, he referred the claimant for an MRI and for evaluations with a neurologist, podiatrist, orthopedist and psychiatrist to determine the causes of the claimant’s pain, depression and anxiety, and any connection to the workplace accident. *Id.* After the claimant filed a petition for benefits, Dr. Hershman opined in deposition that the claimant was at MMI because he could do nothing more for the claimant “ ‘pending that MRI.’ ” *Id.* Deposed again a year later, Dr. Hershman testified he had last seen the claimant seven months prior and he was “ ‘pretty much done as far as my therapy was concerned.’ ” *Id.* Although the recommended evaluations had not been done—indeed, the JCC awarded all but the neurological evaluation—the JCC found the claimant at overall MMI. *Id.* at 1221-22. Understandably, we determined Dr. Hershman’s specialty-

specific MMI determination could not support a finding that the claimant was at *overall* MMI. *Id.* at 1222.

Ruiz is readily distinguished from this case. Here, both treating specialists—the cardiologist and the psychiatrist—placed Claimant at MMI; no specialty remained outstanding. The fact that Claimant’s cardiac medication may have aggravated his pre-existing GERD—hence the need for a gastroenterological evaluation—did not affect the MMI determination made by either the cardiologist or the psychiatrist. And the existence of a likelihood that Claimant’s GERD will be compensable because his cardiac medications aggravated his pre-existing acid reflux does not mean, without some supporting medical opinion, that Claimant is not at MMI for *the conditions that rendered him temporarily disabled*. Claimant had been deemed physically ready to return to work, and no doctor testified that Claimant’s GERD would, or could, in any way disable him, or that treating the gastric problem could bring about further improvement to his cardiac condition. Thus, unlike the scenario in *Ruiz*, where several of the claimant’s complaints had yet to be evaluated and treated by a variety of specialists, in this case there were no MMI determinations pending as to the conditions Claimant was being treated for. Moreover, the cardiologist’s MMI determination was not contingent on the outcome of the gastroenterological evaluation.

While *Ruiz* is not applicable here, we have previously held that “an award of medical care and treatment is inconsistent with a denial of temporary indemnity benefits for the same time period[.]” *Rosa v. Progressive Emp’r Servs./Sunz Ins. Co./USIS*, 84 So. 3d 472, 473 (Fla. 1st DCA 2012). The JCC in *Rosa* found a claimant at overall MMI based on the opinions of his treating specialists, and denied temporary disability benefits. 84 So. 3d at 473. At the same time, the JCC also authorized certain medical treatment—specifically, a nerve block—based on the expert medical advisor’s opinion that the treatment could improve the claimant’s condition. *Id.* It is not difficult to see why under those circumstances we concluded that “the JCC’s finding that Claimant had reached overall MMI is by its very nature inconsistent with the JCC’s award of the requested treatment.” *Id.* The claimant could not have reached the point where further improvement in the condition he was being treated for was not reasonably anticipated if there remained medically necessary treatment that could bring about some improvement.

That is not the situation in the case currently before us. Claimant was on temporary disability while being treated for cardiac and psychiatric conditions. Both specialists deemed him at MMI. The gastroenterology referral was for Claimant’s pre-existing GERD which may have been aggravated by his cardiac medications. Claimant’s case turned on whether the authorized evaluation could provide any remedial benefit to his cardiac condition. The answer to that question, based on the

medical opinions of the treating cardiologist and the cardiac IMEs, was no. Unlike the scenario in *Rosa*, no medical expert opined that potential treatment of Claimant's GERD could improve Claimant's cardiac condition. Rather, Claimant was placed at MMI for both his cardiac and psychiatric conditions, and was deemed physically ready to return to work, notwithstanding the GERD issue. Consequently, the JCC's concurrent denial of temporary disability benefits and approval of the gastroenterological evaluation are not inconsistent, as were the rulings in *Rosa*. To hold otherwise and apply *Rosa* to the facts in this case would yield an arguably absurd result: a claimant deemed physically and mentally ready to return to work would nonetheless remain on disability and continue receiving benefits simply because of an acid reflux condition.

The JCC here made a factually and legally correct decision in denying Claimant's request for additional TTD or TPD benefits where no medical testimony established that the gastroenterology evaluation could provide any improvement in Claimant's cardiac condition. Absent such testimony, the JCC correctly found Claimant at overall MMI. Accordingly, we affirm the final compensation order on appeal.

AFFIRMED.

CALOCA-JOHNSON, DAWN, ASSOCIATE JUDGE, CONCURS; SWANSON, J., CONCURS WITH OPINION.

SWANSON, J, concurs with opinion.

I concur because the order is affirmable based on the record and the arguments before us. I write separately, however, to dispel any notion that today's opinion stands for the proposition that a JCC may permissibly make a finding of MMI in every instance where an e/c has failed or refused to authorize a medically necessary referral from an authorized treating physician for the purpose of addressing, and possibly treating, a new (or not yet fully diagnosed) medical condition.

In his petition for benefits, Claimant sought both TTD/TPD benefits and an evaluation and treatment by a gastroenterologist as recommended by Dr. Weston, the authorized treating cardiologist. The JCC awarded the requested evaluation by a gastroenterologist for the express purpose of determining if the medication prescribed for Claimant's compensable heart condition has aggravated a preexisting gastric problem. Because it is unclear whether there is an aggravation and whether it is caused in major part by the compensable injury, the full extent of Claimant's compensable injuries as a result of the workplace accident is unknown—and it was for this very purpose that Claimant was referred for additional medically necessary testing and evaluations. Nevertheless, based on the medical testimony before her, the JCC, although awarding the requested medical evaluation, denied the claim for temporary disability benefits based on her determination that Claimant had reached overall MMI from his workplace injuries.

My concern in this case is directed toward the JCC's conclusion that Claimant reached MMI because he did not *affirmatively prove* that he would, in fact, further recover from his workplace injuries, as this conclusion seems to turn the definition of MMI on its head. Specifically, under the text of section 440.02(10), an individual reaches MMI only when it is affirmatively demonstrated that there is no reasonable anticipation of further recovery or lasting improvement from an injury or disease from a medical standpoint, which, ordinarily, cannot be credibly demonstrated when the extent of the injury is still being diagnosed and remains uncertain. In other words, if the full extent of an injury is unknown, and if additional medical evaluations and diagnostics are reasonable and medically necessary because of this uncertainty, it would seem unusual for a physician recommending such testing to also affirmatively declare (within a reasonable degree of medical probability) that there is no reasonable expectation for further medical improvement. Further, under the textual definition of MMI, any uncertainty in the prospects for further recovery or lasting medical improvement held by the medical providers should, in the ordinary case, weigh against a finding of MMI, as this statutory term (which requires a doctor to affirmatively declare, within a reasonable degree of medical probability, that no improvement is reasonably anticipated) is, by legislative design, an integral part of a compensatory system that requires the real-time provision of medical and disability benefits to an injured employee *during* the period

of medical recovery—a period that is often fraught with uncertainty, which is allayed by medical treatment and evaluations. Thus, any notion that Claimant was required to affirmatively prove that he would in fact recover further disregards the textual guidance provided by the Legislature in its definition of MMI.

Nevertheless, based on the record before us, it does not follow that the error complained of by Claimant in this appeal presents reversible error. Here, the clear and explicit testimony of the medical providers who testified established that Claimant had indeed reached MMI within a reasonable degree of medical probability. Confronted with such evidence, Claimant did not explore the foundation of these opinions, and, importantly, did not create a record demonstrating that any of the doctors whose opinions were accepted by the JCC on the critical issue of MMI misunderstood that term, or harbored uncertainty or positive expectations regarding the prospects of Claimant's further medical improvement. Without such expository evidence, the record, as it were, presented an issue of fact to be resolved by the JCC, based on her interpretation and weighing of the evidence. Although it is conceivable that the JCC could have reached a different result had the evidence been viewed differently, here the JCC's finding regarding the date of MMI is supported by medical opinion testimony.

It is also notable that, although Claimant's complaint of error regarding the date of MMI is directly tied to his claim for temporary disability benefits, he did not

introduce any evidence establishing that he had restrictions that would entitle him to such benefits. Thus, although I believe it is improper for the majority to categorically downplay the potential seriousness of Claimant's acid reflux condition (the majority suggests that because Claimant is physically and mentally capable of working, it would be "absurd" to award disability benefits "simply because of an acid reflux condition"), on this record, it is difficult to fault the majority in this regard because Claimant has not established that any of his conditions were disabling for the periods for which benefits were claimed. Accordingly, this case should be affirmed, not because every ruling and conclusion reached by the JCC was correct as a matter of law, but, rather, because the critical findings of fact are supported by the record before us, and Claimant has failed to demonstrate reversible error that warrants relief on appeal.