

APPEAL NO. 990188

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 January 5, 1999. He (hearing officer) determined that the first certification of maximum medical improvement (MMI) and an impairment rating (IR) of the appellant (claimant), certified by Dr. BU (the first certification) became final by virtue of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant appeals the finality determination, contending that it is against the great weight of the evidence. The respondent (carrier) did not respond on appeal.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that the first certification became final in this case. He asserts that it did not become final because: (1) claimant did not receive written notice of the first certification; (2) Dr. BU now disagrees with the two percent IR and rescinded it in 1998; (3) claimant had fusion surgery on his wrist; and (4) Dr. BU certified in 1998 that claimant's IR is 19%.

Rule 130.5(e) provides that the "first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." The 90-day period begins to run on the date the disputing party receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994.

Claimant testified that he injured his wrist while working for (employer). He said he underwent two surgeries and that he has not worked since October 1996. Claimant testified that he received a notice regarding the first certification one or two years ago from his employer's medical station. He said he lived at the same address during the 28 years he worked for employer. Claimant said he received impairment income benefits (IIBS) at that address but that he did not recall receiving notice of the first certification with it. He also said he did not recall receiving notice of the first certification from the Texas Workers' Compensation Commission. He said he did not call anyone to dispute the first certification before March or April 1996, when he called carrier's adjuster, Ms. N.

In a February 20, 1995, medical note, Dr. BU diagnosed what appears to be osteoarthritis of the right wrist, states that it is an exacerbation, and says, "MMP, will do IR." On March 20, 1995, Dr. BU completed a Report of Medical Evaluation (TWCC-69) in which he certified that the claimant reached MMI on February 20, 1995, with a two percent IR. There was no dispute that this was the first certification of an IR for purposes of Rule 130.5(e). In a June 14, 1995, medical note, Dr. BU states that he is considering surgery for claimant's wrist. In a July 8, 1996, medical note, Dr. C stated that he cannot give claimant an IR, that he may need more surgery, and that "the impairment will be more than two percent." In a November 4, 1998, medical record, Dr. BU stated that he feels claimant is at

MMI and stated, “rescind IR of two percent from 95.” In a November 10, 1998, letter, Dr. BU said that the two percent IR was given before claimant’s surgeries and that his IR is now 19%.

Claimant contends that he did not have notice of the first certification, and that, if he had received notice, he would have disputed the first certification. Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the hearing officer was not persuaded that claimant did not receive notice of the first certification. The hearing officer determined that claimant received notice of the first certification on May 18, 1995. The record contains an EES-19 letter dated May 18, 1995, which is properly addressed to claimant and informs claimant of the first certification. That letter states that a copy was sent to carrier and a date stamp from carrier shows that carrier received it on May 30, 1995. The record also contains a Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28) dated April 25, 1995, which informs claimant of the first certification. The hearing officer determined that claimant did not dispute the first certification until March 1996, when claimant called carrier, and that the first certification became final because it was not timely disputed. We will not reverse the hearing officer’s factual determinations in this regard because his determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra.

Claimant contends the first certification did not become final because he has had surgery to his wrist, Dr. BU has rescinded the first certification, and Dr. BU has now certified that his IR is 19%. There has been no assertion or proof that this case involved a clear misdiagnosis. Dr. BU did not rescind the first certification within the 90-day period. See Texas Workers' Compensation Commission Appeal No. 982002, decided October 5, 1998. Therefore, we conclude that the hearing officer did not err in determining that the first certification became final.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge