APPEAL NO. 991956

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 August 20, 1999. The issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. B on December 4, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer concluded that it had. The appellant (claimant herein) files a request for review arguing that the hearing officer applied the wrong legal standard in making this determination, that the hearing officer erred in finding that the claimant is not suffering from a new, undiagnosed condition, that the hearing officer erred in denying the claimant's request to take a deposition on written questions of Dr. B, and that one of the hearing officer's factual finding is facially invalid. The respondent (carrier herein) replies that there is no evidence that the hearing officer applied an incorrect legal standard, that the hearing officer's decision was supported by the evidence, that the Texas Supreme Court has recently stated misdiagnosis or change of condition does not prevent a certification from becoming final pursuant to Rule 130.5(e), and that, while one of the hearing officer's factual findings appears to be incomplete its meaning, it is clear from the decision and order read as whole.

DECISION

We reform one of the hearing officer's factual findings. Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer as reformed.

The parties stipulated that the claimant suffered a compensable injury on _____. The claimant described this injury as taking place when he was in a motor vehicle accident. The claimant required reconstructive surgery to his left hip, which was performed by Dr. B. In May 1998, Dr. B referred the claimant to Dr. T, a pain-management specialist who treated him for pain of his low back, left hip and left leg.

On a Report of Medical Evaluation (TWCC-69) dated December 4, 1998, Dr. B certified that the claimant attained MMI on November 23, 1998, with a 12% IR. There was evidence that notice of this certification was sent to the claimant by the carrier on December 22, 1998, and by the Texas Workers' Compensation Commission (Commission) on December 31, 1998. The claimant testified that he received notice of this certification but could not remember when he received it. The claimant testified he discussed the fact with Dr. B that the 12% IR rated his hip but not his back.

The claimant testified that he attempted to return to work but after working for a few weeks he got up one morning to go to church and could not move. The claimant testified he sought treatment in an emergency room and was later referred by Dr. B to Dr. W, a spine specialist. The claimant testified that Dr. W performed an MRI and told the claimant he had a herniated disc.

The claimant testified that he called his caseworker concerning this and was told that his 90 days to dispute Dr. B's certification had expired and he would need to call the Commission. The claimant testified that he called the Commission the same day or the next day. It is undisputed that this call to the Commission was made on April 7, 1999.

The claimant's attorney filed a Request for Deposition on Written Questions on July 15, 1999, requesting to depose Dr. B. The request included the questions that the claimant sought to propound to Dr. B. The questions revolved around whether Dr. B felt that the claimant's herniated disc was related to the claimant's compensable injury and whether this would change Dr. B's certification of MMI and IR. The hearing officer denied the request for deposition, stating in his order of denial that no good cause had been shown as the subject matter was irrelevant.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. [Dr. B] certified the Claimant's [MMI] date and [IR] on December 4, 1998.

3. [Dr. B's] certification was the initial certification of Claimant [MMI] date and [IR].

4. The Claimant was notified of [Dr. B's] certification no later than January 5, 1999.

5. The Claimant first disputed [Dr. B's] certification on A [sic]

6. There is insufficient evidence to establish a material mis-diagnosis preceding [Dr. B's] certification, or a substantial change of condition following his certification.

CONCLUSION OF LAW

3. The first certification of [MMI] and [IR] assigned by [Dr. B] on December 4, 1998 became final under Rule 130.5(e).

Rule 130.5(e) provides as follows:

> The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

We have held that this time does not begin to run until a party has received written notice of the assignment of an IR. Texas Workers' Compensation Commission Appeal No.

951229, decided September 5, 1995. In this case, written notice of the IR was sent to the claimant by the Commission on December 31, 1998. The claimant admits receiving this notice, but does not recall when. Rule 102.5(h) deems receipt of a notice from the Commission five days after it is mailed. The claimant was deemed to have received the December 31, 1998, notice from the Commission informing him of Dr. B's certification on January 5, 1999. This was more than 90 days before the claimant called the Commission on April 7, 1999. It is unfortunate if the claimant did not appreciate the significance of the notice he was sent. However, we have previously held that ignorance of the law is no excuse. Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994. We find no basis for the claimant's contention that the hearing officer applied the wrong legal standard in resolving the issue before him.

We had held that, where there is a clear misdiagnosis or egregious error in a first IR, finality of the first rating may not occur under the 90-day provision of Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993; Texas Workers' Compensation Commission Appeal No. 950928, decided July 21, 1995. However the Texas Supreme Court in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999) (hereinafter Rodriguez) held that misdiagnosis and change of condition would not preclude the first certification of MMI and IR from becoming final pursuant to Rule 130.5(e). We applied Rodriguez in Texas Workers' Compensation Commission Appeal No. 991238, decided July 20, 1999 (Unpublished), and in Texas Workers' Compensation Commission Appeal No. 991307, decided July 28, 1999, and find no error in the hearing officer's applying it in the present case.

Rule 142.13(e) requires a party seeking to take a deposition to seek permission from the hearing officer. The determination of whether or not to grant a request to take a deposition is based on a finding of good cause and the test for error is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 94391, decided May 16, 1994. In light of the fact that the claimant sought to depose Dr. B to prove misdiagnosis or change of condition, when the Rodriguez decision made these matters irrelevant to the application of Rule 130.5(e), we find no abuse of discretion in the hearing officer's denying the claimant's request for deposition.

Finally, we address the claimant's argument that Finding of Fact No. 5 quoted above is facially invalid. Obviously, the finding is incomplete. The hearing officer's discussion of the evidence in his decision makes clear that he was finding that the claimant first disputed Dr. B's certification on April 7, 1999. Under these circumstances, we view the defect in Finding of Fact No. 5 to be in the nature of a clerical error and as such subject to our correction by reforming the finding to read: "The Claimant first disputed [Dr. B's] certification on April 7, 1999."

The decision and order of the hearing officer are affirmed as reformed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge