APPEAL NO. 992837

Following a contested case hearing held on November 23, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the sole disputed issue by concluding that since the appellant (claimant) did not dispute the first impairment rating (IR) assigned to him within 90 days of his first written notice, the first certification of maximum medical improvement (MMI) and the IR assigned by Dr. C has become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Claimant challenges this conclusion and an underlying factual finding, asserting that he did not receive written notice of this IR until September 11, 1999. The respondent (carrier) asserts, in response, that the evidence supports the hearing officer's determination.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury; that Dr. C assigned the first certification of MMI and IR for claimant on February 22, 1999; and that the first IR assigned by Dr. C was five percent with a February 16, 1999, MMI date.

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.

Claimant testified through a Spanish language translator that he does not read English. He stated, variously, that he does not remember whether Dr. C sent him a paper in the mail about the IR; that he received some papers from the carrier in the mail in August 1999 including notice of the MMI date and IR; and that he received the paper with the five percent IR on September 11, 1999. He further stated that when the carrier stopped sending checks, he called the Texas Workers' Compensation Commission (Commission) and was told about Dr. C's MMI date and IR; that he had his friend, Mr. D, read all the papers he received from the carrier; that Mr. D read the paper about the five percent IR and told him he needed to talk to the carrier; and that the paper with the five percent IR looked like other papers he received from the carrier. He also indicated he received a large manila envelope from the carrier postmarked September 8, 1999, which contained all of the papers from the carrier.

Mr. D testified that he is claimant's friend; that he read the carrier's letters that claimant brought to him and, with his limited knowledge of Spanish, helped claimant understand the contents; that claimant had him call the Commission when the carrier's checks stopped coming; that it was around September 11, 1999, when claimant brought him correspondence concerning the IR; and that he did not see anything about the IR in claimant's mail prior to that time. He conceded that he could not know whether claimant brought him all the correspondence he received from the carrier but felt that he had.

Claimant further testified that prior to September 1, 1998, he resided at an address on (address A); that from September 1, 1998, to April 7, 1999, he resided (address B); and that since April 8, 1999, he has resided (address C). Claimant indicated there was some initial confusion over the apartment number when he moved to address B, causing two checks to be returned to the carrier, but that they were sent to him again when the correct address was clarified.

In a report to the carrier dated February 22, 1999, Dr. C, who performed an independent medical evaluation (IME), stated that claimant had reached MMI as of February 16, 1999, with an IR of five percent for his lumbar spine injury based on Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. Dr. C also noted that six of seven Waddell's signs were positive. On October 13, 1999, Ms. O of Dr. C's office wrote that the IME report was mailed to claimant on February 25, 1999, and was not returned by the post office.

The Commission, on March 16, 1999, sent a letter to the carrier, in both English and Spanish, stating, among other things, that Dr. C had determined that claimant reached MMI on February 16, 1999, with an IR of five percent, and that if a party disagreed with the MMI date or IR, such must be disputed within 90 days after receiving notice of the certification or rating. That letter reflected that a copy was sent to claimant. Claimant introduced a copy of that letter, in English, sent to him at address A and a copy of a Commission envelope postmarked March 16, 1999, bearing a stamp stating that the letter was not deliverable as addressed and that the forwarding address had expired.

In her affidavit, Ms. M stated that she is employed by the carrier to handle workers' compensation claims and that on February 25, 1999, she mailed a letter and a copy of Dr. C's Report of Medical Evaluation (TWCC-69) dated February 22, 1999, to claimant and to his treating doctor, Dr. M. The TWCC-69 certifies that claimant reached MMI on "2-16-99" with an IR of "5%." The letter she attached is from the carrier to claimant dated February 25, 1999, and addressed to claimant at address B.

In evidence is the carrier's letter of August 14, 1999, to claimant at address C stating that he should contact the Commission to get a referral to the Texas Rehabilitation Commission for retraining. Attached to this letter is a "Notification Regarding [MMI] and/or [IR]" stating that the carrier received a report from Dr. C assigning an IR of five percent and that, based on that report, claimant will not receive additional temporary income benefits but will receive impairment income benefits. Also attached is a copy of Dr. C's TWCC-69.

Also in evidence is an October 25, 1999, letter to Dr. M from a Commission employee assisting claimant which asks whether Dr. M's disagreement with Dr. C's MMI date, which Dr. M wrote on the bottom of Dr. C's TWCC-69 on March 1, 1999, was a dispute on claimant's behalf and whether he had discussed the matter with claimant. Dr. M responded on October 16, 1999, that he had no office notes to the effect that he discussed the MMI date with claimant.

The hearing officer's finding that claimant disputed the first IR assigned to him on August 19, 1999, is not disputed. However, in addition to the dispositive legal conclusion, claimant challenges the finding that he received his first written notice of the first IR assigned to him no later than March 4, 1999.

In her discussion of the evidence, the hearing officer writes that on February 25, 1999, the carrier sent claimant a letter to address B which references the first IR; that claimant resided at this address until April 7, 1999; that, based on the credible evidence, she finds that claimant received first written notice of the first IR not later than March 4, 1999, allowing a reasonable time for mailing; and that claimant did not dispute the IR until at least August 19, 1999.

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 (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. The testimony of a claimant, as an interested party, only raises an issue of fact for the hearing officer to resolve (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)) and need not be accepted at face value (Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ)).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge