

APPEAL NO. 140340
FILED APRIL 17, 2014

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 October 23, 2013, and January 14, 2014, in [City], Texas, with [hearing officer] presiding as the hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) had disability, resulting from an injury sustained on [date of injury], from October 25, 2012, through March 20, 2013, but not otherwise after April 16, 2012; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. O] on September 20, 2012, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); and (3) Dr. O is the claimant's initial choice of treating doctor. The appellant (carrier) appeals the hearing officer's determinations regarding disability and finality of the first certification from Dr. O, contending that the evidence did not show that any exception to finality had been met and that the claimant did not provide sufficient medical documentation to support a finding of disability during the period at issue. The claimant responded, urging affirmance of the hearing officer's determinations. The claimant argued that Dr. O's narrative report is fundamentally flawed and that there is sufficient evidence to support the hearing officer's disability determination.

The hearing officer's determination that Dr. O is the claimant's initial choice of treating doctor was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury; (2) in a report dated September 20, 2012, Dr. O certified that the claimant reached MMI on September 20, 2012, with a three percent IR; (3) Dr. O's certification is the first certification of MMI and assigned IR in this claim; and (4) Dr. O's certification was not disputed within 90 days after the claimant received it. In Finding of Fact No. 4, which was not appealed by the parties, the hearing officer found that Dr. O's certification is valid for the purposes of Rule 130.12(c). The claimant testified that on the date of injury he was playing hockey, the weight was on his right knee, the right knee went over and twisted at the same time, and he instantly felt a pop.

DISABILITY

The hearing officer's determination that the claimant had disability, resulting from an injury sustained on [date of injury], from October 25, 2012, through March 20, 2013, but not otherwise after April 16, 2012, is supported by sufficient evidence and is affirmed.

SECTION 408.123 AND RULE 130.12 FINALITY

The hearing officer also determined that the first certification of MMI and assigned IR from Dr. O on September 20, 2012, did not become final under Section 408.123 and Rule 130.12. The hearing officer cited to Appeals Panel Decision (APD) 132117, decided November 4, 2013, and stated in Finding of Fact No. 6 and similarly in the Discussion portion of his decision, that there is compelling medical evidence of a significant error in Dr. O's certification pursuant to Section 408.123(f)(1)(A) because:

[Dr. O] did not explain in the narrative report how she derived the assigned [IR] from Table 64 of the [Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides)] and did not include examination findings to support the [IR].

However, the evidence reflects that Dr. O included examination findings in her reports that are dated September 20, 2012, the date of the certifying examination. Dr. O described an examination of the right knee, and the examination findings included a notation that the claimant had full active and passive flexion and extension. Dr. O also identified the specific Table in the AMA Guides that she used to assign the claimant a seven percent lower extremity IR, which converts to the three percent whole person IR that is also reflected on the Report of Medical Evaluation (DWC-69).

Section 408.123(e) provides that "[e]xcept as otherwise provided by this section, an employee's first valid certification of [MMI] and first valid assignment of an [IR] is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means." Section 408.123(f) provides in pertinent part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described by Subsection (e) if compelling medical evidence exists of a significant error by the certifying doctor in applying the AMA Guides or in calculating the IR.

As mentioned earlier, the hearing officer cited to APD 132117, *supra*. The parties argued over the meaning of two sentences in APD 132117:

To determine whether or not a certifying doctor has made a significant error in applying the AMA Guides an examination must be made of the certifying doctor's DWC-69, narrative report, and the AMA Guides. To properly assess an IR the certifying doctor must explain in the narrative report how he or she derived the assigned IR, including any range of motion measurements or other values required by the AMA Guides.

APD 132117 was not outlining a set of criteria to determine when a certification falls under the exception provided in Section 408.123(f)(1)(A). It was illustrating that a case-by-case analysis is required when determining whether Section 408.123(f)(1)(A) applies. The holding of the case was that the mere inclusion of a condition in an assignment of IR, by itself, is not an exception to finality under Section 408.123 or Rule 130.12.

In the current case, the hearing officer based his determination merely on what he found to be absent from the narrative report. The specific exception found by the hearing officer requires compelling medical evidence of a significant error by the certifying doctor in applying the AMA Guides or in calculating the IR. The hearing officer does not identify how the AMA Guides have been misapplied, nor does he identify a miscalculation of the IR. A determination of whether compelling medical evidence exists of a significant error by the certifying doctor in applying the AMA Guides or in calculating the IR must be based on a totality of the evidence.

In this case, there is no compelling medical evidence of a significant error by the certifying doctor in applying the AMA Guides or in calculating the IR. Accordingly, we reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. O on September 20, 2012, did not become final under Section 408.123 and Rule 130.12, and render a new determination that the first certification of MMI and assigned IR from Dr. O on September 20, 2012, did become final under Section 408.123 and Rule 130.12.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability, resulting from an injury sustained on [date of injury], from October 25, 2012, through March 20, 2013, but not otherwise after April 16, 2012.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. O on September 20, 2012, did not become final under Section 408.123 and Rule 130.12, and render a new decision that the first certification of MMI and assigned IR from Dr. O on September 20, 2012, did become final under Section 408.123 and Rule 130.12.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Tracey T. Guerra
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge