

APPEAL NO. 142307
FILED DECEMBER 22, 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 June 5, 2014, with the record closing on September 26, 2014, in Fort Worth, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [Date of Injury], extends to left shoulder SLAP tear of the superior labrum, labral tear, and impingement syndrome; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI, no impairment rating (IR) can be assigned; and (4) the first certification of MMI and IR assigned by (Dr. H) on April 8, 2013, did not become final under Section 408.123(e) and 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). We note that the hearing officer's citations of law in his finality determination mistakenly reference Rule 130.105 rather than Rule 130.12.

The appellant (carrier) appealed all of the hearing officer's determinations, contending those determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed as reformed.

It was undisputed that the claimant sustained a compensable injury on [Date of Injury]. It was also undisputed that the claimant received written notice of Dr. H's MMI/IR certification on May 3, 2013, and that the claimant did not file a Request to Schedule, Reschedule, or Cancel a [Benefit Review Conference (BRC) (DWC-45)] until September 16, 2013, which is outside the 90-day timeframe to dispute. The parties stipulated in part that the compensable injury includes at least a left shoulder contusion. The claimant testified that on the date of injury he tripped and fell onto his left shoulder.

CITATIONS OF LAW IN ISSUE STATEMENT 4, CONCLUSION OF LAW NO. 6, AND DECISION

The finality issue as stated on the BRC report reads the following:

Did the first certification of [MMI] and assigned [IR] from [Dr. H] on [April 8, 2013] become final under [Section] 408.123 and Rule 130.12?

The parties agreed on the record to the finality issue as worded on the BRC report. We reform the hearing officer's decision by striking all references to Section 408.123(e) and Rule 130.5(e), and replace with Section 408.123 and Rule 130.12 to reflect the correct citations of law as stated on the BRC report and agreed to by the parties.

STIPULATIONS

The parties stipulated on the record to the following stipulations:

The Texas Department of Insurance, Division of Workers' Compensation (Division) selected (Dr. B) as its designated doctor to determine MMI, IR, and extent of injury.

On May 2, 2013, Dr. B certified that the claimant reached MMI on April 8, 2013, with an IR of one percent.

However, the decision incorrectly identifies the above stipulations as Finding of Fact Nos. 3 and 4 rather than stipulations. Further, Finding of Fact No. 3 fails to reflect that Dr. B was selected to determine the extent of the claimant's compensable injury. Finding of Fact No. 4 incorrectly states that "[o]n May 2, 2013, [Dr. B] certified on April 8, 2013, that [the] [c]laimant reached MMI on February 28, 2013, with an IR of [one percent]." We note that there is no Report of Medical Evaluation (DWC-69) from Dr. B in evidence certifying a February 28, 2013, MMI date. We reform the hearing officer's decision by striking Finding of Fact Nos. 3 and 4, and add the following as Finding of Fact Nos. 1.E. and 1.F.:

Finding of Fact No. 1.E.: The Division selected Dr. B as its designated doctor to determine MMI, IR, and extent of injury.

Finding of Fact No. 1.F.: On May 2, 2013, Dr. B certified that the claimant reached MMI on April 8, 2013, with a one percent IR.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], extends to left shoulder SLAP tear of the superior labrum, labral tear, and impingement syndrome is supported by sufficient evidence and is affirmed.

MMI/IR

The hearing officer's determinations that the claimant has not reached MMI and because the claimant has not reached MMI, no IR can be assigned are supported by sufficient evidence and is affirmed.

FINALITY

Section 408.123(e) provides that except as otherwise provided by Section 408.123, 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. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid DWC-69, as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both.

Section 408.123 provides in part:

(f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by Subsection (e) if:

(1) compelling medical evidence exists of:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];

(B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

The hearing officer determined that the first certification of MMI and IR assigned by Dr. H on April 8, 2013, did not become final under Section 408.123 and Rule 130.12. In Finding of Fact No. 8 the hearing officer found the following:

The first certification of MMI and IR by [Dr. H] failed to include the previously undiagnosed medical diagnoses/conditions of left shoulder SLAP tear of the superior labrum, labral tear and impingement syndrome; [the] [c]laimant had not had adequate treatment for these diagnoses/conditions at the time of [Dr. H's] certification of MMI and IR; and [Dr. H] failed to rate the full extent of the compensable injury, as found herein, at the time of his certification of MMI and IR.

Thus, the hearing officer determined that Dr. H's April 8, 2013, MMI/IR certification did not become final for three reasons, each of which is discussed below.

INADEQUATE TREATMENT

The hearing officer determined that Dr. H's April 8, 2013, MMI/IR certification did not become final in part because he found that the claimant had not had adequate treatment for the left shoulder SLAP tear of the superior labrum, labral tear and impingement syndrome prior to Dr. H's April 8, 2013, MMI/IR certification. To apply the exception to finality in Section 408.123(f)(1)(C), there must be compelling medical evidence of improper or inadequate treatment before the date of certification or assignment. See Appeals Panel Decision (APD) 110527, decided June 3, 2011. In the instant case, no doctor opined that the claimant received improper or inadequate treatment for his injury. There is no compelling medical evidence that the claimant received improper or inadequate treatment for his injury before April 8, 2013, the date of Dr. H's MMI/IR certification. Therefore, the hearing officer erred in finding an exception to finality based on Section 408.123(f)(1)(C).

FAILURE TO RATE THE ENTIRE COMPENSABLE INJURY

The hearing officer determined that Dr. H's April 8, 2013, MMI/IR certification did not become final in part because he found that Dr. H failed to rate the entire compensable injury. The Appeals Panel has previously held that a subsequent determination that the compensable injury extends to a disputed condition is not, by itself, an exception to finality. See APD 132594-s, decided January 3, 2014, and APD 140114, decided March 10, 2014. In the case on appeal, the hearing officer based his determination that Dr. H's April 8, 2013, MMI/IR certification did not become final in part because Dr. H's MMI/IR certification fails to rate the disputed extent-of-injury conditions found compensable by the hearing officer and affirmed above. Under APD 132594-s, *supra*, this basis for the hearing officer's determination that Dr. H's April 8, 2013, MMI/IR certification did not become final is legally incorrect.

UNDIAGNOSED CONDITIONS

The hearing officer determined that Dr. H's April 8, 2013, MMI/IR certification did not become final in part because he found that Dr. H's MMI/IR certification failed to include the previously undiagnosed medical conditions of left shoulder SLAP tear of the superior labrum, labral tear, and impingement syndrome.

Dr. H examined the claimant on April 8, 2013, and certified that the claimant reached MMI on April 8, 2013, and assigned a zero percent IR based on diagnoses of anterior superior labrum, rotator cuff capsule sprain, and labral tear.

In evidence is an initial evaluation and treatment plan dated January 30, 2013, noting that an MRI indicated a problem in the claimant's anterior superior labrum. Also in evidence is a medical record from Dr. H dated February 15, 2013, in which Dr. H noted an impression of a "possible SLAP tear" in the left shoulder. Also in evidence is a medical record dated March 21, 2013, noting an impression of a "possible SLAP tear." Additionally, as noted above Dr. H considered the conditions of the claimant's left anterior superior labrum and labral tear. Because the evidence reflects that the conditions of a left shoulder SLAP tear of the superior labrum and a labral tear are not previously undiagnosed conditions, that portion of the hearing officer's finding of fact regarding those conditions are not supported by the evidence. Accordingly, we strike that portion of Finding of Fact No. 8 that the first certification of MMI and IR by Dr. H failed to include the previously undiagnosed medical diagnoses/conditions of left shoulder SLAP tear of the superior labrum and a labral tear.

The remaining condition discussed by the hearing officer is impingement syndrome. The evidence reflects that impingement syndrome was first diagnosed by I (Dr. VH) on May 13, 2013. We hold that there was compelling medical evidence of a previously undiagnosed medical condition, which was impingement syndrome, and that the subsequent diagnosis of impingement syndrome constituted a previously undiagnosed medical condition and is an exception to finality under Section 408.123(f)(1)(B). See APD 072090, decided January 25, 2008, and APD 121007, decided July 19, 2012. That portion of Finding of Fact No. 8 that the first certification of MMI and IR by Dr. H failed to include the previously undiagnosed medical diagnosis/condition of impingement syndrome is supported by the evidence. Accordingly, we affirm the hearing officer's determination that the first certification of MMI and IR assigned by Dr. H on April 8, 2013, did not become final under Section 408.123 and Rule 130.12.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [Date of Injury], extends to left shoulder SLAP tear of the superior labrum, labral tear, and impingement syndrome.

We affirm the hearing officer's determination that the claimant has not reached MMI and because the claimant has not reached MMI, no IR can be assigned.

We affirm the hearing officer's determination that the first certification of MMI and IR assigned by Dr. H on April 8, 2013, did not become final under Section 408.123 and Rule 130.12.

We reform the hearing officer's decision to strike all references to Section 408.123(e) and Rule 130.5(e), to read Section 408.123 and Rule 130.12.

We reform the hearing officer's decision by striking Finding of Fact Nos. 3 and 4, and add the following as Finding of Fact Nos. 1.E. and 1.F.:

Finding of Fact No. 1.E.: The Division selected Dr. B as its designated doctor to determine MMI, IR, and extent of injury.

Finding of Fact No. 1.F.: On May 2, 2013, Dr. B certified that the claimant reached MMI on April 8, 2013, with a one percent IR.

We reform the hearing officer's decision by striking that portion of Finding of Fact No. 8 that the first certification of MMI and IR by Dr. H failed to include the previously undiagnosed medical diagnoses/conditions of left shoulder SLAP tear of the superior labrum and labral tear.

The true corporate name of the insurance carrier is **ACCIDENT FUND INSURANCE COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge