APPEAL NO. 100943
FILED SEPTEMBER 13, 2010

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 October 19, 2009, April 5, 2010, and concluded on June 1, 2010. The issues before the hearing officer were: (1) what is the appellant's (claimant) impairment rating (IR); and (2) does the compensable injury of _____, extend to depression, chronic pain syndrome and/or adjustment disorder with anxiety (added by agreement of the parties). The hearing officer determined that: (1) the claimant's IR is 5%; (2) the compensable injury of _____, extends to chronic pain syndrome; and (3) the compensable injury of _____, does not extend to depression and/or adjustment disorder with anxiety. The claimant appeals the hearing officer's IR and extent-of-injury determinations that are adverse to the claimant. Additionally, the claimant appeals the withdrawal of three issues to be litigated at the CCH, and one of the stipulations in the decision as being incorrect. The hearing officer's determination that the claimant's compensable injury extends to include chronic pain syndrome has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part, as reformed.

TIMELINESS OF RESPONDENT'S (CARRIER) RESPONSE

The claimant's request for review was sent to the Texas Department of Insurance, Division of Workers' Compensation (Division) by certified mail on July 6, 2010, and received by the Division on July 9, 2010. The claimant's appeal was timely received by the Division.[1]

The claimant's appeal and certificate of service show that the claimant sent his appeal by certified mail to the carrier's attorney on Monday, July 5, 2010. The certificate of service indicates that the claimant only served the carrier's attorney with a copy of the appeal. Records of the Division reflect that the Division served the carrier with a copy of the claimant's appeal by placing a copy of the claimant's appeal in the carrier's Austin representative's box on Wednesday, July 7, 2010. *See* 28 TEX. ADMIN. CODE § 143.3(b) (Rule 143.3(b)). Pursuant to Rule 102.5(d), the carrier is deemed to have received the claimant's appeal on Thursday, July 8, 2010. Additionally, the notice sheet placed in the carrier's Austin representative's box with a copy of the claimant's appeal is stamped as received by the carrier's Austin representative on July 8, 2010.

[1] We note that the decision and order was not mailed to the claimant at the address shown on the sign-in sheet at the June 1, 2010, CCH. The due date for the claimant's appeal would have been July 5, 2010, had the decision and order been mailed to the claimant's correct address. The claimant's appeal is considered timely.

In its response to the claimant's appeal, the carrier asserts that the "[c]ounsel for the [c]arrier, and counsel present at the [b]enefit [CCH], received the [c]laimant's [r]equest for [r]eview on August 20, 2010;" and "that pleading was not served upon counsel for the [c]arrier." Additionally, the carrier states that the "[c]laimant's counsel chose to ignore the responsibility to make proper service." The carrier states that "good cause is shown for the filing of this response on August 23, 2010."

However, as previously mentioned, the claimant's appeal was served to the carrier by the Division on July 7, 2010, and the notice sheet placed in the carrier's Austin representative's box with a copy of the claimant's appeal is stamped as received by the carrier's Austin representative on July 8, 2010. Therefore, the time deadline for the carrier to file a response began on July 8, 2010, and no good cause has been shown to extend that time period.

In the instant case, the carrier's deemed receipt of the claimant's appeal is July 8, 2010, in accordance with Section 410.202(b) and Rule 143.4(c), excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, and the carrier's response had to be filed or mailed no later than Thursday, July 29, 2010.

The carrier's response dated August 23, 2010, was hand-delivered to the Division on August 23, 2010, and received by the Division on that same date. Accordingly, the response not having been mailed or filed by July 29, 2010, is untimely. The Appeals Panel has held that an untimely response will not be considered. *See* Appeals Panel Decision (APD) 041598, decided August 24, 2004.

ISSUE WITHDRAWAL

A benefit review conference (BRC) was held on December 5, 2008, and four issues were certified out of the BRC. The hearing officer states that at the CCH subsequently held, three of those issues were withdrawn by agreement of the parties: (1) did the first certification of IR assigned by (Dr. A) become final under Rule 130.12(b); (2) did the carrier dispute the IR prior to the expiration of the first quarter of supplemental income benefits (SIBs) per Rule 130.102(g); and (3) is the claimant entitled to SIBs for the first and second quarters.

The CCH was recorded on three compact discs (CDs) for proceedings held on October 19, 2009, April 5, 2010, and June 1, 2010. A review of the CDs reflects that the claimant's attorney agreed on the record that the issues to be decided at the CCH were IR and extent of injury to the claimed conditions mentioned above. The other certified issues were withdrawn by agreement of both parties. We perceive no error on the hearing officer's part in revising the issues.

STIPULATION

The claimant alleges that Stipulation E of Finding of Fact No. 1, "Dr. [A] is the properly appointed [d]esignated [d]octor to determine [IR], ability of [c]laimant to return to work and disability for this claim," is more than what his attorney agreed to, and that the actual stipulation was worded as "Dr. [A] is the properly appointed [d]esignated [d]octor for this claim." A review of the recorded CDs indicates that the claimant's allegation is correct. We reform Stipulation E of Finding of Fact No. 1 to state that Dr. A is the properly appointed designated doctor for this claim.

FACTUAL BACKGROUND

It was undisputed that the claimant sustained a compensable injury on _____. On the date of injury the claimant was lifting a metal file damper when he felt something slip in his back. The parties stipulated that the claimant reached maximum medical improvement (MMI) on October 2, 2007.

The hearing officer sent a letter of clarification (LOC) to Dr. A on November 6, 2009, to: (1) question what significant findings of radiculopathy[2] supported Dr. A's 15% IR for Diagnosis-Related Estimates (DRE) Lumbosacral Category III: Radiculopathy from 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); (2) point out that if the claimant met the requirements for DRE Lumbosacral Category III: Radiculopathy, the IR for that category is 10% not 15%; and (3) render an opinion on whether the claimant's compensable injury extended to include depression, chronic pain syndrome and/or adjustment disorder with anxiety, and to provide alternative ratings for those conditions.

Dr. A re-examined the claimant on December 7, 2009. In his response to the November 6, 2009, LOC, Dr. A stated that upon further review of the claimant's medical record the claimant appeared to have an injury classified under DRE Lumbosacral Category II: Minor Impairment. Regarding the extent-of-injury issue, Dr. A stated it was not possible to make a determination regarding the claimant's depression based on the available information. Dr. A noted that the claimant had been seen by psychologists and diagnosed with depression and anxiety, and that an anti-depressant and anxiolytic had been recommended by a psychologist. Dr. A certified that the claimant reached MMI on the statutory MMI date of October 2, 2007, based on the 5% IR, for DRE Lumbosacral Category II: Minor Impairment.

The hearing officer determined that the claimant's compensable injury extends to include chronic pain syndrome but does not extend to include depression and/or adjustment disorder with anxiety, and that the claimant's IR is 5%.

[2] The hearing officer noted that Dr. A previously noted only diminished reflexes bilaterally in the claimant's lower extremities and no indication of atrophy.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to depression and/or adjustment disorder with anxiety is supported by sufficient evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

As previously discussed, the hearing officer sent an LOC to Dr. A on November 6, 2009, to provide alternative ratings for the disputed extent-of-injury conditions. In providing alternative IRs for the compensable injury, Dr. A did not provide an IR for depression or address adjustment disorder with anxiety; however, we have affirmed the hearing officer's determination that the compensable injury does not extend to depression and/or adjustment disorder with anxiety. Dr. A does not specifically mention or provide any IR on chronic pain syndrome. Because the hearing officer's determination that the compensable injury extends to chronic pain syndrome has become final, Dr. A's certification does not rate the entire compensable injury. *See* APD 080380, decided May 8, 2008. Therefore, Dr. A's certification cannot be adopted. We reverse the hearing officer's determination that the claimant's IR is 5%.

The only other certification in evidence with the correct MMI date of October 2, 2007, is from (Dr. H). However, this certification cannot be adopted because it does not rate the chronic pain syndrome which has been determined to be part of the compensable injury. Because there is no other certification in evidence that can be adopted, we remand this case back to the hearing officer.

REMAND INSTRUCTIONS

The designated doctor in this case is Dr. A. On remand the hearing officer is to determine whether Dr. A is still qualified and available to be the designated doctor, and if so, request that Dr. A rate the entire compensable injury, including chronic pain syndrome, in accordance with the AMA Guides based on the claimant's condition as of the October 2, 2007, date of MMI considering the medical record and the certifying examination and the rating criteria in the AMA Guides. The hearing officer is to instruct the parties to send all of the medical documentation that was submitted at the CCH to Dr. A to assist Dr. A in his assessment. The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response, and are to be

allowed an opportunity to respond. If Dr. A is no longer qualified and available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's IR.

SUMMARY

We reform the hearing officer's decision by correcting a clerical error in Stipulation E of Finding of Fact No. 1 to state that Dr. A is the properly appointed designated doctor for this claim.

We affirm the hearing officer's determination that the claimant's compensable injury of _____, does not extend to depression and/or adjustment disorder with anxiety.

We reverse the hearing officer's determination that the claimant's IR is 5% and we remand the IR issue to the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

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

CINDY GHALIBAF
5221 NORTH O'CONNOR BLVD., SUITE 400
IRVING, TEXAS 75039-3711.

_____
Carisa Space-Beam
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge