APPEAL NO. 142338
FILED DECEMBER 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 (CCH) was held on May 15, 2014, and May 21, 2014, with the record closing on September 29, 2014, in (city), 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], does not extend to L4-5 and L5-S1 disc bulges; (2) the appellant (claimant) did not have disability from December 3, 2012, through May 16, 2013; (3) the claimant does have disability from April 8, 2014, to the date of the CCH; (4) the claimant reached maximum medical improvement (MMI) on February 12, 2012; (5) the claimant's impairment rating (IR) is 12%; and (6) the first certification of MMI and IR assigned by (Dr. B) on April 11, 2012, did become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). We note that Issue No. 5 states Dr. B's certification date is April 10, 2012, the hearing officer's Decision states Dr. B's certification date is April 11, 2013, but Dr. B's certification in evidence is dated April 11, 2012. The claimant appealed, disputing the hearing officer's determinations of extent of injury, MMI, IR, finality, and the portion of the disability determination that was not in his favor.

The claimant contended on appeal that there was sufficient evidence of causation to prove the compensability of the disputed conditions, and therefore, there was improper or inadequate treatment for the compensable injury prior to the date of the certification by Dr. B to render his certification not final. The claimant further argued that he is not at MMI in accordance with the opinion of (Dr. G), and he was unable to work from December 3, 2012, through May 16, 2013. The respondent (self-insured) responded, urging affirmance of the disputed determinations.

The hearing officer's determination that the claimant does have disability from April 8, 2014, to the date of the CCH was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on [Date of Injury], the claimant sustained a compensable injury in the form of a lumbar sprain and right shoulder injury while carrying a refrigerator down the stairs. They further stipulated that the claimant did not dispute Dr. B's certification of MMI and IR within 90 days of receiving it, and that the date of statutory MMI is June 28, 2013. The claimant testified that as he was helping to

move the refrigerator, his co-worker lost his grip on his end, and the claimant had to support the full weight of the refrigerator.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], does not extend to L4-5 and L5-S1 disc bulges is supported by sufficient evidence and is affirmed.

FINALITY AND MMI/IR

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the 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 and that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c). Rule 130.12(c) provides, in part, that a certification of MMI and/or IR assigned as described in subsection (a) must be on a [DWC-69]. The certification on the [DWC-69] is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage [IR] assigned; and (3) there is the signature of the certifying doctor who is authorized by the Texas Department of Insurance, Division of Workers' Compensation (Division) under Rule 130.1(a) to make the assigned impairment determination.

The hearing officer determined that the first certification of MMI and IR assigned by Dr. B on April 11, 2012, did become final under Section 408.123 and Rule 130.12. He further determined that the claimant reached MMI on February 12, 2012, and the claimant's IR is 12% in accordance with this certification. As noted above, the parties stipulated that the claimant did not dispute Dr. B's certification of MMI and IR within 90 days of receiving it. Additionally, the hearing officer found in Finding of Fact No. 13 that Dr. B's assigned IR was a valid rating. That finding is supported by sufficient evidence. However, in order for a certification to become final under Section 408.123 and Rule 130.12, it must also be the first certification. In evidence is a prior certification by Dr. B dated February 3, 2012, in which he certifies that the claimant reached MMI on February 2, 2012, with a 10% IR. The certification contains an MMI date that is not prospective, an IR is assigned, and it is signed by a certifying doctor who is authorized by the Division under Rule 130.1(a) to make the assigned IR.

Section 408.123(h) and Rule 130.12(a)(3) state that if a certification of MMI and IR is finally modified, overturned, or withdrawn by agreement of the parties, the first certification made after that can become final. In Appeals Panel Decision (APD) 061569-s, decided October 2, 2006, the Appeals Panel cited APD 052108, decided October 25, 2005, stating:

> The preamble to Rule 130.12 provides examples of what does and does not come within the meaning of Rule 130.12(a)(3) stating in part, "[i]n the event the first MMI/IR is the only certification and it is rescinded, or in the event an agreement or [Division] decision and order is entered but another certification on record is not selected, this would fall within the scope of this subsection. In these situations, the next certification received after this event would become the first certification that may become final if not disputed as provided in this section and by statute." For a subsequent MMI/IR certification to become final, it must be made after a decision that modifies, overturns, or withdraws a first MMI/IR certification that became final.

In the case on appeal, the hearing officer did not make findings on whether Dr. B's prior certification dated February 3, 2012, was finally modified, overturned, or withdrawn, or which was the first certification.

As there is a prior certification by Dr. B dated February 3, 2012, in evidence, we reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. B on April 11, 2012, did become final under Section 408.123 and Rule 130.12, and we remand the issue of finality to the hearing officer to determine what is the first valid certification and whether it became final under Section 408.123 and Rule 130.12.

Because we have reversed and remanded the hearing officer's determination that the first certification of MMI and IR assigned by Dr. B on April 11, 2012, did become final under Section 408.123 and Rule 130.12, we also reverse the hearing officer's determination that the claimant reached MMI on February 12, 2012, and the claimant's IR is 12% in accordance with that certification, and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The claimant has the burden to prove that he had disability as defined by Section 401.011(16). Disability is a question of fact to be determined by the hearing

officer. *See* APD 042097, decided October 18, 2004. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. APD 041116, decided July 2, 2004. The claimant need not prove that the compensable injury was the sole cause of his disability; only that it was a producing cause. APD 042097, *supra*.

The hearing officer determined that the claimant did not have disability from December 3, 2012, through May 16, 2013. Regarding disability, the hearing officer stated in the Discussion section of his decision the following:

> [The claimant] underwent lumbar spinal surgery on November 29, 2012. He was returned to full duty work on May 17, 2013. He underwent shoulder surgery on April 8, 2014, and was taken off work by his surgeon and not yet returned to full duty work. The lumbar surgery was not related to the compensable injury. The right shoulder surgery was related to the compensable injury. [The] [c]laimant does not have disability as a result of the lumbar surgery but does have disability from April 8, 2014, through the date of this hearing.

However, in evidence is an operative report dated November 29, 2012, that indicates that the claimant had surgery to the right shoulder on that date, not to the lumbar spine as indicated by the hearing officer. Another operative report in evidence dated April 8, 2014, indicates that the claimant had lumbar spinal surgery on that date. As the hearing officer's determination that the claimant did not have disability from December 3, 2012, through May 16, 2013, is based on his mistaken belief that the claimant had lumbar spinal surgery on November 29, 2012, we reverse the hearing officer's determination that the claimant did not have disability from December 3, 2012, through May 16, 2013, and remand the issue of disability for the period of December 3, 2012, through May 16, 2013, for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [Date of Injury], does not extend to L4-5 and L5-S1 disc bulges.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. B on April 11, 2012, did become final under Section 408.123 and Rule 130.12, and we remand the issue of finality to the hearing officer to determine what is the first valid certification and whether it became final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determinations that the claimant reached MMI on February 12, 2012, and the claimant's IR is 12%, and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant did not have disability from December 3, 2012, through May 16, 2013, and remand the issue of disability for the period of December 3, 2012, through May 16, 2013, for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to either take a stipulation from the parties or make a finding of fact regarding which certification is the first valid certification in this case and whether the first valid certification was finally modified, overturned, or withdrawn by agreement of the parties. The hearing officer is to determine whether the certification became final under Section 408.123 and Rule 130.12. The hearing officer is to correct the date of Dr. B's certification in the decision. The hearing officer is then to make a determination on finality, MMI, and IR consistent with this decision.

Further, on remand the hearing officer is to consider the evidence regarding the claimant's disability during the period of December 3, 2012, through May 16, 2013, including the correct dates of the claimant's right shoulder and lumbar spinal surgeries, and make a determination on disability for the period of December 3, 2012, through May 16, 2013, which is consistent and is supported by the evidence.

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 **SAN ANTONIO HOUSING AUTHORITY (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

HENRY ALVAREZ
818 SOUTH FLORES
SAN ANTONIO, TEXAS 78204

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge