APPEAL NO. 181983
FILED OCTOBER 29, 2018

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 August 2, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on February 27, 2017; (2) the claimant's impairment rating (IR) is 10%; and (3) the first certification of MMI and assigned IR from (Dr. M) on March 3, 2017, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). The claimant appealed, disputing the ALJ's determinations of finality, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed finality, MMI, and IR determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), and that the compensable injury of (date of injury), extends to at least a left shoulder injury. The evidence reflects that the claimant was injured when handling luggage.

The ALJ 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. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

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 Report of Medical Evaluation (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.

In evidence are two Notification(s) of [MMI]/First Impairment Income Benefit Payment (PLN-3) from the carrier addressed to the claimant. The first PLN-3 is dated March 16, 2017, and was sent to the claimant at his correct mailing address at that time. The second PLN-3 is dated March 24, 2017, and was also sent to the claimant at his correct mailing address at that time. The second PLN-3 was sent as a corrected form because the first PLN-3 contained an incorrect MMI date and impairment income benefits calculation. We note that both the March 16, 2017, and March 24, 2017, PLN-3s state that Dr. M's March 3, 2017, DWC-69 was attached to each PLN-3, and both DWC-69s contained the same MMI date of February 27, 2017.

The ALJ notes in her discussion that the PLN-3 and Dr. M's MMI/IR certification were sent to the claimant and received on March 21, 2017, and April 3, 2017, as evidenced by the signed receipt printout from the United States Postal Service (USPS). Her discussion indicates that she found the claimant signed for and received Dr. M's MMI/IR certification on March 27, 2017, and he had 90 days to dispute Dr. M's MMI/IR certification.[1]

However, a March 27, 2017, date of receipt is not supported by the evidence. In evidence is the USPS track and confirm information for both the March 16, 2017, and March 24, 2017, PLN-3s, as well as signed notifications from USPS "produced" on March 27, 2017, and April 3, 2017. While the notifications from USPS denote that they were "produced" on March 27, 2017, and April 3, 2017, those notifications do not support that the PLN-3s in question were signed for or delivered on those dates.

The track and confirm information regarding the March 16, 2017, PLN-3 reflects that it was delivered to the claimant's address on March 21, 2017. The notification from USPS with the "produced" date of March 27, 2017, also reflects that particular PLN-3 was delivered to the claimant's address on March 21, 2017. The track and confirm information regarding the March 24, 2017, PLN-3 reflects that PLN-3 was in transit from (city), (state), to (city), Texas, on March 27, 2017, and was delivered to the claimant's address in (city), Texas, on March 30, 2017. The notification from USPS with the "produced" date of April 3, 2017, reflects the March 24, 2017, PLN-3 was delivered to the claimant's address on March 30, 2017.

[1] We note that the ALJ incorrectly identified Dr. M as a designated doctor in a finding of fact and in a portion of her discussion. Dr. M is a doctor referred by the treating doctor to act in the treating doctor's place.

The ALJ's finding that on March 27, 2017, the claimant received Dr. M's MMI/IR certification and had 90 days to dispute that MMI/IR certification is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, we reverse the ALJ's finding.

Based on the evidence presented, there are different dates on which the claimant could have received Dr. M's MMI/IR certification; therefore, we do not find it appropriate to render a decision as to when, or if, the claimant received Dr. M's MMI/IR certification by verifiable means. Accordingly, we remand the issue of whether the first MMI/IR certification by Dr. M on March 3, 2017, became final under Section 408.123 and Rule 130.12.

MMI/IR

Given that we have reversed the ALJ's determination that Dr. M's March 3, 2017, MMI/IR certification has become final under Section 408.123 and Rule 130.12 and have remanded that issue to the ALJ, we also reverse the ALJ's determinations that the claimant reached MMI on February 27, 2017, with a 10% IR, and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. M on March 3, 2017, became final under Section 408.123 and Rule 130.12, and we remand the issue of whether the first certification of MMI and assigned IR from Dr. M on March 3, 2017, became final under Section 408.123 and Rule 130.12 for further action consistent with this decision.

We reverse the ALJ's determination that the claimant reached MMI on February 27, 2017, and we remand the issue of the claimant's date of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 10%, and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

We note that the decision contains inconsistent findings of fact, specifically Findings of Fact Nos. 8 and 9. On remand the ALJ is to resolve the inconsistencies contained in the identified findings of fact.

On remand the ALJ is to determine whether the claimant received Dr. M's March 3, 2017, MMI/IR certification by verifiable means, and if so to make findings of fact and conclusions of law as to the date the claimant received Dr. M's March 3, 2017, MMI/IR certification, and the date the claimant disputed that MMI/IR certification that is consistent with the evidence. The ALJ is to then make findings of fact, conclusions of law, and a decision whether Dr. M's March 3, 2017, MMI/IR certification became final under Section 408.123 and Rule 130.12. The ALJ is then to make findings of fact, conclusions of law, and a decision regarding the claimant's MMI and IR.

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 ALJ, 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 Texas Department of Insurance, Division of Workers' Compensation, 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* Appeals Panel Decision 060721, decided June 12, 2006.

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

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge