

APPEAL NO. 182031
FILED NOVEMBER 8, 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 (CCH) was held on July 12, 2018, with the record closing on July 30, 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 compensable injury of (date of injury), does not extend to sleep apnea, shortness of breath, anxiety disorder, or segmental and somatic dysfunction of the lumbar spine; (2) the appellant (claimant) reached maximum medical improvement (MMI) on September 27, 2017; (3) the claimant's impairment rating (IR) is 10%; and (4) the first certification of MMI and assigned IR from (Dr. M) on October 9, 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 the extent of the compensable injury, MMI, IR, and finality. The respondent (carrier) responded, urging affirmance of the disputed extent of injury, MMI, IR, and finality determinations.

DECISION

Reversed and remanded.

The carrier agreed at the CCH that the claimant sustained a compensable injury in the form of a left lower extremity crush injury, left knee dislocation with ligament injury, left tibial plateau fracture, left medial malleolus fracture, and an open wound of the right thigh on (date of injury). The claimant did not attend the CCH. In her discussion of the evidence, the ALJ stated that: "[a] letter advising that the hearing had convened and that the record would be held open for [10] days to afford [the] claimant the opportunity to respond and request that the hearing be rescheduled to permit him to present evidence on the disputed issues was mailed to [the] claimant on July 13, 2018. [The] [c]laimant failed to respond and the record was closed on July 30, 2018."

TIMELINESS OF APPEAL

The carrier contends that the claimant did not timely file his appeal.

Section 410.202(a) provides that to appeal the decision of an ALJ, a party shall file a written request for appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the ALJ is received from the Texas Department of Insurance, Division of Workers' Compensation (Division) and shall on the same date serve a copy of the request for appeal on the other party. Section 410.202(d) provides that Saturdays and Sundays and holidays listed in Texas Government Code Section

662.003 are not included in the computation of the time in which to file an appeal or a response. Rule 143.3(d), effective December 13, 2009, provides that a request for review shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of deemed receipt of the ALJ's decision; and (2) received by the Division not later than the 20th day after the date of deemed receipt of the ALJ's decision. The Appeals Panel has held that both portions of Rule 143.3(d) must be complied with for an appeal to be timely. Appeals Panel Decision (APD) 042688, decided December 1, 2004.

Division records reflect that the claimant called the Division on July 12, 2018, to state that he could not attend the CCH and to provide a change of address. As previously mentioned the record of the CCH closed on July 30, 2018. However, Division records reflect that the decision and order mailed on August 2, 2018, was not sent to the address provided by the claimant on July 12, 2018, but, rather, was mailed to a previous address. Rule 102.5(a) provides, in part, that all written communications from the Division to the claimant will be sent to the most recent address. In his appeal, the claimant attached an envelope from the Division that was mailed to the address the claimant provided to the Division on July 12, 2018. The envelope is postmarked August 16, 2018. The claimant stated in his appeal that the envelope included a copy of the decision and order dated August 2, 2018. The claimant's appeal was received by the Division on August 31, 2018. Accordingly, the claimant's appeal is considered timely.

EXTENT OF INJURY, MMI, IR, AND FINALITY

The claimant contends that he did not attend the CCH or respond to the 10-day letter because he was admitted into a rehabilitation treatment program on May 29, 2018. Attached to his appeal is a letter dated July 20, 2018, from the Department of Veterans Affairs which stated its purpose was to verify that the claimant was admitted into a "Domiciliary Residential Rehabilitation Treatment Program" on June 7, 2018, and that his projected discharge date is on August 6, 2018.

In APD 042634, decided November 29, 2004, the Appeals Panel noted that the purpose of the 10-day letter process is to give the nonappearing party the opportunity to meaningfully participate in the dispute resolution process. In APD 020273, decided March 29, 2002, the claimant made a number of factual allegations in her appeal regarding good cause for failing to attend the CCH and her attempts to respond to the 10-day letter, and the Appeals Panel stated that it was not in a position to evaluate the credibility of the claimant in regard to those matters and, thus, remanded the case to the ALJ to take evidence concerning the claimant's allegations and to permit the claimant to present evidence on the merits of her claim at the CCH on remand.

In the instant case, the claimant makes factual allegations that, if true, could constitute a basis for good cause for the claimant's failure to attend the CCH on July 12, 2018, or respond to the 10-day letter. The letter from the Department of Veterans Affairs attached to the claimant's appeal constitutes newly discovered evidence pertaining to why the claimant did not attend the CCH on July 12, 2018, or respond to the 10-day letter. See *Black v. Wills*, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

In this case, the letter from the Department of Veterans Affairs was not available at the time of the CCH on July 12, 2018; it is not cumulative of other evidence in the record; it is not due to lack of diligence that it was not offered at the CCH; and it is so material that it would probably result in a different decision. The claimant has provided newly discovered evidence on appeal where a remand is warranted based on that evidence. See APD 100457, decided June 25, 2010. As in APD 020273, *supra*, the case is remanded to the ALJ to take evidence concerning the claimant's allegations and to permit the parties to present evidence on the merits of the claim at the CCH on remand.

Accordingly, we reverse the ALJ's determinations that: (1) the compensable injury of (date of injury), does not extend to sleep apnea, shortness of breath, anxiety disorder, or segmental and somatic dysfunction of the lumbar spine; (2) the claimant reached MMI on September 27, 2017; (3) the claimant's IR is 10%; and (4) the first certification of MMI and assigned IR from Dr. M on October 9, 2017, did become final pursuant to Section 408.123 and Rule 130.12, and we remand this case to the ALJ to allow the claimant an opportunity to participate in the dispute resolution process, and present evidence if he wishes to do so.

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 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge