

APPEAL NO. 200548
FILED MAY 26, 2020

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 February 25, 2020, 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 first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. B) on May 10, 2019, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the respondent (claimant) reached MMI on March 27, 2019; and (3) the claimant's IR is 23%. The appellant (carrier) appealed the ALJ's determinations. The claimant responded, urging affirmance of the ALJ's determinations.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of dislocated left middle and left index fingers, rupture flexor left tendons, tear of the extensor hood, and complex regional pain syndrome (CRPS) in the upper left limb; on May 10, 2019, Dr. B, the designated doctor, certified the claimant reached MMI on March 27, 2019, and assigned a 23% IR, and he was the first doctor to certify MMI and assign an IR; and the date of statutory MMI was May 19, 2019. The claimant testified she was injured when she attempted to prevent a patient whom she was assisting from falling.

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, including IRs related to extent-of-injury disputes. The notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c).

Section 408.123(f) 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 ALJ found, in part, that the evidence presented failed to establish that the carrier disputed Dr. B's May 10, 2019, MMI/IR certification within 90 days after being provided written receipt by verifiable means. That portion of the ALJ's finding is supported by sufficient evidence. The ALJ also found that the evidence presented failed to establish that an exception to the 90-day finality rule would apply.

Dr. B examined the claimant on May 1, 2019. Dr. B certified the claimant reached MMI on March 27, 2019, and, using 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), assigned a 23% IR. Dr. B's 23% IR is comprised of range of motion (ROM) measurements taken of the claimant's left index and middle fingers, combined with 30% impairment under Table 34, "Upper Extremity [UE] Impairment for Loss of Strength," on page 3/65 because he felt the ROM deficits did not adequately describe the claimant's impairment.

Dr. B's attached narrative report noted the following ROM measurements for the claimant's left index finger: 15° DIP flexion, 0° DIP extension; 80° PIP flexion, 0° PIP extension; and 60° MP flexion, +15° MP extension. Using Figures 19, 21, and 23 on pages 3/32, 3/33, and 3/34, respectively, of the AMA Guides, Dr. B assigned 4% finger impairment for DIP flexion, 0% impairment for DIP extension, 12% impairment for PIP flexion, 0% impairment for PIP extension, 17% impairment for MP flexion, and 0% impairment for MP extension. However, Figure 19 provides that 15° DIP flexion results in either 26% or 31% finger impairment, depending upon whether 15° is rounded up to 20° or down to 10°. Dr. B's 4% finger impairment for DIP flexion is incorrect. Using these calculations, Dr. B assigned 30% impairment for the claimant's left index finger.

Dr. B's narrative report also noted the following ROM measurements for the claimant's left middle finger: 15° DIP flexion, 0° DIP extension; 60° PIP flexion, -10° PIP extension; and 60° MP flexion, +15° MP extension. Dr. B assigned 4% impairment for DIP flexion, 0% impairment for DIP extension, 24% impairment for PIP flexion, 3% impairment for PIP extension, 17% impairment for MP flexion, and 0% impairment for MP extension. As noted above, 15° DIP flexion results in either 26% or 31% finger impairment. Dr. B's 4% finger impairment for DIP flexion is incorrect. Using these calculations, Dr. B assigned 41% impairment for the claimant's left middle finger.

Dr. B's narrative report shows that he erred in assigning 4% impairment for DIP flexion of the claimant's left index finger rather than 26% or 31% impairment, and 4% impairment for DIP flexion of the claimant's left middle finger rather than 26% or 31% impairment. We hold that this is compelling medical evidence in this case of a significant error by Dr. B in calculating his 23% IR, and that the exception found in Section 408.123(f)(1)(A) applies. Accordingly, we reverse the ALJ's determination that the first MMI/IR certification from Dr. B on May 10, 2019, became final under Section 408.123 and Rule 130.12. We render a new decision that the first MMI/IR certification from Dr. B on May 10, 2019, did not become final under Section 408.123 and Rule 130.12.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

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, in part, 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.

There are numerous MMI/IR certifications in evidence. The first certifications are from Dr. B, based on an examination date of April 26, 2018. Dr. B issued alternate certifications on May 7, 2018, based on this examination. In the first certification Dr. B

certified that the claimant reached MMI on March 18, 2018, and assigned a 4% IR based on a left middle finger tear. In an alternate certification Dr. B certified that the claimant had not reached MMI when considering a left middle finger tear and CRPS of the left upper limb. The compensable injury in this case includes dislocated left middle and left index fingers, rupture flexor left tendons, tear of the extensor hood, and CRPS in the upper left limb. These certifications do not consider and rate the entire compensable injury. Additionally, in evidence is a Benefit Dispute Agreement (DWC-24) dated September 10, 2018, in which the parties agreed the compensable injury extends to CRPS in the left limb, and that the claimant had not reached MMI as certified by Dr. B on May 7, 2018. Neither of Dr. B's May 7, 2018, MMI/IR certifications can be adopted because each fail to rate all of the compensable conditions.

The next certification in evidence is from (Dr. Bk), a post-designated doctor required medical examination (RME) doctor. Dr. Bk examined the claimant on August 10, 2018, and issued alternate certifications on that same date. In the first certification Dr. Bk certified the claimant reached MMI on March 18, 2018, with a 5% IR, based on a left middle finger sprain/tear. In the second certification Dr. Bk certified the claimant had not reached MMI based on a left middle finger sprain/tear and CRPS of the left UE. Neither of Dr. Bk's certifications can be adopted because they fail to rate all of the compensable conditions.

The next certifications in evidence are from Dr. B, both based on a May 1, 2019, examination date and dated May 10, 2019. The first certification is Dr. B's May 10, 2019, certification discussed above, in which he certified the claimant reached MMI statutorily on March 27, 2019, and assigned a 23% IR. Dr. B's second certification certified that the claimant reached MMI statutorily on March 27, 2019, but assigned an 8% IR based on ROM measurements of the claimant's left index and middle fingers, and did not combine 30% UE impairment for loss of strength under Table 34. The parties have stipulated that the statutory date of MMI is May 19, 2019; therefore, neither of Dr. B's certifications can be adopted. Additionally, Dr. B's 23% IR and 8% IR both contain the same error previously discussed: Dr. B incorrectly assigned 4% impairment for DIP flexion of the claimant's left index and middle fingers, rather than 26% or 31% as provided by the AMA Guides.

The next certifications are again from Dr. B. Dr. B examined the claimant on June 19, 2019, and issued alternate certifications on July 1, 2019. In the first certification Dr. B opined that the claimant had not reached MMI. However, the parties have stipulated that the statutory date of MMI is May 19, 2019. This certification cannot be adopted.

In his alternate certification Dr. B certified the claimant reached MMI on the statutory date of May 15, 2019, with a 19% IR. As previously mentioned, the parties stipulated that the statutory date of MMI in this case is May 19, 2019. A letter of clarification was sent to Dr. B noting the correct statutory date of MMI, and Dr. B issued a corrected DWC-69 certifying the claimant reached MMI on the statutory date of May 19, 2019, with a 19% IR. Dr. B noted in his narrative report that he based his 19% IR on ROM measurements taken of the claimant's left index and middle fingers. Dr. B's attached narrative report noted the following ROM for the claimant's left index finger: 20° DIP flexion, 0° DIP extension; 62° PIP flexion, -10° PIP extension; and 60° MP flexion, +15° MP extension. Dr. B's report also noted the following ROM for the claimant's left middle finger: 17° DIP flexion, 0° DIP extension; 58° PIP flexion, -10° PIP extension; and 60° MP flexion, +15° MP extension. Although Dr. B states that a "Figure 1 worksheet" was included to show his calculations to derive the 19% IR, there were no worksheets from Dr. B based on a June 19, 2019, date of examination in evidence. Dr. B stated in his report that he assigned 8% finger impairment for the claimant's left index finger, and 8% finger impairment for the claimant's left middle finger. Dr. B then calculated 16% hand impairment, which he converted to 14% UE impairment. Dr. B then converted 14% UE impairment to 8% whole person impairment. Dr. B combined 8% whole person impairment with 25% UE impairment using Table 14, "Criteria for One Impaired [UE]," on page 4/148 of the AMA Guides for 31% UE impairment, which he then converted to 19% whole person impairment. We note that Table 14 utilizes whole person impairment rather than UE impairment, and that Dr. B's narrative report assigns UE impairment under that table rather than whole person impairment.

Using the ROM measurements provided in Dr. B's report and Figures 19, 21, and 23 of the AMA Guides, the claimant's left index finger impairment results in either 57% or 55%, depending upon how +15° MP flexion is rounded. Both 57% and 55% finger impairment for the index finger results in 11% hand impairment, not 8% hand impairment as assigned by Dr. B. The claimant's left middle finger impairment results in either 57% or 55% impairment for the middle finger, depending upon how +15° MP flexion is rounded, which also results in 11% hand impairment, not 8% hand impairment as assigned by Dr. B. We note that there are recorded ROM measurements in addition to left index and middle finger MP flexion that require medical judgment to determine whether or not the measurements would be rounded up or down, which impacts the final impairment; however, using those ROM measurements does not result in 8% hand impairment for the claimant's left index and middle fingers. The Appeals Panel has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the correct IR. See Appeals Panel

Decision (APD) 171766, decided September 7, 2017; APD 152464, decided February 17, 2016; APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011. Because there are questions regarding how to round the ROM measurements, which require medical judgment, a mathematical correction would not be appropriate in this case. Dr. B's certification cannot be adopted.

Finally, (Dr. G), a post-designated doctor RME doctor, examined the claimant on November 6, 2019, and certified on that same date that the claimant reached MMI on the statutory date of May 19, 2019, with an 8% IR. Regarding his examination, Dr. G noted in his narrative report that during ROM testing of the left hand, the claimant resisted flexion of the digits, but she had full passive ROM of the same digits. Dr. G explained he agreed with Dr. B's 8% hand impairment based on the ROM measurements of the claimant's left index and middle fingers taken by Dr. B during his June 19, 2019, examination. However, as noted above Dr. B assigned 8% hand impairment for the claimant's left index finger and 8% hand impairment for the claimant's left middle finger, and neither of these impairments were correct based upon the ROM measurements taken by Dr. B. Dr. G's certification cannot be adopted.

The ALJ determined that the claimant reached MMI on March 27, 2019, and that the claimant's IR is 23% based upon her determination that Dr. B's May 10, 2019, certification became final under Section 408.123 and Rule 130.12. We have reversed that determination and rendered a new decision that Dr. B's May 10, 2019, certification did not become final under Section 408.123 and Rule 130.12, and as explained above Dr. B's May 10, 2019, certification that the claimant reached MMI on March 27, 2019, with a 23% IR cannot be adopted. We therefore reverse the ALJ's determinations that the claimant reached MMI on March 27, 2019, and that the claimant's IR is 23%. There is no certification in evidence that can be adopted. Accordingly, 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 MMI/IR certification from Dr. B on May 10, 2019, became final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. B on May 10, 2019, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that the claimant reached MMI on March 27, 2019, and we remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 23% and we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand the ALJ is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B is still qualified and available to be the designated doctor, the ALJ is to inform Dr. B that the compensable injury in this case is dislocated left middle and left index fingers, rupture flexor left tendons, tear of the extensor hood, and CRPS in the upper left limb, and that the statutory date of MMI is May 19, 2019. The ALJ is to notify Dr. B of his error in calculating 4% impairment for DIP flexion of the claimant's left index and middle fingers. As discussed above, Dr. B utilized Table 14, "Criteria for One Impaired [UE]," on page 4/148 of the AMA Guides. We note that Table 14 is located under Section 4.3, "The Spinal Cord," and that section discusses impairments resulting from spinal cord injuries, and that the claimant in this case did not sustain a spinal cord injury. We also note that Table 14 utilizes whole person impairment rather than UE impairment, and that Dr. B's narrative report assigns UE impairment under that table rather than whole person impairment. On remand the ALJ is to apprise Dr. B that Table 14 criteria provide percentage of impairment of the whole person rather than UE.

The ALJ is to inform Dr. B that page 3/56 of the AMA Guides, "Causalgia and Reflex Sympathetic Dystrophy," provides rating criteria for CRPS. See APD 052243-s, decided November 29, 2005. The ALJ is to request Dr. B to explain his use of Table 14 in assigning impairment for the compensable injury. The ALJ is to request Dr. B to rate the entire compensable injury and give an opinion on MMI, which cannot be after May 19, 2019, the statutory MMI date, and an opinion on and explanation of the IR in accordance with Rule 130.1(c)(3) based on the claimant's condition as of the MMI date considering the medical records, the certifying examination, and rating criteria in the AMA Guides.

If Dr. B is no longer qualified or available, then another designated doctor is to be appointed to determine the claimant's date of MMI and IR. The ALJ is to inform the designated doctor that the compensable injury in this case is dislocated left middle and left index fingers, rupture flexor left tendons, tear of the extensor hood, and CRPS in the upper left limb, and that the date of statutory MMI in this case is May 19, 2019. The ALJ is to request the designated doctor to rate the entire compensable injury and give an opinion on MMI, which cannot be after May 19, 2019, the statutory MMI date, and an opinion on the IR in accordance with Rule 130.1(c)(3) based on the claimant's condition as of the MMI date considering the medical records, the certifying examination, and rating criteria in the AMA Guides.

The parties are to be provided with the ALJ's letter of clarification to Dr. B or Presiding Officer's Directive to Order Designated Doctor Examination if another designated doctor is assigned, as well as the designated doctor's report. The ALJ is to give the parties an opportunity to respond prior to closing the record and issuing a decision.

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
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge