

APPEAL NO. 220579
FILED MAY 20, 2022

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 March 10, 2022, 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 left lower limb complex regional pain syndrome (CRPS); (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. L) on June 1, 2021, became final pursuant to Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (3) the respondent/cross-appellant (claimant) reached MMI on May 21, 2019; and (4) the claimant's IR is 15%.

The appellant/cross-respondent (carrier) appealed the ALJ's determinations of finality, MMI, and IR. The carrier contends on appeal that the certification of MMI and assigned IR from Dr. L was not the first valid certification. The claimant responded, urging affirmance of the finality, MMI, and IR determinations disputed by the carrier.

The claimant cross-appealed, disputing the ALJ's determination of extent of injury. The carrier responded to the claimant's cross-appeal, urging affirmance of the ALJ's extent-of-injury determination.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that: on (date of injury), the claimant sustained a compensable injury in the form of at least fractures of the left tibia and left fibula; (Dr. O) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to serve as designated doctor for the issues of MMI, IR, and extent of injury; and the statutory date of MMI is May 16, 2020.

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).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to left lower limb CRPS is supported by sufficient evidence and is affirmed.

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 parties stipulated that Dr. O was appointed by the Division as designated doctor for the purposes of MMI, IR, and extent of injury. The evidence reflects that (Dr. L) was initially appointed as designated doctor for the purposes of MMI and IR. Dr. L examined the claimant on April 21, 2021. Dr. L certified on June 1, 2021, that the claimant reached MMI on May 21, 2019, with a 15% IR.

The ALJ found that Dr. L's certification was the first valid certification regarding the claimant's compensable injury of (date of injury). However, in evidence is a Benefit Dispute Agreement (DWC-24) in which the parties agreed that the first certification of

MMI and assigned IR from (Dr. Q) on June 3, 2020, did not become final under Section 408.123 and Rule 130.12. The DWC-24 is dated March 3, 2021, and was signed by a carrier representative on March 4, 2021, signed by the claimant on March 8, 2021, and approved by a Division employee on March 10, 2021. The evidence reflects that Dr. Q was a doctor selected by the treating doctor to act in his place. Dr. Q examined the claimant on June 1, 2020, and certified that the claimant reached MMI on May 16, 2020, with a 15% IR based on loss of range of motion of the left ankle and knee. Dr. Q's certification and narrative report are not in evidence but rather are described in an "Impairment Rating Review" from (Dr. Os). No evidence was admitted regarding the reason the parties agreed the first certification from Dr. Q did not become final. The carrier contends on appeal that the first certification was from Dr. Q and therefore the certification from Dr. L cannot become final. The carrier argues that Rule 130.12(b) was not applicable to the certification of Dr. L and the ALJ erred by applying it.

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.

The parties agree in the DWC-24 that the certification from Dr. Q did not become final but there was no evidence that the Division or a court had made a determination regarding the claimant's MMI/IR or that the certification from Dr. Q had been rescinded. The agreement does not reflect that Dr. Q's certification was not valid or had been withdrawn, simply that it did not become final.

The carrier additionally argues that Dr. L's certification is not valid because Dr. L's authorization to act as a designated doctor expired prior to his narrative report and certification of MMI and assigned IR in the instant case. Rule 130.12(c) provides that a certification of MMI and/or IR assigned as described in subsection (a) must be on a [DWC-69], and that 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 [Division] under Rule 130.1(a) to make the assigned impairment determination. Although Dr. L examined the claimant on April 21, 2021, he did not submit his certification or narrative report until June 1, 2021. There was evidence in the record that Dr. L's authority to act as a designated doctor was only valid to May 10, 2021. Rule 130.1(a)(1) provides, in part, that only an authorized doctor may certify MMI, determine whether there is permanent impairment, and assign an IR if there is permanent impairment. Rule 130.1(a)(2) provides, in part, that doctors who are not authorized shall not make findings of permanent impairment, certify MMI, or assign impairment ratings. Rule 130.1(a)(2) further provides, in part, that a certification of MMI, finding of permanent impairment and/or impairment rating assigned by an unauthorized doctor are invalid. The evidence in the record reflects that Dr. L was no longer authorized to serve as designated doctor on June 1, 2021, when he submitted his certification and narrative report. Therefore, his certification did not meet the requirements of Rule 130.12(c)(3) and is not valid.

Accordingly, we reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. L on June 1, 2021, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR from Dr. L on June 1, 2021, 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 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.

The ALJ based his determination of MMI and IR on his determination that Dr. L's first certification became final. The ALJ's determination that the first certification of MMI and assigned IR from Dr. L on June 1, 2021, became final was reversed and a new decision rendered that the first certification from Dr. L on June 1, 2021, did not become final.

As noted above, there was evidence in the record that Dr. L was not an authorized doctor at the time he certified that the claimant reached MMI and assigned an IR. Further, we note that based on an examination occurring on April 21, 2021, Dr. L provided two certifications. In the first certification, dated June 1, 2021, Dr. L certified that the claimant reached MMI on May 21, 2019, and assessed a 15% IR. Dr. L included impairment assessed for traumatic arthritis in this certification. Traumatic arthritis has not yet been determined to be part of the compensable injury; consequently, this certification cannot be adopted. In the alternate certification, Dr. L certified that the claimant reached MMI on May 21, 2019, and assessed a 24% IR. Dr. L included impairment assessed for CRPS. As previously noted, the ALJ's determination that the compensable injury of (date of injury), does not extend to left lower limb CRPS was affirmed. Consequently, this certification from Dr. L cannot be adopted.

There are two other certifications in evidence, both of which are from Dr. O. Dr. O examined the claimant on June 5, 2021, and in one certification, certified that the claimant reached MMI on May 16, 2020, and assigned a 10% IR based on loss of range of motion in the left knee and left ankle and assessed 0% impairment for CRPS. Since CRPS has been determined not to be part of the compensable injury this certification cannot be adopted.

Dr. O's other certification considered the compensable injury of fractures of the left tibia and left fibula. Dr. O certified that the claimant reached MMI on May 16, 2020. 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), Dr. O assessed 10% impairment based on loss of range of motion of the left knee and the left ankle in accordance with the AMA Guides. This certification of MMI and IR is supported by the evidence. Therefore, we reverse the ALJ's determination that the claimant reached MMI on May 21, 2019, and the claimant's IR is 15% and render a new decision that the claimant reached MMI on May 16, 2020, with a 10% IR.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to left lower limb CRPS.

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. L on June 1, 2021, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR from Dr. L on June 1, 2021, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that the claimant reached MMI on May 21, 2019, and render a new decision that the claimant reached MMI on May 16, 2020.

We reverse the ALJ's determination that the claimant's IR is 15% and render a new decision that the claimant's IR is 10%.

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

**J. KELLY GRAY, PRESIDENT
6907 CAPITAL OF TEXAS HIGHWAY NORTH
AUSTIN, TEXAS 78731-1755.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge