

APPEAL NO. 221349
FILED SEPTEMBER 30, 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 July 18, 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 intraosseous ganglion in the third metacarpal head or triggering right ring finger; (2) the appellant (claimant) did not have disability from March 18, 2022, through the present from an injury sustained on (date of injury); (3) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. G) on March 31, 2020, became final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (4) the claimant reached MMI on February 10, 2020; and (5) the claimant's IR is zero percent. The claimant appealed the ALJ's determinations of extent of injury, disability, finality, MMI, and IR. The respondent (carrier) responded to the claimant's appeal, urging affirmance of the ALJ's determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury in the form of at least a grade 1 sprain of ulnar collateral ligament MCP joint right middle finger and grade 1-2 sprain of radial collateral ligament MCP joint. The claimant testified that she was injured on (date of injury), while working as a supervisor and cleaning buildings for the employer. The claimant further testified that she was taking out the trash when her right hand got jammed by the door between her right middle and ring fingers.

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 intraosseous ganglion in the third metacarpal head or triggering right ring finger is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant did not have disability from March 18, 2022, through the present from an injury sustained on (date of injury), 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).

In Appeals Panel Decision (APD) 042163-s, decided October 21, 2004, the Appeals Panel discussed whether the deemed receipt provision of Rule 102.4 was applicable and what is meant by "verifiable means." APD 041985-s, decided September 28, 2004, and APD 042163-s, *supra*, both reference the preamble to Rule 130.12. The preamble provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification."

The preamble goes on to state:

Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party. This may include acknowledged receipt by the injured employee or insurance carrier, a statement of personal delivery, confirmed delivery by e-mail, confirmed delivery by facsimile, or some other confirmed delivery to the home or business address. The goal of this requirement is not to regulate how a system participant makes delivery of a report or other information to another system participant, but to ensure that the system participant filing the report or providing the information has verifiable proof that it was delivered. 29 Tex. Reg. 2331, March 5, 2004.

The ALJ found that the March 31, 2020, certification by Dr. G, a doctor selected by the treating doctor to act in his place, was the first valid certification of MMI and assigned IR for the purposes of Section 408.123 and Rule 130.12. This finding is supported by sufficient evidence. The ALJ further found that Dr. G's certification was delivered to the claimant by verifiable means on August 24, 2021. In the ALJ's decision, the ALJ explains that in evidence is a Dispute Resolution Information System (DRIS) note that indicates the claimant contacted the Texas Department of Insurance, Division of Workers' Compensation (Division) to dispute Dr. G's certification on August 24, 2021. While a review of the record reflects conflicting evidence concerning the date the claimant may have received Dr. G's certification, the ALJ relied on DRIS notes to find that Dr. G's certification was delivered to the claimant by verifiable means on or before August 24, 2021.

In APD 152374, decided February 3, 2016, the ALJ similarly relied on a DRIS note that indicated the claimant called the Division regarding the dispute of a certification to find that the claimant was provided with written notice by verifiable means. In that case, the Appeals Panel disagreed that the DRIS note in question was sufficient to establish delivery by verifiable means and noted "[t]he DRIS note, which indicates only that the claimant's attorney and doctor are disputing [the] report, does not constitute reasonable confirmation of delivery of written notice to the claimant on that date." Likewise in the present case, the DRIS note dated August 24, 2021, is insufficient to establish that Dr. G's report was delivered to the claimant by verifiable means. Therefore, we reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. G on March 31, 2020, became final under Section 408.123 and Rule 130.12.

A review of the record indicates that there were several other dates put forth by the carrier as dates the claimant may have received Dr. G's certification. The ALJ did not make further findings regarding the alternate dates. Therefore, we remand the issue of finality to the ALJ for further action consistent with this decision.

MMI AND IR

As we have reversed and remanded the issue of whether the first certification of MMI and assigned IR from Dr. G on March 31, 2020, became final under Section 408.123 and Rule 130.12, we also reverse the ALJ's determinations that the claimant reached MMI on February 10, 2020, with a zero percent IR and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to intraosseous ganglion in the third metacarpal head or triggering right ring finger.

We affirm the ALJ's determination that the claimant did not have disability from March 18, 2022, through the present from an injury sustained on (date of injury).

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. G on March 31, 2020, became final under Section 408.123 and Rule 130.12, and we remand the issue of finality to the ALJ for further action consistent with this decision.

We reverse the ALJ's determinations that the claimant reached MMI on February 10, 2020, with a zero percent IR and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the ALJ is to make findings of fact regarding whether the claimant received Dr. G's certification by verifiable means and, if so, on what date. The ALJ is to make a determination of whether the first certification of MMI and assigned IR from Dr. G on March 31, 2020, became final under Section 408.123 and Rule 130.12 that is consistent with the evidence and this decision. If the ALJ determines that Dr. G's March 31, 2020, certification did not become final, he is to request a designated doctor on the issues of MMI and IR.

The ALJ is then to make a determination of MMI and IR that is consistent with the evidence and this 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 **ACCIDENT FUND INSURANCE COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge