

APPEAL NO. 222017
FILED FEBRUARY 9, 2023

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 November 17, 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 (date of injury), compensable injury does not extend to a left shoulder rotator cuff tear; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. F) on November 24, 2021, became final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (3) the appellant (claimant) reached MMI on October 5, 2021; and (4) the claimant's IR is 11%. The claimant appealed all the ALJ's determinations. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated, in part, that the carrier accepted a (date of injury), compensable injury in the nature of a dislocation of the left shoulder girdle, left shoulder impingement syndrome, and a sprain of the left wrist and hand and on November 16, 2021, and November 24, 2021, Dr. F was authorized to perform IR evaluations in accordance with Rule 130.1. The evidence indicates that the claimant, a custodian, was injured on (date of injury), when she blacked out while walking and fell to the ground, injuring her left shoulder, wrist, and hand.

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 (date of injury), compensable injury does not extend to a left shoulder rotator cuff tear 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:

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 Dr. F's November 24, 2021, certification that the claimant reached MMI on October 5, 2021, with an IR of 11% was the first valid certification of MMI and IR for the purposes of Rule 130.12(c). She further found that the claimant was provided written notice of the certification by verifiable means on December 9, 2021, but did not file a timely dispute. Those findings are supported by sufficient evidence. The ALJ also found none of the exceptions to 90-day finality under Section 408.123(f) apply in this case.

Dr. F examined the claimant on November 16, 2021, and certified on November 24, 2021, that the claimant reached MMI on October 5, 2021. 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), he assigned an 11% IR for the compensable conditions of a dislocation of the left shoulder girdle, left shoulder impingement syndrome, and left wrist

and hand sprain. Dr. F's 11% IR is based on range of motion (ROM) deficits in the left shoulder and left wrist.

Dr. F correctly calculated a 4% upper extremity (UE) impairment based on the ROM measurements he provided for the left wrist. Dr. F's corresponding narrative report noted the following ROM measurements and their UE impairments for the claimant's left shoulder (rounded to the nearest 10°): 100° flexion (5%), 40° extension (0%), 80° abduction (5%), 0° adduction (2%), 40° internal rotation (3%), and 50° external rotation (1%). Dr. F added the left shoulder UE impairments for a total 16% UE impairment for the left shoulder. He then combined the UE impairments for the left wrist and left shoulder which resulted in a 19% UE impairment and converted that to an 11% whole person impairment (WPI). However, Dr. F made a mistake in his calculation of the left shoulder impairment. Figure 38 on page 3/43 of the AMA Guides provides that 40° of extension results in 1% UE impairment, not 0% UE impairment as indicated by Dr. F. Using these calculations, Dr. F assigned a 16% UE impairment for the claimant's left shoulder, instead of a 17% UE impairment. Combining the 17% left shoulder UE impairment with the 4% left wrist UE impairment results in a total 20% UE impairment, which converts to a WPI of 12%, instead of 11% as certified by Dr. F.

Dr. F's narrative report shows that he erred in assigning 0% UE impairment for left shoulder extension rather than 1% UE impairment. We hold that this is compelling medical evidence in this case of a significant error by Dr. F in calculating the 11% IR, and that the exception found in Section 408.123(f)(1)(A) applies. Accordingly, we reverse the ALJ's determination that the first certification of MMI and IR from Dr. F on November 24, 2021, became final under Section 408.123 and Rule 130.12. We render a new decision that the first certification of MMI and IR from Dr. F on November 24, 2021, did not become final under Section 408.123 and Rule 130.12.

We note that the evidence indicates that the claimant underwent left shoulder surgery on March 16, 2021, which included a distal clavicle resection. We further note that in Appeals Panel Decision (APD) 151158-s, decided August 4, 2015, the Appeals Panel held that impairment for a distal clavicle resection arthroplasty that was received as treatment for the compensable injury results in 10% UE impairment under Table 27 on page 3/61 of the AMA Guides.

MMI AND 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.

The evidence in the record indicates that there has not been a designated doctor appointed in this case to address MMI and IR. The ALJ adopted the certification from Dr. F, a referral doctor, in which he certified that the claimant reached MMI on October 5, 2021, and assigned an 11% IR.

Section 408.125(a) provides if an IR is disputed, the commissioner shall direct the employee to the next available doctor on the Division's list of designated doctors, as provided by Section 408.0041. In APD 020385, decided March 18, 2002, the Appeals Panel stated that "[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant's IR because there is no report from a designated doctor." In APD 132423, decided December 19, 2013, the ALJ mistakenly found that the treating doctor was the designated doctor appointed on the issues for MMI and IR; however, there was no designated doctor appointed on the issues of MMI/IR. In that case, the Appeals Panel reversed the ALJ's MMI and IR determinations and remanded the issues of MMI and IR. In this case, there was no designated doctor appointed on the issues of MMI and IR because of the finality issue. However, we have rendered a decision that the first certification of MMI and assigned IR from Dr. F on November 24, 2021, did not become final under Section 408.123 and Rule 130.12. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on October 5, 2021, with an 11% 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 (date of injury), compensable injury does not extend to a left shoulder rotator cuff tear.

We reverse the ALJ's determination that the certification of MMI and IR from Dr. F on November 24, 2021, became final under Section 408.123 and Rule 130.12, and we render a new decision that the certification of MMI and IR from Dr. F on November 24, 2021, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determinations that the claimant reached MMI on October 5, 2021, with an 11% 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 request the appointment of a designated doctor for the issues of MMI and IR. The ALJ is to advise the designated doctor that the claimant sustained a compensable injury on (date of injury), which includes a dislocation of the left shoulder girdle, left shoulder impingement syndrome, and a sprain of the left wrist and hand, but does not extend to a left shoulder rotator cuff tear. The parties did not stipulate to or discuss a date of statutory MMI and there was no finding of the date of statutory MMI by the ALJ. Based on the evidence in this case the date of statutory MMI may have passed. The ALJ is to take a stipulation from the parties regarding the date of statutory MMI. If the parties are unable to stipulate to the date of statutory MMI, the ALJ is to make a determination of the date of statutory MMI in order to inform the designated doctor of the date of statutory MMI. The ALJ is to request the designated doctor to give an opinion on MMI and IR in accordance with the AMA Guides considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's MMI and IR certification and are to be allowed an opportunity to respond. The ALJ is to consider the evidence on MMI and IR. The ALJ is then to make a determination on MMI and IR consistent with 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 **AIU 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 78701-3218.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge