

APPEAL NO. 230778
FILED JULY 27, 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 (CCH) was held on January 12, 2023, with the record closing on April 25, 2023, 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 respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on November 16, 2020; (2) the claimant's impairment rating (IR) is nine percent; (3) the first certification of MMI and assigned IR from (Dr. X) on April 3, 2020, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); and (4) the claimant had disability from July 11, 2020, through November 30, 2020, resulting from an injury sustained on (date of Injury), but the claimant did not have disability from December 1, 2020, through December 18, 2020, resulting from the compensable injury.

The appellant/cross-respondent (self-insured) appealed that portion of the ALJ's disability determination that was in favor of the claimant, as well as the ALJ's MMI, IR, and finality determinations. The claimant responded, urging affirmance of the appealed determinations. The claimant cross-appealed, disputing that portion of the ALJ's disability determination that was against her. The self-insured responded, urging affirmance of that portion of the determination.

DECISION

Reversed and remanded.

The parties stipulated, in part, that: (1) on (date of Injury), the claimant sustained a compensable injury that consists of a right hand contusion, lumbar strain, right scapholunate ligament tear, L3-4 disc herniation, and lumbar radiculopathy; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. J) and (Dr. T) as designated doctors to determine extent of injury, MMI, and IR; and (3) the date of statutory MMI is December 18, 2020.

The claimant, a lead teacher, was injured on (date of Injury), when she fell while sitting back down into a chair and it slipped out from under her.

FINALITY

Section 410.168 provides that an ALJ's decision contain findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. Rule 142.16 provides that an ALJ's decision shall be in writing and

include findings of fact, conclusions of law, and a determination of whether benefits are due, and if so, an award of benefits due.

The certified finality issue before the ALJ in this case was: Did the first certification of MMI and assigned IR from Dr. X on April 3, 2020, become final under Section 408.123 and Rule 130.12? Dr. X, the post-designated doctor insurance carrier-selected required medical examination doctor, certified that the claimant reached MMI on March 13, 2019, with a five percent IR. The ALJ states in Conclusion of Law No. 5 and the Decision section that the first certification of MMI and assigned IR from Dr. X on April 3, 2020, did not become final under Section 408.123 and Rule 130.12. Although the ALJ made a conclusion of law, decision, and addressed the issue in her discussion of the evidence, the ALJ failed to make a finding of fact regarding whether the first certification of MMI and assigned IR from Dr. X on April 3, 2020, became final under Section 408.123 and Rule 130.12. Additionally, the ALJ states in Finding of Fact No. 5 that Dr. T's certification of MMI and assigned IR was the first valid certification and was provided to the claimant by verifiable means on April 13, 2020. However, as it was undisputed that Dr. X's certification was the first certification in this case, and not Dr. T's certification, this finding is against the great weight of the evidence. Because the ALJ's decision contains no findings of fact regarding whether the first certification of MMI and assigned IR from Dr. X on April 3, 2020, became final under Section 408.123 and Rule 130.12, which was an issue properly before the ALJ to resolve, it does not comply with Section 410.168 and Rule 142.16. We therefore reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. X on April 3, 2020, did not become final under Section 408.123 and Rule 130.12 as being incomplete, and we remand the finality issue to the ALJ for further action consistent with this decision. See Appeals Panel Decision (APD) 132339, decided December 12, 2013; APD 180839, decided June 4, 2018; and APD 181357, decided July 30, 2018.

MMI AND IR

As we have remanded the issue of whether the first certification of MMI and assigned IR from Dr. X on April 3, 2020, became final under Section 408.123 and Rule 130.12, we must also reverse the ALJ's determinations that the claimant reached MMI on November 16, 2020, and the claimant's IR is nine percent and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

The ALJ found that the certification of (Dr. Q), the treating doctor referral, that the claimant reached MMI on November 16, 2020, with a nine percent IR was supported by the preponderance of the evidence. However, we note that none of the four alternate certifications from Dr. Q dated March 25, 2021, in evidence rate the compensable injury as stipulated by the parties in this case. We further note that in calculating the

claimant's right wrist range of motion deficits, Dr. Q failed to round the radial deviation and ulnar deviation measurements to the nearest 10°, as required by 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). See APD 022504-s, decided November 12, 2002; and APD 111384, decided November 23, 2011. See also APD 131541, decided August 29, 2013.

There is an additional Report of Medical Evaluation (DWC-69) dated August 30, 2022, from Dr. Q that certified the claimant's MMI on November 16, 2020, with a nine percent IR, but it is unclear what it rates as there is no corresponding narrative.

DISABILITY

As previously noted, Section 410.168 provides that an ALJ's decision contain findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. Rule 142.16 provides that an ALJ's decision shall be in writing and include findings of fact, conclusions of law, and a determination of whether benefits are due, and if so, an award of benefits due.

The certified disability issue before the ALJ in this case was: Did the claimant have disability from July 11, 2020, to December 18, 2020, resulting from an injury sustained on (date of Injury)? The ALJ states in Conclusion of Law No. 6 and the Decision section that the claimant had disability from July 11, 2020, through November 30, 2020, resulting from an injury sustained on (date of Injury), but the claimant did not have disability from December 1, 2020, through December 18, 2020, resulting from the compensable injury. Although the ALJ made a conclusion of law, decision, and addressed the issue in her discussion of the evidence, the ALJ failed to make a finding of fact regarding whether the claimant had disability from July 11, 2020, to December 18, 2020, resulting from an injury sustained on (date of Injury). Because the ALJ's decision contains no findings of fact regarding whether the claimant had disability from July 11, 2020, to December 18, 2020, resulting from an injury sustained on (date of Injury), which was an issue properly before the ALJ to resolve, it does not comply with Section 410.168 and Rule 142.16. We therefore reverse the ALJ's determination that the claimant had disability from July 11, 2020, through November 30, 2020, resulting from an injury sustained on (date of Injury), but the claimant did not have disability from December 1, 2020, through December 18, 2020, resulting from the compensable injury as being incomplete, and we remand the disability issue to the ALJ for further action consistent with this decision. See APD 132339, *supra*; APD 180839, *supra*; and APD 181357, *supra*.

We note that although the ALJ in this case ended the claimant's disability due to the claimant returning to work, there is evidence in the record that the claimant returned to work in a different position and earned less than her preinjury wage.

We additionally note that the claimant's attorney contends in his cross-appeal that the ALJ failed to consider the claimant's timely supplemental closing argument in response to Dr. T's new report that was sent to the parties after the CCH. The claimant's attorney attached a fax confirmation sheet to his cross-appeal proving his response was sent to and received by the Division before 5:00 p.m. on the deadline date of April 24, 2023. The ALJ states in her decision that the self-insured's response to Dr. T's report was admitted into evidence, but does not mention or admit the claimant's timely submitted response.

We have previously held that it is reversible error to solicit a response from a designated doctor and write an opinion based thereon without having afforded the parties the opportunity to comment on the additional evidence. APD 011128, decided June 25, 2001. See *also* APD 93323, decided June 9, 1993; APD 010902, decided June 6, 2001; and APD 100201, decided April 23, 2010. Although this case differs somewhat from APD 011128 in that the ALJ did send the parties the designated doctor's new report and left the record open to afford them the opportunity to respond, the ALJ did not consider the claimant's response that was sent in compliance with the deadline for submitting a response to the designated doctor's new report.

SUMMARY

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. X on April 3, 2020, did not become final under Section 408.123 and Rule 130.12 as being incomplete, and we remand the finality issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determinations that the claimant reached MMI on November 16, 2020, and the claimant's IR is nine percent and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant had disability from July 11, 2020, through November 30, 2020, resulting from an injury sustained on (date of Injury), but the claimant did not have disability from December 1, 2020, through December 18, 2020, resulting from the compensable injury as being incomplete, and we remand the disability issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the ALJ is to make a finding of fact, conclusion of law, and a decision regarding whether the first certification of MMI and assigned IR from Dr. X on April 3, 2020, became final under Section 408.123 and Rule 130.12 that is supported by the evidence and consistent with this decision. The ALJ is then to make a finding of fact, conclusion of law, and a decision regarding the issues of MMI and IR that is supported by the evidence and consistent with this decision. Finally, the ALJ is to make a finding of fact, conclusion of law, and a decision regarding whether the claimant had disability from July 11, 2020, to December 18, 2020, resulting from an injury sustained on (date of Injury), that is supported by the evidence and consistent with this decision.

The ALJ is to admit into evidence and consider the claimant's timely supplemental closing argument.

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 **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge