

APPEAL NO. 231076
FILED SEPTEMBER 14, 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 June 29, 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 compensable injury sustained on (date of injury), does not extend to right shoulder supraspinatus and infraspinatus tendinosis with partial tearing, right shoulder longhead bicep tendinosis, right shoulder superior labrum contusion with mild tearing, or right shoulder adhesive capsulitis; (2) the claimant did not have disability from August 9, 2022, through the date of the CCH resulting from the compensable injury sustained on (date of injury); (3) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. C) dated September 28, 2022, became final pursuant to Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (4) the appellant (claimant) reached MMI on June 27, 2022; and (5) the claimant's IR is 2%. The claimant appealed, disputing the ALJ's determinations of extent of injury, finality, disability, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed extent of injury, finality, disability, MMI, and IR determinations.

DECISION

Affirmed in part, and reversed and rendered in part.

The parties stipulated, in part, that: the claimant sustained a compensable injury on (date of injury), in the form of at least the insurance carrier-accepted condition of right shoulder acromioclavicular joint sprain; the first valid certification of MMI and assigned IR was by Dr. C on September 28, 2022; Dr. C was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) on the issues of MMI and IR; and the claimant first disputed the certification of MMI and assigned IR of Dr. C on February 21, 2023, when she filed a request for a benefit review conference on those issues. The claimant testified that she was injured on (date of injury), when she was pulling a lever on an extrusion machine.

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 right shoulder supraspinatus and infraspinatus tendinosis with partial tearing, right shoulder longhead bicep tendinosis, right shoulder superior labrum contusion with mild tearing, or right shoulder adhesive capsulitis is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant did not have disability from August 9, 2022, through the date of the CCH resulting from the compensable 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; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. Section 408.123(f) provides, in part, that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in 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.

The ALJ found that none of the exceptions to the 90-day rule were applicable. On September 28, 2022, Dr. C examined the claimant and certified the claimant reached MMI on June 27, 2022, and assigned a 2% IR, 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. C considered and rated a right shoulder acromioclavicular joint sprain.

Dr. C noted in her narrative the range of motion (ROM) measurements used to assess impairment and the upper extremity (UE) impairment assigned. Dr. C's narrative listed the following: flexion 170° (1%); extension 43° (when rounded to 40°)

(1%); abduction 175° (0%); adduction 40° (1%); internal rotation 80° (0%); and external rotation 95° (0%); using Figures 38, 41, and 44, on pages 3/43, 3/44, and 3/45, respectively, of the AMA Guides. The ROM values used by Dr. C to assess impairment included the measurements recorded in the physical therapy notes on June 27, 2022, for flexion, abduction, internal rotation, and external rotation. However, Dr. C noted that those measurements were incomplete. Dr. C used the ROM values obtained in her examination for adduction and extension. The impairments Dr. C assigned for ROM measurements for right shoulder flexion, extension, abduction, internal rotation, and external rotation were all correctly calculated in accordance with the AMA Guides. However, Dr. C assigned 1% UE impairment for 40° of adduction. Figure 41 on page 3/44 of the AMA Guides does not provide that 40° of adduction results in 1% UE impairment but rather results in 0% UE impairment. Dr. C incorrectly assigned 1% UE impairment for loss of ROM for adduction of the right shoulder.

Dr. C's miscalculation of the impairment for ROM loss of the right shoulder constitutes compelling medical evidence of a significant error by Dr. C in calculating the claimant's IR, and therefore, the exception in Section 408.123(f)(1)(A) applies. Accordingly, we reverse the ALJ's determination that the first MMI/IR certification from Dr. C on September 28, 2022, became final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. C on September 28, 2022, did not become final under Section 408.123 and Rule 130.12.

MMI

The ALJ's determination that the claimant reached MMI on June 27, 2022, is supported by sufficient evidence and is affirmed.

IR

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.

As previously noted, there is compelling medical evidence of a significant error by Dr. C in calculating the claimant's IR. Therefore, Dr. C's assessment of IR cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant's IR is 2%.

There is one other certification in evidence. (Dr. H), a doctor selected by the treating doctor to act in the treating doctor's place, examined the claimant on January 6, 2023. Dr. H certified that the claimant reached MMI on June 27, 2022, with a 3% IR. Dr. H considered and rated a right shoulder acromioclavicular joint sprain using the AMA Guides based on loss of ROM. Dr. H noted that the measured ROM values by the physical therapist taken on June 27, 2022, were incomplete. Dr. H stated he compared his values for loss of ROM of the claimant's right shoulder with the ROM measurements taken by Dr. C during the examination performed by her on September 28, 2022, and he considered her measurements to be accurate. Those ROM measurements and the UE IR assigned were as follows: flexion 137° (rounded to 140°) (3%); extension 43° (rounded to 40°) (1%); abduction 151° (rounded to 150°) (1%); adduction 40° (0%); internal rotation 80° (0%); and external rotation 65° (whether rounded up to 70° or rounded down to 60°) (0%). Dr. H correctly assigned 5% UE impairment for loss of ROM of the claimant's right shoulder which converted to 3% whole person impairment. We render a new decision that the claimant's IR is 3%.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to right shoulder supraspinatus and infraspinatus tendinosis with partial tearing, right shoulder longhead bicep tendinosis, right shoulder superior labrum contusion with mild tearing, or right shoulder adhesive capsulitis.

We affirm the ALJ's determination that the claimant did not have disability from August 9, 2022, through the date of the CCH resulting from the compensable injury sustained on (date of injury).

We reverse the ALJ's determination that the first MMI/IR certification from Dr. C on September 28, 2022, became final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. C on September 28, 2022, did not become final under Section 408.123 and Rule 130.12.

We affirm the ALJ's determination that the claimant reached MMI on June 27, 2022.

We reverse the ALJ's determination that the claimant's IR is 2% and render a new decision that the claimant's IR is 3%.

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

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-4284.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge