APPEAL NO. 062535-s
FILED FEBRUARY 9, 2007

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 November 17, 2006. The hearing officer decided that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 13th quarter, September 14 through December 13, 2006, and that the respondent (carrier) is entitled to take action with respect to benefits, including SIBs, based on a report of a required medical examination (RME) performed on July 25, 2006, by (Dr. H) pursuant to 28 TEX. ADMIN. CODE § 126.5 (Rule 126.5). The claimant appealed the hearing officer's determinations that the carrier complied with Rules 126.5 and 126.6 and was entitled to take action with respect to benefits based on Dr. H's RME report and that the claimant was not entitled to SIBs. The claimant attaches two additional pieces of evidence to his appeal contending that the medical narrative from his treating doctor was unavailable before the CCH despite his due diligence and providing no rationale for the unavailability or new discovery of the computer printout regarding avascular necrosis. The carrier responds, urging affirmance of the decision and objecting to the documents attached to the claimant's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

FACTUAL BACKGROUND

It is undisputed that the claimant sustained a compensable injury on _____, that resulted in a right hip replacement. In a prior CCH, it was determined that the compensable injury extends to include bilateral avascular necrosis of the hips. The parties stipulated that the claimant reached maximum medical improvement on December 26, 2001, with a 30% impairment rating; the claimant did not elect to commute any portion of the impairment income benefits; and the claimant's qualifying period for the 13th quarter began on June 2, 2006, and ended on August 31, 2006. It is undisputed that the carrier paid SIBs for the first 12 quarters. At the CCH, the claimant acknowledged that, for the qualifying period in dispute, he had conducted no job searches. The claimant asserted an entitlement to SIBs for the 13th quarter based on a theory of total inability to work. It is undisputed that the first selected carrier RME doctor is (Dr. N). The claimant submitted to an RME by Dr. N on June 23, 2000, August 22, 2003, and April 14, 2005. After the August 2003 RME, Dr. N opined that, at that time, the claimant was unable to work because of constant pain in the right hip, as well as immobility and that the claimant's pain would limit his ability to concentrate and perform any type of gainful employment. At the CCH, the claimant testified that on May 10, 2006, he received and signed a one-page form from the carrier requesting that an independent medical exam be scheduled to evaluate the claimant's current medical status and requesting that the claimant agree to attend the medical evaluation. The

form in evidence does not indicate which doctor will be selected by the carrier for the examination. The carrier asserts that the one-page form was sent to the claimant attached to the Required Medical Examination Notice or Request for Order Form-22 (DWC-22) dated June 5, 2006. In his testimony, the claimant denied ever receiving the DWC-22, from the carrier. The DWC-22 in evidence indicates that the carrier is selecting Dr. H for the requested RME exam; the requested doctor, Dr. H, is not the same doctor for the previous examinations at the carrier's request; and Dr. N had previously examined the claimant for an RME on three occasions, namely, April 14, 2005, August 22, 2003, and June 23, 2000. The DWC-22 does not indicate that the carrier's request was approved or denied by the Texas Department of Insurance, Division of Workers' Compensation (Division). Admitted into evidence is a Dispute Resolution Information System-Contact Data note dated August 11, 2006, which indicated that the Division received an RME report from Dr. H dated July 31, 2006, and there had been no DWC-22 filed. At the CCH, the claimant acknowledged that he attended an RME with Dr. H on July 25, 2006. On that same day, Dr. H referred the claimant to another health care provider for a functional capacity evaluation (FCE). The FCE indicates that the claimant had some ability to work.

NEWLY DISCOVERED OR UNAVAILABLE EVIDENCE

The claimant attaches to his appeal a "Medical Narrative Report" written by the claimant's treating doctor and dated December 7, 2006, and a computer printout regarding avascular necrosis posted on the internet website of HealthLink, Medical College of Wisconsin. The claimant requests that those documents be considered for the first time on appeal. In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the appellant after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to the lack of diligence, and whether it is so material that it would probably result in a different decision. Appeals Panel Decision (APD) 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Upon our review, we cannot agree that the evidence meets these requirements. We believe that due diligence would have obtained the information contained in the proffered documents prior to the CCH.

RULE 126.5 AND RME REPORT

In the December 28, 2001, issue of the *Texas Register (*26 Tex. Reg. 10899), the preamble notes that the amendments to Rules 126.5-126.7, effective January 2, 2002, were adopted to limit the use of a carrier-selected doctor for an RME to only the resolution of issues regarding the appropriateness of the health care received by an injured employee and similar issues. Adopted Rule 126.5(a) adds references to Sections 408.151 and 408.0041 to make clear that the [Texas Workers' Compensation Commission] (now Division) may authorize RMEs for reasons consistent with those subsections, as well as Section 408.004. The preamble notes that language is added relating to the consequences of an RME report which was not obtained in accordance

with the subsection. The preamble states that if a carrier does not comply with the requirements for requesting and scheduling examinations (*including those that the employee agrees to*) (emphasis added), the carrier and the Division are not allowed to act with respect to benefits, based on the RME doctor's opinion. This approach eliminates any incentive for not complying with the rule.[1]

The carrier argues that it is not required to comply with the applicable provisions of Rule 126.5(a), (b)(1), and (g) because it substantially complied with Rule 126.6(a), which provides in part that "[a]n agreement between the parties for an examination under [Rule] 126.5 of this title (relating to Entitlement and Procedure for Requesting Required Medical Examinations) that the carrier has a right to, has the same effect as the [Division's] formal order." We disagree. The Appeals Panel has previously held that the provisions of Rules 126.5 and 126.6 clearly state that an agreement for an RME is to be made in compliance with the provisions of Rule 126.5. APD 031650, decided August 13, 2003. The hearing officer's determination that the carrier complied with Rules 126.5 and 126.6, and therefore is entitled to take action with respect to benefits, including SIBs, based on a report of an RME performed on July 25, 2006, by Dr. H pursuant to Rule 126.5, is against the great weight and preponderance of the evidence because the carrier failed to comply with the provisions of Rule 126.5(a), (b)(1), (d)(1), (g), and (h) and Section 408.004(b).

Section 408.004(b) requires the same doctor for a subsequent RME unless otherwise approved. Rule 126.5(b)(1) provides in part that "a subsequent examination may be requested once every 180 days after the first examination and must be performed by the same doctor unless otherwise approved by the Division." There was no evidence that a requested subsequent RME by Dr. H was ever approved by the Division. Accordingly, the carrier failed to comply with Section 408.004(b) and Rule 126.5(b)(1).

Rule 126.5(d) states in part that:

> "Except for an examination under subsection (b)(2) [involving evaluating a designated doctor's determination on maximum medical improvement and/or impairment rating], the [Division] shall not require an employee to submit to a medical examination at the carrier's request until the carrier has made an attempt to obtain the agreement of the employee for the examination as required by subsection (g). The carrier shall notify the [Division] in the form and manner prescribed by the [Division] of any agreement or non-agreement by the employee regarding the requested examination. An examination of an employee by a doctor selected by the carrier shall be requested as follows: (1) Prior to requesting an RME from the [Division], the carrier shall send a copy of the request to the employee and the employee's representative (if any) in the manner prescribed by

[1] We note that Rules 126.5 and 126.6 were again amended, effective January 1, 2007. The instant case is decided under the January 2, 2002, amendments.

subsection (g) of this section in an attempt to obtain the employee's agreement to the examination."

Rule 126.5(g) states that "[t]he carrier shall send a copy of the request for a medical examination order required by subsection (d) of this section to the employee and the employee's representative (if any) by facsimile or electronic transmission if carrier has been provided with a facsimile number or email address for the recipient, otherwise, the carrier shall send the request by other verifiable means."

Rule 126.5(h) states in part that the carrier shall maintain copies of the request for a medical examination order and shall also maintain verifiable proof of successful transmission of the information. The evidence reflects that the carrier failed to comply with Rule 126.5(d)(1), (g), and (h) because, prior to requesting an RME from the Division, the carrier failed to send a copy of the DWC-22 to the claimant by verifiable means.

Rule 126.5(a) provides that:

"The [Division] may authorize a [RME] for any reason set forth in the Texas Workers' Compensation Act (the Act), Texas Labor Code, Sections 408.004, 408.0041, or 408.151 at the request of the insurance carrier (carrier), or the [Division]. The request shall be made in the form and manner prescribed by the [Division]. A carrier is not entitled to take action with respect to benefits based on, and the [Division] shall not consider, a report of an RME doctor that was not approved or obtained in accordance with this section."

In 26 Tex. Reg. 10900, the preamble states that the language in Rule 126.6 clarifies that an agreement between the parties for an RME has the same effect as the Commissioner's order only if the carrier has a right for the examination under Rule 126.5. The preamble discusses that previously carriers were obtaining the employee's agreement to attend an examination by the carrier's choice of doctor and not reporting these examinations to the Division as required by the previous Rule 126.5. This activity was a violation of the previous rule. Failing to report RME's to the Division prevents the Division from monitoring RME requests as required by the Texas Labor Code. Therefore, an agreement for an examination that the carrier is not entitled to does not have the effect of an order. Because the carrier failed to comply with Rule 126.5(b)(1), (d)(1), (g), and (h), the carrier failed to comply with Rules 126.5(a) and 126.6. Accordingly, we reverse the hearing officer's decision that the carrier is entitled to take action with respect to benefits, including SIBs, based on a report of an RME performed on July 25, 2006, by Dr. H pursuant to Rule 126.5 and render a new decision that the carrier is not entitled to take action with respect to benefits, including SIBs, based on a report of an RME performed on July 25, 2006, by Dr. H pursuant to Rule 126.5 because the carrier failed to meet the requirements of Rules 126.5(a), (b)(1), (d)(1), (g), and (h) and 126.6.

SIBS

Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) states that the [Division] Commissioner by rule shall adopt compliance standards for SIBs recipients. In that no such rules have been implemented as of this date, we refer to the eligibility criteria for SIBs entitlement in Rule 130.102. Commissioner's Bulletin No. B-0058-05 dated September 23, 2005, provides that until new SIBs rules are adopted, the Division's Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.

The evidence supports the hearing officer's decision that the claimant did not present a narrative report from a doctor which specifically explains how the injury caused a total inability to work and is not entitled to SIBs.

Accordingly, we affirm the hearing officer's decision that the claimant is not entitled to SIBs for the 13th quarter because the claimant did not present a narrative report from a doctor, which specifically explained how the injury caused a total inability to work, without consideration of Dr. H's RME report as evidence of a record showing an ability to work and without consideration of the claimant's alleged newly discovered evidence.

SUMMARY

We affirm the hearing officer's decision that the claimant is not entitled to SIBs for the 13th quarter, September 14 through December 13, 2006. We reverse the hearing officer's decision that the carrier is entitled to take action with respect to benefits, including SIBs, based on a report of a RME performed on July 25, 2006, by Dr. H pursuant to Rule 126.5 and render a new decision that the carrier is not entitled to take action with respect to benefits, including SIBs, based on a report of a RME performed on July 25, 2006, by Dr. H pursuant to Rule 126.5.

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge