AVOIDING THE NINETY-DAY RULE:
Filing Proper Disputes & Challenging Validity of Impairment Ratings

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Over the last year, the Ninety-Day Rule seems to be rearing its ugly head in a large percentage of impairment rating cases. It cuts both ways, against both claimants and carriers, and the effects can be costly. Most of the time, the party that is trying to avoid the Ninety-Day Rule immediately looks to the enumerated statutory exceptions to the rule: error in the use of the AMA Guides, a mistaken diagnosis, a previously undiagnosed medical condition, or improper or inadequate medical treatment. While these exceptions to the rule are available, they each require proof of "compelling medical evidence." Concepts such as burden of proof, differences of medical opinion and presumptive weight can significantly affect the outcome of these issues. However, technicalities found in the statute and rules may provide immediate relief, and may avoid litigation of Ninety-Day Rule issues altogether.

The essence of analyzing technicalities to avoid the Ninety-Day Rule is determining whether or not a party has made a timely and proper dispute of a valid certification of impairment. The following assumes that the initial certification of impairment was not disputed within ninety days as prescribed by Rule 130.12.

TIME

The Ninety-Day Rule only applies when the claimant's initial impairment rating is certified on or after June 18, 2003 (Rule 130.12(d)). The timing of June 18, 2003, does not come into play in most cases anymore, but it does affect a few. If there is a rating in the claim that was certified prior to June 18, 2003, then the Ninety-Day Rule does not apply to that claim, ever.

The second timing issue is the requirement that a party wishing to dispute a first certification of impairment must do so within ninety days of receiving written notice through verifiable means of the impairment rating with a copy of the DWC-69. The ninety days does not begin to run until the party receives the DWC-69 by verifiable means. All parties should investigate whether they received a DWC-69 and whether the date can be verified.

PROPER DISPUTES

It should be easy to determine how to dispute an impairment rating, but too often it is done incorrectly. It may be that Rule 130.12(b)(1) is poorly worded, or system participants just do not pay enough attention to the details, but the fact is that there are many timely disputes that are not made properly.

While the Act and Rules do not require a "proper" dispute per se, Rule 130.12(b)(1) does specify how a dispute is to be made. The rule states that a party may dispute an impairment rating by requesting a benefit review conference or by requesting the appointment of a designated doctor, if one has not been appointed. Thus, there are only two ways to dispute a first certification of impairment.

The problems with proper disputes do not usually arise out of how a DWC-45 or a DWC-32 are completed. In fact, in Appeal 043023-S, it was determined that a DWC-32 that was incomplete was a dispute of the first impairment rating because the carrier checked the box indicating it was disputing maximum medical improvement or impairment rating. However, because there are multiple reasons for the selection of a designated doctor, if no box was checked for the purpose of the designated doctor request, then it may not qualify as a dispute of the impairment rating.

It appears from a plain reading of Rule 130.12(b)(1) that a request for a benefit review conference to dispute the first certification of impairment is always adequate to avoid the Ninety-Day Rule. However, a request for a designated doctor will not always be a proper method of dispute, and may not protect the disputing party from the effects of the Ninety-Day Rule. As noted above, the rule states that a party may dispute an impairment rating by requesting a benefit review conference or by "requesting the appointment of a designated doctor, if one has not been appointed." The last phrase of the rule limits the use of the DWC-32 in impairment rating disputes. *If a designated doctor has already been appointed, then filing a DWC-32 to dispute the initial impairment rating does not protect the party from the effects of the Ninety-Day Rule.* This is logical given the fact that if a designated doctor has already been appointed, there is no need for the appointment of a designated doctor – it has already been done.

Consider the following scenario which is currently pending before the Division: the carrier requests a designated doctor to address maximum medical improvement and impairment rating. The day before the designated doctor examination, the claimant's treating doctor issues a valid DWC-69 certifying maximum medical improvement and impairment. The next day, the designated doctor issues a DWC-69 with an impairment rating significantly lower than the treating doctor's certification, with maximum medical improvement as the day of the exam. The carrier issues a PLN paying impairment income benefits pursuant to the treating doctor's certification because it has not received the designated doctor's report yet. Thereafter, the carrier issues a PLN indicating that payment will be made pursuant to the designated doctor's report. The carrier never files a request for a benefit review conference or a request for a designated doctor.

There are only two methods to dispute the first impairment rating: requesting a benefit review conference or requesting a designated doctor. The request for a designated doctor only applies if one has not already been appointed. Therefore, in the above example, because a designated doctor had been appointed prior to the first certification of impairment, the carrier could not dispute the impairment rating by filing a DWC-32. It could only obtain relief by filing a DWC-45.

Furthermore, assuming that the first certification of impairment is valid, there is no language in the rule that would relieve a party of the duty to file a dispute to avoid finality. Even though a designated doctor has been appointed, there has not been a dispute filed against the initial impairment rating. A party must take affirmative action to dispute the initial impairment rating. Failing to do so will result in finality.

It follows, then, that if the first certification of impairment is made by a designated doctor, the only proper method of disputing that certification is a benefit review conference request. Again, there is no need for the appointment of a designated doctor because one has already been appointed. Because of the "if one has not been appointed language," a DWC-32 would not satisfy the requirements of the rule and the impairment rating would become final.

VALIDITY

The most common technical defenses to the Ninety-Day Rule are in the arena of validity. Rule 130.12 indicates only a valid certification of impairment may become final. Therefore, any argument against the validity of the impairment rating is an argument to avoid the Ninety-Day Rule.

Rule 130.12(c) specifies that an impairment rating is valid if it is on a DWC-69, the maximum medical improvement date is not prospective, there is an impairment determination made, and there is a signature of the certifying doctor who is authorized to perform impairment ratings pursuant to Rule 130.1(a). If any of these items are missing from the DWC-69, then the rating cannot become final because it is not valid.

Many parties do not look beyond Rule 130.12(c), but there are many more validity questions throughout the Act and Rules. Rule 130.12(c)(3) addresses the requirement of the signature of the certifying doctor on the DWC-69, but it also references Rule 130.1(a). That rule indicates that only a doctor who is authorized (which means certified) by the Division to perform an impairment rating exam may provide an impairment rating. If the rating is by a doctor who is not authorized to provide an impairment rating, it is not a valid rating (Rule 130.1(a)(2)).

If the doctor uses the wrong version of the AMA Guides to certify impairment, then it is not a valid rating (Rule 130.1(c)(2)). If the heath care practitioner that performs range of motion, sensory and strength testing has not had the impairment rating training module required in Rule 180.23 within two years of the date the claimant is evaluated, then it is not a valid rating (Rule 130.1(c)(5)). If the rating is provided by a designated doctor who has someone other than himself perform the range of motion, sensory and strength testing, then the health care provider performing the testing must have successfully completed Division approved training, must not have previously treated or examined the employee within the past 12 months, and must not have examined or treated the employee with regard to the medical condition being evaluated by the designated doctor (Rule 130.6(d)).

There are times when a designated doctor certifies that maximum medical improvement has not been achieved, and then the insurance carrier obtains a required medical examination with a doctor of its choice that certifies a maximum medical improvement date and gives an

impairment rating. This is most often an initial impairment rating that must be disputed. But there are many more validity criteria for an RME doctor's certification. Rule 126.5(b) states that the Division shall not consider a report of an RME doctor that was not approved or *obtained* in accordance with that section. Rule 126.6 contains specific requirements that must be met to obtain an RME report: all examinations must be scheduled to occur within thirty days after receipt of the Division's approval of the RME; both the claimant and the claimant's representative must be given ten days' notice of the exam; and, a rescheduled exam must occur within seven days of the originally scheduled exam unless an agreement is made to extend this time, but no more than thirty days from the original exam date. If these requirements are not met, then the Division cannot consider the impairment rating certified by the RME doctor.

SUMMARY

It is always proper to dispute an initial certification of impairment by filing a request for a benefit review conference. It is sometimes, but not always, proper to dispute an initial certification of impairment by filing a request for a designated doctor. In those instances when the wrong form is filed, or no dispute is filed at all, then the first thought of the disputing party should be to review all of the technical deficiencies that might lead to a finding of an invalid impairment rating. Compelling medical evidence is not required to challenge the validity of an impairment rating, and invalid impairment ratings cannot become final as a matter of law.