APPEAL NO. 931065

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On October 19, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that claimant reached maximum medical improvement, consistent with an oral agreement made during the contested case hearing, on February 15, 1993. She also determined that claimant's impairment rating was 13% as found by the designated doctor. Appellant (claimant) asserts that he disagrees with the finding of fact that states he entered into an agreement as to MMI and which refers to the agreement as in his best interest; he further describes misunderstandings he had as to MMI. Claimant also attacks the impairment rating of the designated doctor because two doctors disagree with it which, he states, should overcome the presumptive weight which may be given the designated doctor. Carrier asks that the hearing officer be affirmed.

DECISION

We affirm.

Claimant worked as an airplane mechanic. On (date of injury), claimant fell down stairs, while on the job, injuring his back. Prior to this date of injury, claimant had surgery to fuse a part of his cervical spine in 1990. After the injury in question, claimant had surgery on August 27, 1992, to repair a herniated disc at the L5-S1 area. The last MRI in evidence was made on May 14, 1993, and reflects "no evidence of posterior disc bulge or herniation" at L2-3, L3-4, or L4-5. A very large disc bulge at L5-S1 was interpreted as "epidural scarring".

Claimant's treating doctor, (Dr. B), stated in writing (but did not sign, apparently) that claimant had reached MMI on February 15, 1993. No question was raised as to whether this writing could constitute a certification of MMI (*See* Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992, which requires that a physician certify MMI based on reasonable medical probability before MMI is found to have been reached; also *see* Section 401.011 (30) which states that MMI can be reached 104 weeks after income benefits began.)

The hearing officer announced at the hearing that the benefit review officer had reported one of the issues to be "has the claimant reached maximum medical improvement, and if so, what date was it reached?" The hearing officer then said:

Do you agree with that, (claimant), as being an issue?

(CL)I think that was one of the questions on the interrogatories, and--

(HO)This is -- I'm taking this from the benefit review officer's report.

(CL)Right.

(HO)Okay. Do you understand that to be an issue?

(Mrs CL)That they --

(CL)Correct

(Carrier)I think what (claimant) --

(CL)I don't think the date was an issue. I think the impairment was the basic issue.

(HO)Okay.

(Carrier)What (claimant) may be referring to is, in his fourth answer to interrogatory, I think he agreed, and we're prepared to agree, with the hearing officer's recommendation as far as the date of maximum medical improvement.

I don't want to speak for you, because I don't. But that's what I understand you to be saying.

(CL)Right. The maximum -- or the date of maximum medical improvement should stand as the date that it was initially given.

The initial date of MMI was stated to be February 15, 1993, (as stated by Dr. B). The parties then agreed to stipulate that the date of MMI was February 15, 1993.

Claimant's appeal takes issue with that part of the hearing officer's finding of fact that says the agreement as to MMI was in the best interest of the claimant. Neither the 1989 Act at Sections 408.005, 410.029, 410.030, or 410.166, nor the Rules of the Commission (Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.9 and 147.4) require that an agreement must be "in the best interest of the claimant." Section 408.005(e) does require the director of hearings to be "satisfied" that a settlement is in the best interest of the claimant. With no question raised that the terms of the agreement are inaccurately reported and that such agreement was accepted by the claimant (and with sufficient support in the record for findings made as to these points), that part of a finding of fact that says the agreement was in the interest of the claimant was not essential to the decision. *See* Texas Indemnity Insurance Company v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940), which permits the disregarding of certain findings when necessary findings sufficiently support the decision.

Claimant's appeal also states that he erred in thinking that he had to be at MMI in order to have the Texas Rehabilitation Commission accept him; he adds that was his basis for requesting an MMI from Dr. B. He says that if he had understood that only a release to work was necessary, he would not have made the agreement. None of these statements were offered at the hearing; no evidence was offered at the hearing that would show Dr. B was willing to say claimant was at MMI when he was not. One of claimant's exhibits

indicates that he and a representative of Texas Rehabilitation Commission signed a document on April 27, 1993, that related to claimant's program; the date of hearing when the oral agreement was made was October 19, 1993, almost six months later. While Section 410.030 may not apply to oral agreements (it refers to Section 410.029 which only applies to written agreements), it does permit relief of some claimants from a written agreement only when good cause is shown. Whether good cause exists is a factual determination made by the hearing officer as sole judge of the weight and credibility of the evidence. *See* Section 410.165. The factual basis that claimant asserts as a reason for relief from his agreement was present for claimant to have raised at the time of hearing. Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992, said that newly discovered evidence was necessary for a case to be remanded for further consideration (when the basis for a remand was not error committed by the hearing officer). To qualify, the evidence would need to come to the claimant's attention since the hearing; there had to be no lack of diligence that it came to claimant's attention no sooner; it would not be cumulative; and it had to be material. *Also see* Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Claimant does not even indicate that he could not have learned before the hearing that Texas Rehabilitation Commission did not require that MMI be reached. A remand is not called for by claimant's statements.

Finally, claimant asserts that two doctors disagree with the opinion of the designated doctor as to impairment rating. The hearing officer considers all the medical evidence in deciding whether the presumptive weight given to the designated doctor's impairment rating by Section 408.125(e) has been overcome by other medical evidence. "The weight to be given medical evidence is not necessarily based on the quantity of evidence admitted or the time spent with a particular doctor." *See* Texas Workers' Compensation Commission Appeal No. 93482, decided July 29, 1993. The Appeals Panel will not overturn the hearing officer, who is charged with weighing the evidence, unless his decision is against the great weight and preponderance of the evidence. We do not find that the great weight and preponderance of the evidence is against the hearing officer's determination that the impairment rating of the designated doctor is entitled to presumptive weight.

While only referred to in passing in the claimant's appeal, the question, "if surgery is pending how can I be at MMI?" is raised. The record shows that Dr. B, the treating doctor, on May 18, 1993, after the most recent MRI of May 14, 1993, considered the fact that claimant's bulge was scar tissue; Dr. B advised claimant "it would not be beneficial for any type of intervention at this time." The strongest indication for surgery is a statement by Dr. B on July 22, 1993, that if claimant gets worse, he will probably have to have surgery. No doctor's statement indicates that surgery is pending or even that claimant has gotten worse.

Claimant attached a statement from Dr. B dated November 16, 1993, to his appeal. While such a statement can not be considered for the first time on appeal, and would have to meet the criteria of Black v. Willis, *supra*, for the case to be remanded for the hearing officer to consider it, the document appears to contain no new information. Surgery is not stated to be pending. Pain control is said to be needed.

Medical care continues after MMI has been reached. Texas Workers' Compensation Commission Appeal No. 93300, decided June 3, 1993, pointed out that MMI does not mean a person will be free of pain. In addition, that decision found the need for treatment to develop "coping skills" would not cause a hearing officer's decision that MMI had been reached to be overturned.

A main contention made at the hearing, whether impairment amounts for claimant's back condition should be given based on both Sections IIC and IIE of Table 49 of the Guides to the Evaluation of Permanent Impairment, February 1989, third edition, second printing, published by the American Medical Association (Guides), was not stated to be an issue on appeal. At the hearing the treating doctor was shown to have added ratings from Sections IIC and IIE while the designated doctor only applied Section IIE of Table 49 (10 points for surgically treated disc lesion with residual symptoms) and found a total of 13% in part from other areas, such as range of motion. Had this issue been appealed, the record does not disclose probative evidence that the designated doctor's use of Table 49 was in error.

Finding that the decision and order of the hearing officer are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge