APPEAL NO. 93107

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on January 11, 1993, in (city), Texas, to decide two issues: whether the claimant has reached maximum medical improvement (MMI) and if so, on what date; and whether the claimant has impairment as a result of this injury, and if so, how much. The claimant as appellant seeks this panel's review of hearing officer (hearing officer) determination that she reached MMI on June 3, 1992, with a zero percent whole body impairment rating, and contends that the hearing officer improperly excluded her husband as a witness. The carrier in its response asks that we uphold the decision and order; it also contends that the hearing officer's ruling was not reversible error.

DECISION

Upon review of the record in this case, we affirm the hearing officer's decision and order.

The claimant was working as a trade shipping puller for (employer) on (date of injury), when she injured her lower back lifting a box of books. She saw a doctor the next day who took x-rays and released her to light duty work. Thereafter, she treated with (Dr. B), a doctor chosen by employer, from October 8, 1991 to June 2, 1992. Dr. B initially diagnosed lumbar strain with no neurological deficit. However, her back became worse following physical therapy and she developed pain and numbness in her leg. Dr. B sent her for further tests, including a CAT scan, an MRI and an EMG, all of which produced normal results. Because of her continued pain she was sent to Dr. H at a pain clinic, but she only saw him once. She went several times to a psychologist, Dr. S, who used biofeedback techniques to help her with pain. She also saw Dr. R for a second opinion.

On June 2, 1992, Dr. B said he had no further suggestion for claimant's treatment, and he referred her to the (clinic) for inpatient therapy. Because she did not want to pursue that option, he wrote on June 3rd that he had no further treatment options left, and he certified claimant had reached MMI on June 3, 1992, with five percent impairment. (At the hearing, the parties stipulated that the carrier had paid 17 weeks of impairment income benefits based upon Dr. B's assessment of five percent impairment.) Because of claimant's disagreement with Dr. B's opinion, the Texas Workers' Compensation Commission (Commission) appointed a designated doctor, (Dr. O), who examined the claimant on September 23, 1992. Dr. O agreed with Dr. B's date of MMI, but he found claimant to have no impairment.

The claimant subsequently began treating with (Dr. M), who on December 8, 1992 said her estimated date of MMI was unknown. The claimant stated her belief that Dr. M was helping her to recover gradually.

In her request for review, the claimant appears to challenge the hearing officer's

decision and order holding that, pursuant to the designated doctor's report, the claimant reached MMI on June 3, 1992, with a zero percent whole body impairment rating. The 1989 Act defines MMI as the earlier of (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). Subsection (A) is applicable to the facts of this case. The Act also provides that if the Commission selects a designated doctor to resolve a dispute over MMI or impairment, the report of the designated doctor shall have presumptive weight, and the Commission shall base its determination on MMI and impairment on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. Articles 8308-4.25(b), 4.26(g).

It should be noted that the fact that an individual may have reached MMI does not mean, in every case, that he or she is free of pain or fully restored to his or her preinjury condition. Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992. Reaching MMI also does not mean that an employee will not continue to be entitled to lifetime medical benefits under the 1989 Act.

This panel has previously held that to overturn the report of a designated doctor requires more than a mere balancing of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Upon review of the record in this case, we cannot say the hearing officer erred in determining that the great weight of the other medical evidence was not contrary to Dr. O's report. The claimant appears to contend that she has not reached MMI because she is continuing to improve under Dr. M's care. Records from Dr. M were in the record as part of the medical evidence the hearing officer considered; as trier of fact he was entitled to consider and weigh this and other medical evidence in making his decision and to find that this evidence did not overcome the presumptive weight accorded Dr. O's report. *See* Article 8308-6.34(e), which provides that "the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence;" and Texas Workers' Compensation Commission Appeal No. 92031, decided March 13, 1992.

Finally, the claimant alleges error in the hearing officer's excluding her husband as a witness because of her failure to identify him as a potential witness, as required by Commission rules, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 142.13, 142.19 (Rules 142.13 and 142.19). Although the hearing officer did not specifically state his determination that there was a lack of good cause for non-disclosure on claimant's part, the record shows he questioned claimant about the circumstances surrounding her answering of interrogatories and the failure to identify her husband as a witness. We thus conclude that lack of good cause was the basis for the hearing officer's ruling. *See* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992. The standard of appellate review of the hearing officer's ruling is one of abuse of discretion.

Morrow v. HEB, Inc., 714 S.W.2d 297 (Tex. 1969). We note that the hearing officer, in addition to giving the claimant opportunity to explain her lack of disclosure, questioned claimant and her husband as to the nature of his proposed testimony, which appeared to be cumulative of claimant's. Upon review of the record, we do not find that the hearing officer abused his discretion.

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge