APPEAL NO. 931121

This case returns for review after having been remanded pursuant to our decision in Texas Workers' Compensation Commission Appeal No. 93518, decided August 5, 1993. After the first contested case hearing (CCH), held in (city), Texas, on June 1, 1993, the hearing officer, (hearing officer), determined that the respondent (claimant) had reached maximum medical improvement (MMI) on January 7, 1993, with a whole body impairment rating (IR) of five percent based on the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission). Shortly before that CCH, the Commission had approved claimant's request for spinal surgery which was performed on June 9, 1993. We remanded for a determination as to whether the designated doctor's opinion on MMI and IR had changed as a result of the Commission approved surgery. At the second CCH, held in (city), Texas, on November 15, 1993, additional evidence was adduced including evidence that while the designated doctor did not change his opinion that claimant had reached MMI on January 7, 1993, he did increase claimant's IR to 10% to account for the spinal surgery. The hearing officer, finding that the great weight of the other medical evidence was not contrary to the report of the designated doctor, concluded that claimant reached MMI on January 7, 1993, with an IR of 10%. The carrier stated at the hearing that it did not oppose the 10% IR. Claimant has requested our review pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.202 (1989 Act) (formerly V.A.C.S., Article 8308-6.41). Claimant asserts, in essence, that the great weight of the other medical evidence is contrary to the designated doctor's opinion that claimant reached MMI on January 7, 1993, with an IR of 10% because the Commission approved the spinal surgery which he underwent on June 9, 1993, the Appeals Panel thereafter remanded the case for further consideration, the opinions of two doctors establish that claimant is a candidate for still more surgery, that after another operation further material recovery or lasting improvement can be anticipated, and, therefore, that the determination of an IR is premature. The respondent contends in its response that the evidence sufficiently supports the hearing officer's determinations and shows not only that the surgery on June 9th failed to improve claimant's condition but that his condition has since deteriorated.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Our decision in Appeal No. 93518, *supra*, set forth the extensive medical evidence in this case to that date and it will not be here repeated in detail. At the second hearing, additional medical evidence was introduced and the claimant again testified.

Claimant introduced the Commission's "Findings and Decision" of May 27, 1993, which referenced the opinions on his first proposed spinal surgery from his treating doctor, (Dr. B), a neurosurgeon, from (Dr. T) (who was also the designated doctor), an orthopedic surgeon, from whom the carrier had requested a second opinion, and from (Dr. C), a neurosurgeon, to whom claimant was referred by the Commission for an examination to

resolve the disputed issue of spinal surgery. The reports of these doctors, though referenced in the exhibit, were not with the exhibit when it was introduced. We also observe there was no disputed issue nor is there an appealed issue concerning the use of the designated doctor by the carrier to provide an opinion on spinal surgery in the same case and thus we need not address the advisability of such. The Commission's decision found that due to Dr. C's concurrence with the need for the proposed surgery, "extenuating circumstances" warranted the Commission's order that carrier pay for the surgery.

On June 23, 1993, Dr. B wrote a letter stating that he had been treating claimant since December 1992, that claimant underwent a laser percutaneous diskectomy for a herniated disc at the L5-S1 level on June 9, 1993, and that he was then in the recovery period and unable to work. Claimant testified that immediately after the surgery he felt better, that one day near the end of his recovery period he made a long drive and was in severe pain by the end of that day, and that the pain in his lower back, left buttocks and left leg, as well as the numbness in his left leg, are "worse" and more frequent than they were before the surgery. Claimant said that Dr. B knows the surgery was not successful and has proposed another operation. He also testified that with respect to Dr. B's proposed additional surgery he had been examined by (Dr. R) who recommended against further surgery, and by (Dr. L) who recommended that certain therapy be tried before further surgery is undertaken. He also testified that Dr. B had not advised him one way or the other on whether the proposed second operation would improve his condition.

Dr. R, a neurosurgeon, examined claimant on August 26, 1993, to provide the Commission with a second opinion on the proposed second operation. The history portion of his report of that date stated that the June 9th laser surgery which Dr. B performed on claimant's low back helped him for a few days but that when claimant got out of bed and stepped on his leg, the pain returned immediately, and that Dr. B now wants to do a microscopic diskectomy. Dr. R's report recited the results of his neuro-orthopedic examination, indicated he had either reviewed or was aware of various diagnostic test results, and stated his impression that claimant has a "very small midline type of disc" which he did "not feel is clinically significant." Dr. R then commented as follows: "[I] do not recommend surgery for this disc. There is no evidence of neurological involvement in this patient. He does have marked functional features."

Dr. L also indicated he had reviewed various diagnostic tests which showed the disc bulge at L5-S1 but without apparent focal nerve compression. In his October 26, 1993, "third opinion" report for the Commission, Dr. L stated his impression that claimant has a disc bulge and degenerative disc at L5-S1 and said that claimant, by history, had "not really had a vigorous attempt at conservative therapy" which Dr. L said he would recommend. Dr. L went on to state that if such conservative treatment failed, claimant "might very well be a candidate for surgery . . . if the degree of back pain persists."

In his report of October 28, 1993, Dr. T, the designated doctor, recounted that when he saw claimant on January 7, 1993, he felt claimant had reached MMI as of that date and assigned him a five percent IR, and that when he saw claimant in March 1993, he felt

claimant would not benefit from the proposed spinal surgery. Dr. T stated that since that time he had reviewed Dr. B's operative report of the June 9th percutaneous diskectomy with laser, as well as Dr. B's postoperative clinic notes. The latter indicated that claimant had residual complaints of back pain, that he was injected with an anesthetic on June 29th, that by July 7th the back pain and left leg pain persisted, and that when claimant saw Dr. B on July 29th, the latter recommended "open surgery." As for his prior opinion on MMI and IR, Dr. T made no change in the MMI date but stated that since claimant then had an operated disc lesion with residual symptoms, his IR was 10%. Dr. T stated that based on the available evidence, he continued to agree with his March 5, 1993, opinion in which he said he did not concur with spinal surgery because he felt surgery would not result in claimant's being able to resume "a full and unrestricted active laboring lifestyle" nor would he expect such surgical procedures "to remove the residual low back pain which [claimant] has stated to me and others to be his major complaint."

The hearing officer, finding that the designated doctor certified that claimant reached MMI on January 7, 1993, with a five percent IR, that he later amended his IR assignment to 10% in consideration of claimant's surgery of June 9th, and that the designated doctor's certification of MMI and IR was not overcome by the great weight of contrary medical evidence, concluded that claimant reached MMI on January 7, 1993, and has an IR of 10%. We are satisfied that the evidence, including the medical evidence detailed in our earlier decision in this case, sufficiently supports the hearing officer's findings and conclusions. The 1989 Act makes the hearing officer the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. Section 410.165(a). It is the hearing officer who resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust (In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986)) and we do not find them so in this case.

As earlier noted, our opinion in Texas Workers' Compensation Commission Appeal 93518, *supra*, details the medical evidence introduced at the first hearing. Before claimant began being treated by Dr. B, apparently in December 1992, Dr. S, a doctor at the clinic where claimant had previously been treated, stated that he reached MMI on June 25, 1992, with a zero percent IR. However, claimant maintained that it was Dr. C and not Dr. S whom he saw at the clinic. A prior designated doctor, Dr. K, determined that claimant had reached MMI on October 1, 1992, with a 10% IR. In his report of January 7, 1993, Dr. T, the current designated doctor, not only stated that claimant had reached MMI by that date but also opined that claimant was "unlikely to benefit from further active surgical, medical, or physical therapeutic intervention." As the hearing officer observed in her discussion, the fact that claimant's June 9th surgery was unsuccessful and that he has not been given any reasonable assurance that the proposed additional surgery will improve his condition tends to support the designated doctor's opinion that claimant reached MMI on January 7, 1993. The 1989 Act defines MMI, in part, as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can

no longer reasonably be anticipated." Section 401.011(30)(a).

The Appeals Panel has said that MMI does not equate to the absence of pain or restoration to the pre-injury condition. *See e.g.* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993. As for the 10% IR determined by the hearing officer, claimant did not contend that it resulted from an inadequate examination by the designated doctor or that it was not in compliance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, as required by Section 408.124, but rather that the determination by the Commission of any IR was premature for the reason that claimant felt he has not yet reached MMI. In our view, claimant's point lacks merit and we do not find the great weight of the other medical evidence contrary to the designated doctor's report.

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm the hearing officer's decision.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge