APPEAL NO. 93230

On January 21, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The issues at the contested case hearing were: 1. the identity of the treating doctor; 2. whether the appellant (claimant herein) had reached maximum medical improvement (MMI) and, if so, the date on which it was reached; and 3. the claimant's impairment rating.

The hearing officer concluded that (Dr. F) was claimant's treating doctor. The hearing officer also found that claimant had reached MMI on June 2, 1992, with a zero percent impairment rating.

The claimant appeals, contesting the finding of MMI and the impairment rating. The claimant questions whether the hearing officer gave too much weight to the opinion of the designated doctor, particularly in light of her contentions that the designated doctor had indicated to her that she needed to see a more qualified doctor, had given more than one date of MMI, and had failed to run further tests. The claimant also argues that other doctors, who have treated her longer, disagree with the designated doctor that she has reached MMI. The claimant also asserts that before a doctor can certify MMI he must have treated a patient for six months, and no doctor, including the designated doctor, has treated her for this long. The respondent (carrier herein) replies that the hearing officer's findings of MMI and of the impairment rating are based upon the opinion of a designated doctor. The carrier argues that the findings of the designated doctor in regard to MMI and impairment must be given presumptive weight and can only be overcome by the great weight of the other medical evidence.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The claimant sustained a compensable injury on (date of injury), and was originally seen by the company doctor. The claimant then was treated by her family doctor (Dr. R) who referred her to (Dr. H), an orthopedic surgeon. Prior to seeing Dr. H, claimant also began treating with (Dr. B), a chiropractor. Dr. H prescribed physical therapy, and later sent the claimant to (Dr. L) to have a MRI of the lumbar spine performed, which done on March 19, 1992. Dr. L read the results of the MRI as normal and Dr. H characterized the MRI results as negative. On March 20, 1992, Dr. B wrote Dr. H, stating that the claimant had not improved with manipulation and physiotherapy and suggesting Dr. H possibly do more in-depth studies. Dr. H stated on a Report of Medical Evaluation form (TWCC-69) that claimant reached MMI on March 25, 1992, with a zero percent whole body impairment.

The claimant requested Dr. H provide another opinion, and he sent her to (Dr. W),

an orthopedic surgeon, for his evaluation. Dr. W stated that the claimant "does not demonstrate any objective findings on physical exam or MRI," and suggested that a CT scan be performed for the sake of completeness, declaring that if the CT scan were negative that he would feel that the claimant had reached MMI.

The claimant consulted with a (Dr. M), who, according to claimant, was a family physician who indicated he could not treat her, but referred to another doctor who claimant did not see. Claimant next saw Dr. F, an osteopath and board certified pain management specialist. Meanwhile, due to the claimant's contest of Dr. H's finding of MMI, the Texas Workers' Compensation Commission (Commission) appointed a designated doctor, (Dr. T), an orthopedist, to examine her and give his opinion as to MMI and impairment. Dr. T saw the claimant on June 2, 1992, and certified on a TWCC-69 that she had reached MMI on June 2, 1992, with a zero permanent impairment rating.

On August 14, 1992, the claimant, at the referral of Dr. H, saw Dr. G. (Dr. Fo), who stated that in the light of the absence of pathology on the MRI his opinion was that a discogram was not warranted and that he thought that claimant had reached MMI. On September 11, 1992, the claimant saw Dr. R who stated that his examination showed a severe limitation of back motion and that in his opinion the claimant had not reached MMI. In October 1992, the claimant saw Dr. F, who had been approved by the Commission at the request of the claimant, to be the claimant's treating doctor. Dr. F, in a report dated October 19, 1992, stated that he did not feel that claimant had reached MMI and had the need for further treatment. At the contested case hearing, the claimant testified she had not seen Dr. F since October, 1992, because he refused to treat her due to the carrier's refusal to pay his bill.

The record of the contested case hearing was held open to allow the claimant to be reexamined by the designated doctor, Dr. T, to confirm or clarify his previous findings as to MMI and impairment. Upon reexamination of the claimant on February 10, 1992, Dr. T indicated that his opinion as to claimant's MMI and impairment were unchanged from his June 2, 1992 findings.

In her appeal, Claimant contests the findings of the hearing officer as to MMI and impairment. Claimant's first ground of appeal is based upon her contention that the hearing officer gave too much weight to the opinion of the designated doctor in regard to MMI and impairment. She states four reasons for suggesting that the opinion of the designated doctor should not have been given the weight accorded to it by the hearing officer. First, she argues that the designated doctor gave more than one date of MMI. Second, claimant asserts that the designated doctor told her she needs to see another, more qualified, doctor. Third, she claims that the opinions of the designated doctor are suspect because he failed to run further tests. Finally, claimant contends that under the law no doctor can make a finding of MMI unless the doctor has treated the claimant for at least six months, and the

designated doctor in this case had not treated her for six months.

Article 8308-4.25(b) provides that the report of the designated doctor shall have presumptive weight, and the Commission shall base its MMI determination on that report unless the great weight of the other medical evidence is to the contrary. Further, Article 8308-4.26(g) provides that if the Commission selects a designated doctor, the report of the designated doctor shall have presumptive weight on the issue of impairment, and the Commission shall base its impairment rating on that report unless the great weight of the medical evidence is to the contrary. Thus the hearing officer was correct, and in fact required by the law, to give the opinion of the designated doctor, Dr. T, presumptive weight.

As to claimant's contention that the opinion of the designated doctor was suspect because of her allegation that the designated doctor told her she needed to see a more qualified doctor, we find no evidence in the record to support this claim. Nowhere in either of Dr. T's reports does he mention a need for claimant to see any other doctor. While claimant stated at the hearing, in argument, that Dr. T told her she needed to see a spine specialist in Dallas or Houston, there is no evidence that the designated doctor, an orthopedic surgeon, was not qualified to give an opinion as to MMI and impairment.

Claimant's argument that the designated doctor gave two dates of MMI--June 2, 1992 and February 10, 1993--appears to be based upon a misreading of Dr. T's reports. In his first report Dr. T found that claimant had reached MMI on the date of his initial examination, June 2, 1992. Before his second examination of the claimant, Dr. T was asked to confirm or clarify his findings from the first visit. Thus when Dr. T says in his written report of the second visit on February 10, 1993, that the claimant has reached MMI, it is clear from the context of the report that he is referring to and affirming his finding of MMI on June 2, 1992, not finding MMI as of February 10, 1993.

Claimant attacks the opinion of the designated doctor stating that the designated doctor failed to run further tests before issuing his opinion. There is no medical evidence in the record that further tests were necessary to form a medical opinion as to MMI and impairment. Claimant had an MRI done on March 19, 1992. The only other possible tests mentioned in the medical records in evidence are: the suggestion of "further studies" by Dr. B in his letter of March 20, 1992, to Dr. H (this might have well been referring to conducting or reading the results of the MRI itself); the feeling of Dr. W that a CAT scan should be done for "completeness" to corroborate the negative MRI; and Dr. Fo's statement that he thought a discogram was unwarranted in light of the negative MRI. No doctor ever stated that further tests were needed to determine either MMI or physical impairment. We have previously rejected the assertion by a claimant, unsupported by medical evidence, that a medical examination was inadequate to support a determination of MMI. *See* Texas Workers' Compensation Commission Appeal No. 92255, decided November 12, 1992.

Finally, claimant attacks the opinion of the designated doctor as to MMI asserting that

prior to finding MMI a doctor must treat a patient for six months, and Dr. T had not treated her for this period. There is no requirement that a doctor treat a claimant for six months prior to finding MMI. Claimant's misunderstanding on this point probably stems from a discussion at the contested case hearing that one factor in determining impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) is the persistence of pain for over six months. It was felt by the hearing officer that since Dr. T originally saw claimant less than six months after her injury that he may not have taken this factor into account when determining her impairment under the AMA Guides. This is the very reason that the hearing officer held the record open to allow a reexamination of the claimant by Dr. T prior to making a final decision in this case.

In her second ground of appeal, the claimant essentially argues that the great weight of the other medical evidence is contrary to the opinion of the designated doctor, Dr. T, as to MMI. To support her view she points to the contrary opinions of both Dr. R and Dr. F. She then argues that the opinions of these two doctors should be given great weight because they have treated her longer than Dr. T. She also contends that Dr. F's opinion should be entitled to great weight because he is her Commission approved treating doctor.

As stated earlier, Article 8308-4.25(b) provides that the report of the designated doctor shall be given presumptive weight on the issue of MMI. Further, we have held that the report of no other doctor, including a report of the treating doctor, is to be given this presumptive status. *See* Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

In judging any argument involving the weight of the evidence we must look to the proper appellate standard of review. Article 8308-6.34 provides that the contested case hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given the evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided August 3, 1992; Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993. This rule applies to the testimony of expert witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 289-290 (Tex. App.-Houston [14th Dist.] 1984, no writ); Texas Workers' Compensation Appeal No. 93175, decided April 23, 1993. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993; Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In the present case in light of the statutory presumption to be given to the doctor's findings under Article 8308-4.25, and in light of the proper standard of appellate review, we cannot say that the hearing officer's decision as to MMI and impairment was erroneous.

For the foregoing reasons, we affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge