APPEAL NO. 93736

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On July 22, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) had not reached maximum medical improvement (MMI). Appellant (carrier) on appeal disputes the determination that claim ant disputed within 90 days a doctor's opinion that MMI was reached; carrier adds that since MMI was not timely disputed, there should have been no designated doctor appointed; and states that conclusions of law that say MMI was not reached and no valid impairment rating has been issued are disputed because there was a proper assignment of each. Claimant responds within the time allowed for appeal and points out that the initial attempt to certify MMI and assign an impairment rating was invalid; claimant also states that the evidence is sufficient to support the hearing officer's decision.

DECISION

We affirm the decision and order.

At the hearing the parties agreed that the issues were whether claimant had reached MMI and if so, what was the impairment rating. A "sub-issue" was "whether claimant timely disputed."

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

Carrier disputes: the finding of fact that states claimant disputed the initial impairment rating given by her treating doctor, (Dr. F), within 90 days; the finding that says the opinion of the designated doctor,(Dr. S), that MMI has not been reached, is a valid certification; and the finding that the great weight of other medical evidence is not contrary to the designated doctor's opinion. Carrier also disagrees with conclusions of law that say claimant has not reached MMI and claimant has been issued no valid impairment rating. Claimant in her response, filed within the time for appeal, asserts that the certification of MMI and assignment of impairment rating by Dr. F were invalid.

The Appeals Panel determines:

That Dr. F's certification of MMI and assignment of impairment rating were not valid;

That claimant does not have to dispute an initial impairment rating within 90 days, unless that rating is a valid one made after MMI has been certified;

That findings of fact and conclusions of law in regard to claimant's dispute of the August 1992 impairment rating were not necessary to the decision because that rating was based on an invalid certification of MMI; and

That claimant has not reached MMI.

Claimant worked for (employer) in the video department but on (date of injury), she was helping to stock shelves when she hurt her back attempting to handle a bundle of six bags of charcoal. She saw Dr. F who first gave an opinion as to MMI in March 1992. In April 1992 Dr. F changed his mind, rescinded his prior opinion, and indicated that claimant would reach MMI in the future. Neither party in its assertions to the Appeals Panel suggests that the opinion of March 1992 as to MMI and impairment rating could operate as an initial assignment of impairment rating for which the 90-day period to dispute could apply. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(c)).

Dr. F next signed a TWCC-69 in regard to claimant and dated it "7/17/92" after having received a letter from (medical facility)., dated 7-14-92, asking him to advise whether claimant had reached MMI. Dr. F, on July 17, 1992, said that claimant's date of MMI was August 10, 1992. The copy of the TWCC-69 in question shows that it was transmitted immediately by Dr. F because (medical facility) date stamped its receipt as July 20, 1992, still 21 days prior to the date claimant was said to have "reached" MMI. In addition, at that time claimant had a different lawyer and the name of his office was date stamped (August 5, 1992) on a TWCC-21 that showed claimant "reached MMI 8-10-92 with 0% disability." Clearly the MMI date used by Dr. F was not only a prospective date of MMI, it also was communicated to others as an accomplished fact prior to the date MMI was to be "reached."

Claimant's efforts to dispute the impairment rating that accompanied the MMI date of August 10, 1992, were directed to the Texas Workers' Compensation Commission (Commission) in late September 1992, at which time she saw (Mr. L). She testified that she told him, "(t)hat I didn't feel like I reached my maximum medical improvement, and I would like to see another doctor." She also testified that at that time she believed her physical condition could get better. She added that she later had surgery with another doctor and her back and legs are better now. Claimant also filled out a form relating to naming a second treating doctor on October 9, 1992, in which she said, "I would like to know what my physical condition is and how to improve it." On September 23, 1992, claimant had signed a form in which she stated a reason for changing her treating doctor as, "[n]ot satisfied with [Dr. F's] treatment course."

After claimant changed her treating doctor to (Dr. T), she had back surgery in December 1992. In February 1993, when the benefit review conference was held, Dr. S was appointed as the designated doctor; she examined the claimant on February 19, 1992, and reported that claimant had not reached MMI. She added that claimant was not at MMI in August 1992, but should be at MMI when she completes her postoperative rehabilitation program.

The hearing officer in the "Discussion of Evidence" states that the August 1992 certification of Dr. F did not comply with the rules. He added at that point in the opinion that claimant did dispute the certification, "assuming its validity." While he made no finding of

fact that the August 1992 certification was invalid, he did not find it valid as he did the certification of Dr. S. In addition, he concluded that no valid impairment rating had been issued to claimant. (Since Dr. S's valid certification as to MMI concluded that MMI had not been reached, she assigned no impairment rating.) Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993, stated that a doctor's certification in one month that the claimant reached MMI the next month is prospective. That appeal then said, "[w]e have stated that an anticipated date of MMI is not a statement or certification that MMI has been reached." It then concluded that with no valid MMI date, the impairment rating was not valid so there was nothing to become final under Rule 130.5(e) within 90 days. *See also* Texas Workers' Compensation Commission Appeal No. 93361, decided June 23, 1993.

In Texas Workers' Compensation Commission Appeal No. 93551, decided August 19, 1993, citing Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992, the panel said, "the hearing officer begins his consideration of the evidence with a doctor's certification of MMI in deciding whether MMI has been reached" and added, "it is only after certification of MMI that an impairment rating is assigned." On September 15, 1993, Texas Workers' Compensation Commission Appeal No. 93691 held that certification of MMI and assignment of an impairment rating must have occurred prior to the time the 90-day time period under Rule 130.5(e) begins to run.

In the case on appeal, the conclusion of law that says no valid impairment rating had been issued is sufficiently supported by the evidence. The finding of fact that claimant timely disputed the August 1992 date of MMI and impairment rating of Dr. F is disregarded as not necessary to the decision (*See* Texas Indemnity Ins. Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940)) since there was no finding that Dr. F made a valid certification as to MMI. Because this conclusion of law can be sustained on the theory, supported by the evidence, that no valid certification of MMI preceded the impairment rating, no finding that the rating was timely disputed is necessary. *See* Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied) which called for affirmance of the judgment of the trial court on any reasonable theory supported by the evidence.

The carrier's assertion of error in regard to the appointment of Dr. S as a designated doctor was premised on the assumption that a valid initial certification of MMI and assignment of impairment rating had been noticed to the claimant and 90 days had passed without dispute, resulting in finality of the impairment rating and a corresponding absence of dispute upon which to base appointment of a designated doctor. Having found sufficient support for the conclusion that no valid impairment rating had been assigned by Dr. F, and more importantly, having found no failure to follow the criteria for appointment of a designated doctor in Rule 130.6. the Commission had authority in the circumstances to appoint a designated doctor, and Dr. S's opinion sufficiently supported a finding that it was a valid certification that MMI had not been reached.

The opinion of the designated doctor as to MMI and impairment rating is entitled to

presumptive weight unless the great weight of other evidence is to the contrary. *See* Sections 408.122 and 408.124 of the 1989 Act. In addition, the hearing officer is the sole judge of the weight of the evidence. *See* Section 410.165 of the 1989 Act. In this case the only physician with an opinion different from that of the designated doctor was Dr. F. There was no lack of thoroughness or accuracy regarding Dr. S's opinion or particular outstanding quality or incisiveness about Dr. F's opinions to cause the Appeals Panel to determine that the finding that the great weight of other medical evidence was not contrary to the designated doctor's opinion was against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 93432, decided July 16, 1993, which pointed out that the 1989 Act's requirement of "great weight" is clearly a higher standard to meet in order to overcome the designated doctor's opinion than would be present if a preponderance of the evidence test were applied.

With the presumption applied to the opinion of the designated doctor, Dr. S, the hearing officer was sufficiently supported in following the designated doctor's advice and concluding that the claimant had not reached MMI. The findings of fact, minus the finding as to timely dispute which was disregarded, and conclusions of law are sufficiently supported by the evidence. The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge