APPEAL NO. 93933

This appeal arises pursuant to 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*.). A contested case hearing (CCH) was held on May 27, 1993, in (city), Texas, with the record closing on September 21, 1993. (hearing officer) presided as hearing officer. The issues at the CCH were: 1. had the appellant/cross-respondent (claimant herein) reached maximum medical improvement (MMI); 2. the period of the claimant's disability; and 3. the claimant's impairment rating. The hearing officer concluded that the claimant reached MMI on January 25, 1993, with an 18% impairment rating as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The hearing officer found that claimant had disability which began on September 5, 1991, and which ended on April 1, 1992.

The claimant files a request for review arguing that the hearing officer erred in regard to his ruling as to disability for a number of reasons. The respondent/cross-appellant (carrier herein) replies in its response to the claimant's request for review that the hearing officer correctly determined the period of claimant's disability. The carrier also files a request for review contending that the hearing officer erred in adopting the opinion of the designated doctor because he was not properly selected and the great weight of the other medical evidence was contrary to his opinion as to MMI and impairment. The claimant responds that the designated doctor was properly selected and that the hearing officer correctly adopted his opinion as to MMI and impairment.

DECISION

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

The evidence in the case is summarized in the hearing officer's Decision and Order in the section entitled "Statement of the Evidence" and we adopt his rendition for the purposes of our decision. Briefly, the claimant was injured on (date of injury), in a motor vehicle accident while working for his employer. He was initially treated for neck, back, and left leg pain by (Dr. G). In January 1992, Dr. G referred the claimant to (Dr. H) who had treated the claimant for a prior injury. Dr. H certified on a Report of Medical Evaluation (TWCC-69) that the claimant reached MMI on March 23, 1992, with a zero impairment rating. Dr. H also released the claimant to return to his regular work at that time. On April 1, 1992, after receiving Dr. H's release to return to work, the claimant returned to his employer to resume his regular duties, but was advised that the employer did not have work available for him. The claimant then applied for social security disability benefits which were granted in June 1992. The claimant testified that he has not attempted to find work since that time.

The claimant was next treated by (Dr. B) who certified on a TWCC-69 that the claimant reached MMI on August 3, 1992 with a zero percent impairment rating. In his medical narrative of August 3, 1992, Dr. B stated that he felt that the claimant was capable

of working.

In June 1992 the parties entered into a Benefit Review Conference Agreement (TWCC-24) for the claimant to see a Commission-designated doctor to resolve disputes concerning disability, MMI, and impairment. The TWCC-24 stated that (Dr. F) would be the designated doctor. There was originally some confusion in setting an appointment with Dr. F who eventually saw the claimant on October 22, 1992, and stated that in his opinion the claimant had not reached MMI. Dr. F recommended that the claimant be sent to (Dr. M) for evaluation and treatment. Claimant entered a functional restoration program under Dr. M's care and, after completing the program, was released by Dr. M to full duty on January 25, 1993.

After the hearing, the hearing officer wrote to Dr. F to obtain his opinion as to MMI and impairment in light of Dr. M's treatment. Dr. F responded certifying on a TWCC-69 that the claimant had reached MMI on September 25, 1993, with an 18% impairment rating. The hearing officer then sent a copy of Dr. F's report to the parties for comment. The claimant apparently agreed with Dr. F's assessment, while the carrier disagreed contending that Dr. F was not a properly appointed designated doctor by the Commission, Dr. F used the wrong version of the "Guides to the Evaluation of Permanent Impairment," published by the American Medical Association (AMA Guides), and that Dr. F did not properly apply the AMA Guides. The hearing officer wrote to the designated doctor and received clarification from him concerning his opinion applying the correct version of the AMA Guides. We observe that the hearing officer showed commendable diligence in developing the post-hearing record.

The claimant in his request for review complains of the hearing officer's finding that the claimant's disability ended April 1, 1992. The claimant argues that the claimant's disability must have extended beyond April 1, 1992, because he was not at MMI on April 1, 1992, and then recites evidence and reasons that the claimant had not attained MMI on April 1, 1992. The claimant's argument confuses the issues of disability and MMI. Disability and MMI are distinct concepts under the 1989 Act, and we have held that disability may cease before one reaches MMI. *See* Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991.

The claimant does point to specific evidence supporting his contention that the claimant had disability after April 1, 1992. The claimant's testimony that he could not work, his qualification for social security disability benefits, and his mental condition are all evidence of his inability to work. Yet there is certainly countervailing evidence in the unrestricted work release from the claimant's treating doctor. This raises a conflict in the evidence for the hearing officer to resolve. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical

evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). 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 great weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The question of disability is a question of fact. *See* Appeal No. 91060, *supra*. We will not substitute our judgment for that of the hearing officer in this regard. While different inferences and deductions from the evidence might reasonably be drawn, his finding that the claimant's disability ceased on April 1, 1992, is not against the great weight of the evidence.

The claimant also complains that the hearing officer should have determined that the claimant was eligible for supplemental income benefits. It appears to us that entitlement to supplemental income benefits was not an issue at the CCH. This is a matter that may be properly determined through the dispute resolution process.

Having disposed of the claimant's points of error, we must examine those of the carrier. The carrier first contends Dr. F was not properly appointed as the designated doctor. The carrier's objection below on this point dealt with the fact the Commission sent a letter dated July 28, 1993, addressed to Dr. F with a copy to all parties stating that Dr. B would be the designated doctor and directing the claimant to attend a medical examination by Dr. B at Dr. F's office address. On August 12, 1993, another letter was sent by the Commission stating that Dr. F was the designated doctor and directing the claimant to attend a medical examination by Dr. F at his office. We believe that while the first letter appears to be an unfortunate clerical error, we fail to see how any harm could have resulted to the carrier in light of the fact that on June 4, 1992, the carrier, the claimant, the claimant's representative and the benefit review officer signed a TWCC-24 agreement clearly stating as follows:

> Employee and carrier agree to the commission designated doctor to resolve the dispute of disability, maximum medical improvement and impairment. Dr. [F] to be designated doctor.

This agreement distinguishes the present case from Texas Workers' Compensation Commission Appeal No. 93099, decided March 25, 1993 and Texas Workers' Compensation Commission Appeal No. 93170, decided April 22, 1993, upon which the carrier relies.

The carrier argues that the hearing officer erred in concluding that the great weight of the other medical evidence did not outweigh the finding of the designated doctor as to MMI because two of the claimant's treating doctors found an earlier MMI date, there was no evidence of any improvement in the claimant's medical condition after the original finding of MMI by Dr. H, and there was no evidence that the claimant ever contested Dr. H's impairment rating within 90 days.

Section 408.122 provides that the report of a Commission-selected designated doctor has presumptive weight and "the commission shall base its determination of whether the employee has reached maximum medical improvement on the report unless the great weight of the other medical evidence is to the contrary." We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the treating doctor's report, is accorded the special, presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. We have held that the number of contrary opinions is relevant in determining the issue factually, but that two contrary medical opinions will not, as a matter of law, constitute the great weight of the contrary medical evidence. Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

As to medical improvement taking place after the original certification by Dr. H, this appears to be a medical and factual question, well within the purview of the designated doctor and the hearing officer. We decline to overturn their determinations. Nor do we find that whether the claimant contested Dr. H's rating was an issue in the proceeding below, so we certainly will not consider it on appeal.

The carrier's final argument is that the hearing officer erred in finding that the great weight of the other medical evidence did not outweigh the finding of the opinion of the designated doctor as to impairment. Again carrier contends that two treating doctors gave the claimant a lower impairment rating than the designated doctor. Again we point to our decision in Appeal No. 93825, *supra*, holding that this is not controlling on appeal.

Carrier then argues that the fact that Dr. F appears to have included the effects of prior injuries in his impairment rating renders it defective. We have previously held otherwise. *See* Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993; Texas Workers' Compensation Commission Appeal No. 93835, decided November 3, 1993.

Having reviewed and overruled the points of error raised by both the claimant and the carrier, we affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I concur in the result but note that Section 401.011(24) says impairment rating means the percentage of permanent impairment of the whole body resulting from a compensable injury. *See* Texas Workers' Compensation Commission Appeal 93246, decided May 10, 1993.

Joe Sebesta
Appeals Judge