APPEAL NO. 93981

This appeal arises under 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*.). At a contested case hearing held in (city), Texas, on August 30, 1993, the hearing officer, (hearing officer), finding that the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission) was not contrary to the great weight of the other medical evidence, concluded that the appellant (claimant) reached maximum medical improvement (MMI) on March 29, 1993, with an impairment rating of 11%. In her request for review, the claimant asserts that the evidence from the designated doctor should not have been considered by the hearing officer because the designated doctor was not present at the hearing, as was claimant's treating doctor, and because the designated doctor has refused to answer her inquires concerning his report. Claimant further asserts that the designated doctor did not do "any of the things" at his examination that were done at claimant's other examinations, and, finally, that the hearing officer failed to mention her testimony in his decision. In its response, the respondent (carrier) asserts first that claimant's appeal is untimely, and in the alternative, that the great weight of the other medical evidence was not contrary to the report of the designated doctor and, thus, that we should affirm.

DECISION

Determining that the request for review was not timely filed and that the jurisdiction of the Appeals Panel has not been properly invoked, the decision of the hearing officer has become final pursuant to the provisions of Section 410.169.

The records of the Commission indicate that the decision of the hearing officer was distributed to the claimant by mail on October 1, 1993. In a letter dated October 12, 1993, addressed to the Commission's Hearing Division in (city), Texas, in which she requested review of the hearing officer's decision, claimant indicates she received the decision on October 2, 1993. According to the Commission's records, however, claimant's October 12th letter requesting review was sent to the Commission attached to her letter of October 22nd which was mailed to the Commission on October 27th and received by the Commission on October 29, 1993. Consistent with the advice the hearing officer gave the parties at the close of the hearing, claimant had 15 days to file her request for review. Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (Rule 143.3(a)(3)) provides that a party to a contested case hearing who is dissatisfied with the decision of the hearing officer may request the Appeals Panel to review the decision and that the request shall be filed with the Commission's central office in (city) not later than the 15th day after receipt of the hearing officer's decision. Rule 143.3(c) provides that a request shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision and is received by the Commission not later than the 20th day after such date.

However, since October 17th was a Sunday, claimant had until Monday, October 18th, to file her appeal. *See* Rule 102.7. Since claimant's request for review was neither mailed on or before October 18th nor received by the Commission not later than the 20th day (October 22nd), claimant's appeal was untimely and, consequently, the jurisdiction of the Appeals Panel was not properly invoked. Pursuant to Section 410.169 and Rule 142.16(f), the decision of the hearing officer has become final.

Notwithstanding the untimeliness of the claimant's appeal, we have nonetheless reviewed the evidence and are satisfied that were we called upon to decide claimant's appeal on the merits, we would have affirmed the hearing officer's determinations respecting MMI and the impairment rating. According to the evidence, claimant hurt her back on (date of injury), when she lifted files at work. Claimant asserts that the hearing officer should have ignored the evidence of the designated doctor's report because he neither appeared for testimony nor answered correspondence from her treating doctor. As for the designated doctor's not having appeared at the hearing, no issue was presented regarding the denial of a subpoena to obtain his presence and Rule 142.2(1) authorizes the hearing officer to issue subpoenas. (*See also* Rule 142.12.) We are aware of no requirement for the designated doctor to have attended the hearing in this case.

As for the complaint that the designated doctor failed to respond to correspondence from claimant's treating doctor, which pointed out a claimed inaccuracy in the computation of impairment for loss of true lumbar flexion and which requested a great deal of both explanation and information, some of which was in claimant's existing medical records, again we are aware of no requirement that a designated doctor justify his report to another doctor. Claimant had the opportunity to challenge the correctness of the designated doctor's report by calling her own treating doctor for testimony at the hearing and, indeed, the treating doctor testified at length and in substantial detail as to his opinions concerning both whether claimant had reached MMI and the accuracy of the designated doctor's impairment rating. In sum, he felt that claimant had not reached MMI yet and that her condition could be improved with further "active medical care" such as more physical therapy and a work hardening program. He also felt the designated doctor's 11% impairment rating was incorrect since, in addition to the claimed computational error for true lumbar flexion loss, it assigned impairment for only the specific lumbar spine disorder and for abnormal range of motion but not for pain and loss of strength, which, he contended, were components of a lumbar spine impairment rating. Notwithstanding such testimony however, the hearing officer was obviously not persuaded that the treating doctor's testimony constituted the great weight of the other medical evidence against the report of the designated doctor. *See* Sections 408.122(b) and 408.125(e). As the fact finder (*See* Section 410.165(a)), it was for the hearing officer to resolve conflicts in the evidence, including medical evidence.

Claimant asserted that the designated doctor's examination was too brief considering the time spent by other doctors in examining her in the past, and that the designated doctor did not "do all the things" that other examiners had done to her in the past. She did say, however, that the designated doctor used an instrument to take measurements on her back although neither she nor her treating doctor were able to say whether it was a goniometer

or an inclinometer. We have reviewed the report of the designated doctor consisting of a Report of Medical Evaluation (TWCC-69), a two-page typewritten narrative report, a chart with lumbar range of motion measurements, and a chart with a spine impairment summary. According to his report, the designated doctor performed a physical examination, took x-rays, reviewed claimant's MRI scan, was aware of the results of her myelogram and post-myelogram CT scan, was aware that she had declined surgery, though he stated she was reconsidering that issue, and was aware of the several doctors claimant had seen in the past, including information that one doctor had given her a "0%" impairment rating.

As for claimant's complaint that the hearing officer ignored her testimony, we would first note that neither the 1989 Act nor the Commission's rules require a hearing officer to detail the particulars of the testimony of a witness. Further, we have often observed that since Sections 408.122(b) and 408.125(e) address the great weight of the other medical evidence concerning both MMI and the impairment rating, it is the medical evidence and not the lay evidence that is probative on these issues. *See* Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992.

Having reviewed the entire record, had our jurisdiction been properly invoked, we would be of the opinion that the hearing officer's determinations were not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

The hearing officer's decision has become final by operation of law.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge