APPEALS PANEL NO. 94027
FILED FEBRUARY 10, 1994

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*.). On October 14, 1993, a contested case hearing was held in (City), Texas, with _____ presiding. After requesting clarification from the designated doctor, the record was closed on November 22, 1993, and the hearing officer determined that respondent (claimant) had not reached maximum medical improvement (MMI) as of March 12, 1993. Appellant (carrier) asserts that certain findings of fact are in error and that the claimant reached MMI on November 20, 1992, with three percent impairment. Claimant indicated the hearing officer should be upheld.

DECISION

We affirm.

Claimant hurt her back moving a sewing machine at work on (date of injury). She saw (Dr. H), who manipulated her back, but referred claimant to a neurosurgeon, (Dr. L), for an opinion as to surgery. Dr. L advised that disc decompression surgery should be done on claimant's lower back. Claimant then saw (Dr. C) for a second opinion as to whether spinal surgery was necessary. Dr. C on August 25, 1992, said that surgery was not necessary, that conservative care should be continued, and that claimant had not reached MMI.

On November 20, 1992, claimant saw (Dr. B), on referral from Dr. H. While Dr. H's referral is not in evidence, Dr. B notes that claimant was referred for consultation, examination, and "impairment rating for disability evaluation relative to injuries." Dr. B did not discuss MMI in his narrative, but did note that Dr. H agreed with Dr. L as to the need for surgery in that claimant's condition had reached a plateau and "stabilized" in regard to chiropractic manipulation. Dr. B prepared a TWCC-69, Report of Medical Evaluation, which stated that MMI occurred on November 20, 1992, with 13% impairment.

The carrier then disputed the "13% impairment" in December 1992. (Dr. S) was appointed as designated doctor in February 1993 to evaluate claimant on March 12, 1993, for an impairment rating; no request in regard to MMI was made to the designated doctor. Dr. S completed the TWCC-69 by stating "as per [Dr. H]" on the line that called for a date of MMI; next to this phrase was the entry "3%" for impairment. Dr. S's cover letter acknowledged that claimant was seen only for an impairment rating. In that cover letter Dr. S also declared that claimant "has been declared at maximum medical improvement by the primary treating physician or an independent medical examiner."

The issue at hearing from the benefit review conference was the amount of the impairment rating. In addition, at the hearing, the parties agreed that an issue as to whether MMI has been reached should be added; it was.

Since there was an issue as to MMI, a determination on this point was necessary. Dr. S indicated in his report that he was not determining whether MMI had occurred but was taking the word of "the primary treating physician or an independent medical examiner." The criteria for MMI and impairment rating are not the same so it is possible for a doctor to evaluate one without the other. *See* Texas Workers' Compensation Commission Appeal No. 93035, decided February 24, 1993. Even had Dr. S indicated that he was making his own determination as to MMI, whether based on the date of MMI reported by Dr. B or not, his opinion as to MMI in this case would not have presumptive weight. A designated doctor's opinion as to MMI and/or impairment rating may be entitled to presumptive weight only when designated for that purpose. *See* Texas Workers' Compensation Commission Appeal No. 93710, decided September 28, 1993, and Texas Workers' Compensation Commission Appeal No. 931018, decided December 9, 1993. When there is an issue as to MMI and no designated doctor has been asked to provide an opinion on that point, the hearing officer may then decide that issue by weighing all the medical evidence.

In a report of medical evaluation, dated June 15, 1993, the treating doctor, Dr. H, indicated, after Dr. B gave his impairment rating and entered a date of MMI, that he did not agree with Dr. B. In addition, Dr. H's statement may indicate some misconception about MMI and impairment rating since he states, in referring to Dr. B's report, "[h]is MMI rating was 13%." Notwithstanding his understanding as to impairment, Dr. H in that same report refers to surgery as if there is no question that it will be done and says that the rating of Dr. B could change after surgery. Dr. C said that MMI had not been reached. Dr. L is the proponent of surgery; no statement that MMI has been reached comes from him. The only indication of MMI comes from Dr. B, who was asked for "an impairment rating for disability evaluation." There is no indication that Dr. H provided Dr. B medical records from which Dr. B could provide any opinion as to MMI, but Dr. responded by adding a date of MMI to the impairment rating he gave. Based on this body of medical evidence, the determination of the hearing officer that MMI had not been reached is sufficiently supported by the evidence.

The carrier disputes Finding of Fact No. 12 which stated that Dr. H disputed Dr. B's "maximum medical improvement rating," by pointing out that Dr. H did not notify the Texas Workers' Compensation Commission in a timely manner. Texas Workers' Compensation Commission Appeal No. 92132, decided May 18, 1992, did not refuse to consider a doctor's report that was not timely provided, pointing out that sanction provisions exist which may be used against a doctor for late filing. Regardless of whether Dr. H filed a timely report or not in regard to the report of Dr. B, Dr. H never indicated that MMI was reached. A doctor may solicit an opinion from another doctor by referring his patient for evaluation without being bound to adopt whatever the referral doctor opines.

The carrier also takes issue on appeal with Findings of Fact Nos. 13, 14 and 15. Finding of Fact No. 13 stated that Dr. H did not find that MMI had been reached and referred to Dr. H's request to Dr. B for an impairment rating. Even if Dr. H had asked for an opinion as to MMI, such opinion by Dr. B would still not become that of Dr. H without Dr. H stating that MMI had been reached or referring to such an opinion of Dr. B as his own.

Finding of Fact No. 14 states that claimant has not been found to have reached MMI "in a manner anticipated" by the 1989 Act and applicable rules.

Finding of Fact No. 15 reflects the hearing officer's decision that MMI has not been reached. As stated, a consideration of all the medical evidence sufficiently supports the hearing officer on this point. A correct impairment rating cannot be determined by the hearing officer when he has determined that MMI has not been reached. *See* Section 401.011(23).

Findings of Fact Nos. 12, 13 and 15 are sufficiently supported by the evidence and those findings sufficiently support the conclusions of law and the decision and order. Finding of Fact No. 14 is not necessary to the decision and is disregarded. *See* Texas Indemnity Insurance Company v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940). Unless the decision is against the great weight and preponderance of the evidence, the decision of the hearing officer on a factual determination will not be reversed. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The decision and order are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Lynda H. Nesenholtz
Appeals Judge

_____
Alan C. Ernst
Appeals Judge