APPEAL NO. 94036

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.). A contested case hearing was held on December 2, 1993. The appellant, hereinafter claimant, seeks our review of the hearing officer's determination that the claimant reached maximum medical improvement (MMI) on December 1, 1992, pursuant to the report of the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The respondent, hereinafter carrier, contends that the hearing officer correctly accorded presumptive weight to the determination of the designated doctor.

DECISION

We affirm the decision and order of the hearing officer.

The claimant suffered a back injury on _____, while working for (employer). He was originally sent by employer to Dr. M, who ordered an MRI which was reported as unremarkable on September 24th. Dr. M diagnosed acute lumbar strain and released him back to work. Claimant also saw a chiropractor, Dr. B; an October 30th CT scan ordered by that doctor showed "some encroachment upon nerve root foramina by the hypertrophic hypertrophy" but no evidence of herniated nucleus pulposus. Dr. B also ordered physical therapy for the claimant.

On (3 months after date of injury) claimant was seen by Dr. F at carrier's request. Dr. F wrote that in his opinion the claimant had "at most, an unverifiable soft tissue injury which was appropriately diagnosed and treated by [Dr. M]. In my opinion, he has inexorably resolved that injury in the three months time following the asserted event." Dr. F certified claimant as having reached MMI on (3 months after date of injury), with a zero percent impairment rating.

Shortly thereafter, claimant began seeing Dr. D as his treating doctor, upon Dr. B's referral. Claimant said Dr. D sent him to physical therapy, which he began on January 11, 1993. At the conclusion of the therapy claimant returned to see Dr. D, who referred him for work hardening (the assessment interview report gives claimant's diagnosis as lumbosacral and cervical spine strain). Claimant said he was unable to complete this program because his blood pressure became elevated from doing some of the exercises.

In a January 14, 1993, Report of Medical Evaluation (Form TWCC-69) Dr. D stated that claimant had had a second lumbar spine MRI, dated December 15, 1992, which he said was "abnormal." (The MRI report stated there was no evidence of disk herniation or significant bulging, but there were "slight degenerative changes at L5-6 posterior disk on the left" and "slight soft tissue thickening at the articular facet joints of L5-6 on the left impinging on the spinal canal posterolaterally"). He also said Dr. F's report failed to mention that there was "motion artifact" present in claimant's September 24, 1992, MRI

which he said negated its validity. Dr. D stated that claimant had not reached MMI and that he required further conservative treatment.

On March 29, 1993, claimant saw Dr. L, the Commission-appointed designated doctor. Dr. L stated that claimant's MRI scans were "essentially unremarkable," and said his CT scan was "essentially normal for age." He noted claimant's complaints of low back pain and stated his impression as "contusion with lumbar strain without significant radiculopathy and without changes in structural tests." Dr. L found claimant to have reached MMI on December 1, 1992, with a five percent impairment rating.

On May 18th, Dr. D completed a TWCC-69, stating his disagreement with Dr. L's report: "[Dr. L] did not examine the patient on 12-1-92 so there is no way he could given an MMI as of this date. Per exam [Dr. L] 3-29-93, the patient had not reached maximal rehab based on my treatment and examination; therefore I disagree with the date of MMI." On June 16th, Dr. D completed another TWCC-69 certifying claimant as having reached MMI on June 2, 1993, with a five percent impairment rating.

Both parties stipulated that claimant's impairment rating was five percent. The sole issue at the hearing and on appeal is whether Dr. L's MMI date of December 1, 1992, is entitled to presumptive weight. Claimant contends there are no diagnostic reports or other medical records which support this date; thus, he argues, the great weight of the medical evidence supports Dr. D's MMI date of June 2, 1993.

The 1989 Act provides that where a designated doctor has been appointed to determine MMI, that doctor's report shall have presumptive weight and the Commission shall base its determination of MMI on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. Section 408.122(b). "MMI" is defined in pertinent part as the earliest date after which, based upon reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated. Section 401.011(30).

In this case, Dr. L in assessing claimant had the benefit of numerous studies and doctors' reports predating his March 29, 1993, examination; it is evident that the bulk of these, with the exception of the reports of the treating doctor, found claimant to have suffered a strain pursuant to studies that were unremarkable. The fact that as of December 1, 1992, claimant had not yet undergone the physical therapy and work hardening prescribed by Dr. D does not negate Dr. L's finding that he had already reached MMI, as participation in such treatment programs is not inconsistent with a finding of MMI. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. Furthermore, we have held that the MMI provisions of the 1989 Act and the rules of the Commission do not specifically restrict the designated doctor to certifying MMI only as of the date of his or her examination. Texas Workers' Compensation Commission Appeal No. 92453, decided October 12, 1992. Dr. L's use of a particular date is but one

evidentiary factor the hearing officer can consider when weighing the designated doctor's report against the other medical evidence.

This panel has many times commented upon the "unique position" and "special presumptive status" the designated doctor's report is accorded under the Texas workers' compensation system, and the fact that no other doctor's report, including that of the treating doctor, is entitled to such deference. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992; Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. Also, to overturn a designated doctor's report requires more than a mere balancing of the evidence. Appeal No. 92412, *supra*. Our review of the evidence in this case indicates that the hearing officer did not err in determining that the designated doctor's report was not overcome by the great weight of the other medical evidence. We do not substitute our judgment for that of the hearing officer where, as here, her decision is supported by the evidence in the record and is not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge