APPEAL NO. 94045

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on November 23, 1993, (hearing officer) presiding. The contested issues were whether the appell ant, hereinafter claimant, had reached maximum medical improvement (MMI) and, if so, on what date; if the claimant has reached MMI, what is the impairment rating; and did the claimant have disability from (date of injury), to the present time resulting from an injury sustained on (previous injury). The claimant takes this appeal from the hearing officer's determination that the claimant reached MMI on April 5, 1993, with a 10% whole body impairment rating pursuant to the report of the doctor designated by the Texas Workers' Compensation Commission (Commission). She contends that she has not reached MMI, and encloses with her appeal medical reports dated after the contested case hearing. Claimant also disagrees with the hearing officer's determination that she had disability beginning (date of injury), stating that she began losing time from work on May 30th. The respondent, hereinafter carrier, contends that the hearing officer's decision is supported by the evidence.

DECISION

We affirm the decision and order of the hearing officer.

The claimant suffered an injury to her lower back on (date), while employed by (employer). She was first seen by her family doctor, (Dr. HE), who diagnosed low back strain, prescribed medication, and released claimant to light duty work. When claimant was unable to perform the light duty work she returned to Dr. HE, who took her off work and referred her to (Dr. R) in June. Dr. R, who diagnosed lumbar facet syndrome and sprain/strain of the sacroiliac, treated claimant for 10 months, during which time he performed local injections, sent her to physical therapy, and referred her to other doctors who he said treated her "without significant resolution of her discomfort."

A July 21, 1992, CT scan of the lumbar spine found a broad-based annular disc bulge at L5-S1 with additional findings of minimal facet arthropathy and lateral recess stenosis at this level. On September 10th claimant saw carrier's doctor, (Dr. S), who noted claimant's continued complaints of pain and said she had not reached MMI but that she could return to limited duty work; he also recommended an MRI. A lumbar spine MRI performed on September 18, 1992, was essentially normal, with degenerative disc dehydration at L5-S1, but no evidence of herniation.

Dr. R certified claimant as having reached MMI on April 5, 1993, with a five percent impairment rating. Shortly thereafter, Dr. S re-examined the claimant and also certified MMI (on April 19, 1993) with a five percent impairment rating. Because she continued to have pain and believed she needed further treatment, claimant sought and received permission to change treating doctors, to (Dr. B). On June 28th Dr. B stated his impression as ruptured lumbar disc, L5-S1, with lumbar radiculopathy. On that date he recommended exercises which, if unsuccessful, would be followed by epidural nerve

blocks. He said that surgery would probably be necessary if the nerve blocks did not work. Nerve conduction studies performed on July 12th disclosed S-1 radiculopathy greater than L-5. On July 19th claimant was administered injections into her joint and laser therapy was proposed. Claimant apparently had epidural injections in October of 1993. In a Report of Medical Evaluation (Form TWCC-69) dated November 22, 1993, Dr. B stated that claimant continued to have back and right leg pain with right leg numbness and tingling, and that a myelogram was scheduled for December 1st. It was also stated that claimant had not reached MMI and that she had "only partial relief from epidurals. Will probably require surgery."

Due to claimant's dispute of Dr. R's determination of MMI and impairment, (Dr. HU) was appointed as designated doctor by the Commission on August 12th. Dr. HU summarized claimant's history and diagnostic studies and found she had reached MMI on April 5, 1993, with a 10% impairment rating. The carrier introduced into evidence a letter from (Dr. O) in which he questioned the percentage of impairment Dr. HU attributed to claimant's range of motion.

Based upon the evidence in the record before him, the hearing officer determined that the report of the designated doctor was not contrary to the great weight of the other medical evidence; he accordingly accepted Dr. HU's determination of MMI and 10% impairment rating. The claimant contends on appeal that she has not reached MMI due to her continued pain and Dr. B's recommendation for surgery. In support, she attaches to her appeal certain documents which were not in evidence at the hearing: the report of a myelogram which was performed on December 1, 1993, and reports of Dr. B dated December 1 and 3, 1993.

This panel has declined to consider documents which were not offered at the contested case hearing, as our review of the evidence is limited to the record developed below. *See* Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 92092, decided April 27, 1992. However, we have also considered whether it was shown that the information was unknown or unavailable to the appealing party at the time of the hearing, that due diligence would not have brought such information to light, and that the information in the documents would probably tend to produce a different result. Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983). The documents proffered by the claimant clearly could not have been produced at the hearing as they did not come into existence until December 1st. Whether they could have produced a different result, i.e., whether they were not merely cumulative of prior medical evidence, must be examined in light of the designated doctor's opinion which is entitled to presumptive weight and which is the focus of the inquiry in this proceeding.

This panel has many times addressed the issue of whether a surgical recommendation calls for a re-examination of the designated doctor's opinion that a claimant has reached MMI--defined in pertinent part as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section

401.011(30)(a). We have declined to take the position "that simply because a treating doctor indicates that a claimant is a candidate for surgery that MMI may not be found. Each case must be decided on its own merits, and factors such as when the claimant first learned of the need for surgery, the claimant's actions after obtaining that information, the reason for delay, if any, in scheduling surgery, and the opinions of doctors may be evaluated in such cases." Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993. In that case, however, we reversed and remanded for further evidence with regard to the designated doctor's opinion regarding surgery where the claimant was a candidate for surgery, there was an absence of any medical evidence to the contrary, and the designated doctor did not offer any opinion as to whether surgery would result in further material recovery from or lasting improvement to claimant's injury.

Compare Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993 (designated doctor specifically found surgery would not be effective, despite recommendations from other doctors); Texas Workers' Compensation Commission Appeal No. 93427, decided July 14, 1993 (designated doctor did not address either the need for or effect of the surgery, but does refer to reports of preceding doctors seen by the claimant and the results of MRI revealing a herniation; held that conflict and inconsistency in the medical evidence were within the hearing officer's province to resolve).

In our opinion the facts of this case more parallel those of Appeal No. 93427, *supra*. At the time of the designated doctor's report, he reviewed claimant's existing studies, including the CT scan which showed an annular bulge and the EMG and nerve conduction studies performed by Dr. B; the reports of several doctors, including Dr. R and his referral doctors, and Dr. S, who did not mention surgery as an alternative; and the initial report of Dr. B who mentioned surgery as a possibility following exhaustion of other modes of treatment. With respect to Dr. B's report, Dr. HU did not specifically address the surgical recommendation, but he mentioned the trigger point injections and stated that "[Dr. B] is also planning to do laser therapy to the S1 joints and its ligament and if all these fail, he will do epidural blocks." He also details claimant's complaints of pain.

Given the fact that Dr. HU reviewed and considered all of claimant's studies except for the myelogram, as well as Dr. B's recommendations which do not appear to have markedly changed, we cannot say that a different result probably would be reached if this case were remanded to allow Dr. HU to consider the documents which came into existence after the hearing. Upon our review of the evidence in the record below, we agree with the hearing officer that the great weight of the other medical evidence was not contrary to that of Dr. HU, especially where much of the medical evidence consisted of the opinions of doctors who apparently believed that surgery was not necessary. The 1989 Act provides that the opinion of the designated doctor is to be accorded "presumptive weight," Sections 408.122(b), 408.125(e); we have held that overcoming this presumption requires more than a mere balancing of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. A designated doctor's report should not be rejected absent a substantial basis to do so. Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. We do not disturb the hearing

officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

With regard to claimant's real and persistent complaints of pain, it has been held that a finding of MMI does not require that the injured employee be pain free. As we held in Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993:

> When the doctor finds MMI and assesses an impairment he or she agrees, in effect, that while the injured worker may continue to have consequences, and quite possibly pain, from the injury, the doctor has determined, based upon medical judgment, there will likely be no further material recovery from the injury. Thus, although claimant is unfortunately in pain, this fact alone would not rule out MMI.

We also note that the claimant is entitled to all reasonable medical care as and when needed. Section 408.021. This entitlement does not cease when an injured worker reaches MMI.

Finally, we hold that the hearing officer's determination that claimant's disability began on (date of injury), is supported by the evidence in the form of claimant's own testimony.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge