APPEAL NO. 94053

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues to be determined at the contested case hearing were whether claimant had reached maximum medical improvement (MMI), what was claimant's impairment rating, if any, and whether the designated doctor in this case was properly appointed as such. The claimant is AF, the respondent, who was injured in a fall while employed by (employer). The injury occurred (date of injury), and involved physical injuries and a related psychological condition.

The hearing officer found as fact that (Dr. MF) had been appointed as the designated doctor by the Texas Workers' Compensation Commission (Commission). He nevertheless found that the great weight of other medical evidence was to the contrary of Dr. MF's certification of MMI and impairment, and determined that claimant had not reached MMI (which was the opinion of the contrary medical evidence).

The carrier appeals the determination to reject Dr. MF's opinion, pointing out that the great weight of other medical evidence is not to the contrary of his opinion. The carrier complains that the hearing officer has not complied with previous decisions of the Appeals Panel that require him to detail how the great weight of other evidence overcomes the designated doctor's report. The carrier complains about a finding of fact that stated that it had interfered with claimant's treatment, arguing its position based upon facts not contained in the record. The carrier states that the hearing officer erred by not allowing the designated doctor to respond to the hearing officer's concerns. The carrier asks that the case be reversed and rendered based upon the designated doctor's report, or reversed and remanded. No response was filed.

DECISION

We affirm the hearing officer's decision.

Claimant was injured when he was cleaning the windshield of the bus he was driving and fell off the bumper of the bus onto his left side. Soon after the accident, injuries to his left neck, shoulder, back, and foot were noted and treated. Claimant's primary treating physician was (Dr. P), M.D., whose letterhead indicates association with a clinic specializing in treatment of back and muscle injuries.

From the record, it appeared that Dr. P began to note early in his treatment claimant had depression. In September 1992, claimant attempted suicide through inhaling carbon monoxide while in his car. Dr. P accelerated his treatment of claimant's psychological condition, referring him to psychotherapists within his clinic as well as outside, and to a psychiatrist, (Dr. Q). To very briefly summarize various written opinions, Dr. P is of the opinion that claimant has brain damage that is apparent through clinical examination and observation. (Claimant, for example, has talked from one side of his mouth since the accident, and has become paranoid and withdrawn, according to his medical team). A

letter from Dr. P dated June 7, 1993, to the adjuster for the carrier complains that carrier has denied authorization for an MRI of the brain. Dr. P noted that he has been concerned all along that claimant may have sustained a head injury that he cannot recall. (Dr. W), Ph. D., the outside therapist to whom claimant was referred, wrote a five and a half page report of a psychological evaluation of claimant conducted for two days in late May 1993 that led him to conclude that claimant had sustained cerebral damage, with greater impairment evident in the left cerebral cortex (as measured by testing of functions originating in that portion of the brain). He attributed this to the fall and to the effects of carbon monoxide poisoning. The report noted that claimant's wife stated that claimant's personality change occurred after his fall.

Dr. MF was appointed designated doctor by order of the Commission to evaluate whether claimant reached MMI and, if so, his impairment rating. Pursuant to this order, Dr. MF examined the claimant February 17, 1993. The record indicated that he completed a Report of Medical Evaluation (TWCC-69) that stated that MMI was reached February 16, 1993, but that the impairment rating was pending.

Dr. MF referred claimant for functional capacity evaluation, which was conducted February 17, 1993. Although the evaluator was not a medical doctor, he noted asymmetry in claimant's functions and facial appearance. He speculated that one explanation for claimant's fall from the bus could be a partial stroke which caused him to lose his balance. Also included in materials from Dr. MF was an evaluation of claimant's range of motion limitations, and a work sheet that appears to give claimant 18% for lumbar range of motion. A second work sheet evaluated range of motion deficits for hip, knee, and ankle and assessed a five percent whole person impairment related to these areas.

Dr. MF's narrative report is in two documents. Dr. MF indicated that he regarded the range of motion deficits as non-valid "based upon clinical discorrelation." Dr. MF said that he found a high probability of symptom magnification. In a April 10, 1993, narrative Dr. MF noted psychological overlay again, and stated there was little objective evidence of injury. Dr. MF acknowledged psychological difficulties, and stated that although they were due largely to claimant's "premorbid personality, the events surrounding the accident and the treatment process . . . are responsible for his decompensation . . . " He recommended continuation of claimant's counselling. Dr. MF completed a second TWCC-69 certifying impairment of five percent with the same MMI date he previously certified. The conditions for which he assessed impairment are heel contusion and lumbar strain.

Dr. P took issue with Dr. MF's evaluation in his own TWCC-69, which referred to his earlier letter of June 7, 1993, and the report of Dr. W. Dr. P asserted that claimant had evidence of brain injury and that this had not been taken into account by Dr. MF. Dr. P stated that the mental disorder had not stabilized and claimant was not at MMI. On the same date, a benefit review officer for the Commission wrote to Dr. MF and asked him to review reports from Dr. P, Dr. W, and Dr. Q and to assign an impairment for claimant's psychological disorder. It appears that Dr. MF then sought a review of these records by (Dr. G), Ph.D. Dr. G's memo to Dr. MF, dated August 24, 1993, stated that he had begun

neuropsychological evaluation and he promised that a full report would follow. Dr. G agreed that there was severe impairment. He appeared, however, to question Dr. W's statement that claimant had cerebral damage, saying that there was no reported history of claimant having been unconscious, and, if he was, that the duration would likely be brief. No other report of Dr. G is in evidence.

Dr. MF completed another TWCC-69 on August 25, 1993, repeating his MMI date and impairment rating, and stating that there was "no brain damage-all pre-existing." So far as the record of this case is concerned, the basis for this conclusion is only further described in answers to written questions propounded by the carrier to Dr. MF, which includes the following:

Q.In summary what were [Dr. G]'s opinions regarding the relation of the claimant's brain damage and head injury to the original workers' comp injury?

A.Impairment was not consistent with history of injury, no evidence of loss of consciousness.

Because carrier complains that the hearing officer found it had interfered with claimant's psychological treatment and prescriptions, we would briefly note that there are numerous letters in the file from Dr. P and his psychological associate disputing refusal of the carrier to pay for treatment and prescriptions drugs, and referring to hearings or directives from the Commission that have not (in Dr. P's opinion) been obeyed or complied with. However, this finding of the hearing officer is not material to the issues before him and may be disregarded.

"Impairment" is defined in the 1989 Act as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." TEX. LAB. CODE ANN. § 401.011(23). Further, impairment must be based upon "objective clinical or laboratory finding" and, where assigned by a doctor chosen by the claimant, must be confirmable by a designated doctor. Section 408.122(a). Doctors who assess an impairment rating are required to use a certain version of the American Medical Association Guides to the Evaluation of Permanent Impairment (Guides), specifically the third edition, second printing, dated February 1989. Section 408.124.

The hearing officer has, we believe, satisfactorily discussed the evidence in the case and identified his reasons for determining that the great weight of other medical evidence is against the designated doctor's report. As the hearing officer points out, there was no evidence that the carrier has disputed or controverted that the claimant has sustained brain damage and psychological injury. He noted the lack of support for the conclusion that claimant's mental condition was pre-existing and therefore could not be rated. He noted the strong opposition of Dr. P to Dr. MF's opinion that MMI had been reached. He noted that Dr. G also found that claimant could not work and needed extensive therapy to be able to rejoin the work force. A hearing officer may find that part of

the "great weight" of medical evidence against a designated doctor's conclusion lies within his or her own report. Texas Workers' Compensation Commission Appeal No. 931085, decided January 4, 1994; Appeal No. 92621, decided December 23, 1992. The omission of part of a work-related injury by a designated doctor from consideration or from a report can constitute a basis for outweighing the presumptive weight it would otherwise be given. Texas Workers' Compensation Commission Appeal No. 93435, decided July 16, 1993.

In this case, it is clear that the basic premise of Dr. MF's report was that claimant's brain damage or psychological problems were pre-existing. He based his opinion on Dr. G's opinion which was in turn based upon Dr. G's review of medical records. (The carrier having denied Dr. P's recommended MRI of the brain, Dr. MF and Dr. G would not, of course, have had the benefit of the results of that test). The hearing officer did not agree that such records would support the conclusion that claimant's mental condition was exclusively pre-existing.[1]

It was not error in this case for the hearing officer to decline to consult the designated doctor yet one more time about claimant's case. We realize that the Appeals Panel has encouraged hearing officers who are faced with apparent computational errors or inconsistencies within the designated doctor's report, or who need further explanation about the premises upon which the doctor's conclusions are based, to seek answers or explanations before rejecting such a report on matters that may have been easily cleared up. *See* Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992. We have also stated that where material medical information comes forward which might have affected the designated doctor's opinion (and which he could not have had), the trier of fact may wish to afford the designated doctor an opportunity to review such materials. Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992. However, it has never been the Appeals Panel's mandate that the trier of fact hold a case open indefinitely, affording the designated doctor unlimited opportunities to correct errors or re-evaluate the claimant, while the parties' cases hang in the balance. When a trier of fact can ascertain from the evidence before him (including a designated doctor's failure to clarify or supply requested information) that the great weight of other medical evidence is against a designated doctor's report that MMI has been reached, or that a certain degree of impairment is present, there is no requirement to return to a designated doctor to add more weight to his or her side of the scale. Thus, we decline to find that the hearing officer in this case erred by not holding the case open longer to compel the designated doctor to assign a rating to claimant's psychological condition. While he used strong language about his view that Dr. MF "disqualified" himself from further participation, the primary consideration should be that a designated doctor has no vested interest to stay in the process once a trier of fact determines that the record contains

[1] We observe that the Appeals Panel has, in the area of cases that could involve contribution, opined that questions relating to the existence of causation or an aggravation that would be a compensable injury are primarily legal determinations. Texas Workers' Compensation Commission Appeal No. 93695, decided September 23, 1993. Therefore, a good faith observation by a doctor that a condition may have existed previously does not preclude compensability based upon aggravation.

sufficient medical evidence to decide the issues.

The determination of the hearing officer is not against the great weight and preponderance of the evidence, and we affirm his decision and order.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Gary L. Kilgore
Appeals Judge