APPEAL NO. 94062

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001, *et seq*. On June 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether the claimant, JS, who is the respondent in this case, had disability due to a compensable injury, and whether the claimant's change to (Dr. B) in March 1993 was in compliance with applicable statute and rules relating to change of doctor. The hearing officer ruled favorably to claimant on both issues. In Texas Workers' Compensation Commission Appeal No. 93629, decided September 13, 1993, the Appeals Panel affirmed the hearing officer's determination as to change of treating doctor, but reversed and remanded for two primary reasons: because the hearing officer had admitted documents not timely exchanged with no finding of good cause, and because the hearing officer took official notice of the claims file without specifying documents of which notice was taken. The Appeals Panel deferred consideration of whether the finding on disability was sufficiently supported by the record until the scope of the evidence was cleared up.

A hearing on remand was held November 17, 1993, devoted solely to the evidentiary matters; no additional evidence was taken or developed as to disability.
The hearing officer specified the documents of which she took official notice, and determined that good cause existed for failure to exchange one doctor's report but not others. She then determined that claimant continued to have disability since his compensable injury of (date of injury).

The carrier has timely appealed this decision, raising several of the same points raised in its prior appeal. The carrier urges that the great weight and preponderance of the evidence is contrary to the hearing officer's determination that the claimant had disability. The carrier cites the lack of objective evidence of injury. The carrier argues that the hearing officer erred by admitting evidence that had not been exchanged with no finding of good cause. The carrier further argues that claimant should be presumed to have reached maximum medical improvement (MMI) based upon Rule 130.4 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4.), or because his original treating doctor opined, on a TWCC-64 (Subsequent Medical Report), that he would reach MMI effective in December 1992. The carrier argues that the finding of disability is erroneous because the claimant changed treating doctors in violation of Section 408.023 (formerly Art. 8308-4.63).

The claimant argues, incorrectly, that the carrier's appeal was untimely. He argues that the fact he is able to carry on activities of daily living does not mean he does not have disability. He states that tape recordings upon which carrier bases some of the appeal have been taken out of context. Claimant argues that he should not return to work until he has received a clean bill of health. He responds that he had a right to change his treating doctor to Dr. B and asks that the hearing officer's decision be upheld.

DECISION

We affirm the hearing officer's decision and order, not finding that same was against the great weight and preponderance of the evidence. We previously affirmed, in Appeal No. 93629, *supra*, the hearing officer's determination that Dr. B became claimant's treating doctor in accordance with the applicable statutes and rules and reassert that affirmance, for the reasons stated in that decision.

The appeal was timely filed within 15 days after the deemed date of receipt by the carrier. Notwithstanding that claimant recites he received the decision on December 26, 1993 (a Sunday), our records indicate that the decision was distributed to the parties on December 27, 1993. Applying Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), carrier is deemed to have received the decision by January 1, 1994. Fifteen days from that date is January 16, 1994, a Sunday. By virtue of Rule 102.3, the due date carried over to Monday, January 17, 1994. The appeal is postmarked that date and was received January 18, 1994, at the Texas Workers' Compensation Commission (Commission) in (city). It is considered except to the extent that it brings into question the compensability of the injury which has previously been resolved by an earlier hearing decision in claimant's favor.

The case is complicated by the fact that both sides assert facts outside the record. The claimant sustained an injury on (date of injury), in the course and scope of his employment as a working manager at a T-shirt printing shop. Claimant's injuries were diagnosed in December 1991 as repetitive trauma to his wrists and elbows, and chondromalacia of the right knee. (Compensability was apparently established in an earlier contested case hearing decision, so carrier's appellate arguments that claimant was not injured are without merit in this proceeding). His treating doctor, beginning December 1991, was (Dr. N), who had treated claimant for an earlier compensable claim.

Although physical therapy was prescribed by Dr. N, claimant's first treating doctor, he did not attend. Claimant said he thought it would be too rigorous. Claimant did not see a doctor from June 1992 until he first saw Dr. B in March 1993, shortly after his temporary income benefits (TIBS) were suspended by interlocutory order, and stated that this was because he was dissatisfied with Dr. N's treatment and did not know he had a right to change doctors. Claimant had not sought employment at all up to the date of the hearing. During the original hearing, claimant testified that he did not think he could work because of pain. He testified to an ability to do activities of daily living, including playing musical instruments, and housework, or activities with his son. However, a careful reading of the transcript indicated that carrier never pinned down the extent or timing of many of these activities. For example, claimant stated he mowed the lawn once. Claimant also appears to say that any guitar playing took place before his injury. Other reasons he stated that he felt would interfere with his ability to work included the lack of training, limited skills, his history of workers' compensation claims, and his criminal convictions. In fact, claimant testified that he felt there were tasks he could physically perform (managerial) but for which he would need retraining. However, he never sought the services of the Texas Rehabilitation

Commission. Prior to seeing Dr. B, claimant was found by Dr. N to have full range of motion in the affected areas, and his objective testing was normal. Dr. B, however, stated as late as June 28, 1993, that claimant was currently unable to work.

Claimant was ordered at least three times to attend medical examinations sought by the carrier. For the first, set for November 16, 1992, with (Dr. P) the claimant asserted that he had car trouble and notified the carrier that morning. The carrier responded by writing that if car trouble occurred for the next medical examination, that claimant could call a taxi and the carrier would pay. A second examination was scheduled for December 7, 1992. There are conflicting accounts in the record of what occurred; claimant stated he was questioned by office staff about an overdue bill which he refused to pay, so that he was refused service. A letter from the doctor's office indicated that the claimant was abusive and vulgar and was therefore ejected. Claimant then notified the carrier in a December 18th letter that he would be out of state until the following February 1st and stated that he was visiting his family during this time.

A third examination was scheduled for another doctor at the same practice, Dr. H, for May 18, 1993. (While somewhat surprising, this would not excuse the requirement of an employee to comply with the order of the Commission). Claimant maintained that he called this doctor's office merely to verify that he was to be examined, and discussed the previous scene at the office purely in the spirit of assuring it would not be repeated, and that he was then told again not to come. Recorded conversations with the carrier which are in the evidence could be interpreted as claimant indicating the will to impede efforts by the carrier to obtain either an examination or discovery from claimant.

On March 4, 1993, claimant's benefits were suspended after a benefit review conference. Next day, he sought and thereafter received approval to change treating doctors to (Dr. B), a change allowed in April 1993. Dr. B took claimant off work and has essentially kept him off, at least by the time of the first session of the hearing before remand. There is no indication in the record that carrier attempted discovery against Dr. B as to the basis for his assertions. The record contains at least two other orders in May and June 1993, for medical examinations with doctors who were not in the same practice as previous doctors. The fate of these orders, however, was undeveloped in the record.

EVIDENCE ADMITTED OVER OBJECTION BUT NOT EXCHANGED

The carrier objected on appeal to all of claimant's evidence on the basis that he failed to exchange such information in accordance with Section 410.160 and that he further failed to answer interrogatories. As recited in the previous decision, the record include transcripts of a telephone conversation dated April 20, 1993, in which the claimant asserted an intent not to answer interrogatories, and to delay the hearing, which he explained resulted from anger because of not receiving benefits.

At the June 30th hearing, claimant countered carrier's objections by pointing out that he had just received some records from his second treating doctor, Dr. B, that morning, that he had received some of the documents he was submitting from the carrier, and that he had given a written release to the carrier for his medical records for all his injuries. He also argued, essentially, that the carrier had records directly from the doctors in question. He stated that he had returned answers to interrogatories by regular mail, on a date that he could not remember.

On remand, nothing was proved about whether claimant's answers to interrogatories had been received or not prior to the remand hearing. Only one exhibit (Exhibit No. 1) tendered by claimant was objected to at the remand hearing on the basis of failure to comply with exchange requirements or to answer discovery. The carrier withdrew its objections to claimant's other exhibits. Exhibit No. 1 contained some records from Dr. B. The hearing officer found good cause for failure to exchange a June 1993 report from Dr. B, because it was received by the claimant two days before the June 30, 1993 hearing. She sustained carrier's objection as to other documents tendered by the claimant in Exhibit No. 1, finding no good cause. Apparently, she did not agree that claimant's signing of a medical release would, in this case, amount to an exchange. We find no abuse of discretion in these rulings, and, contrary to carrier's assertion that she failed to make a good cause finding, note that good cause is recited in both the record and on the face of the decision.

The hearing officer, in keeping with the directive on remand to specify the portions of the claims file that were included in her official notice, specifically listed those items. Carrier objected to official notice being taken of records of Dr. B contained in the claims file, and was overruled. The hearing officer made a good cause finding on her admission of these documents (which included reports not tendered by the claimant), reciting as "good cause" the fact that the claims file is equally available to both parties.

We do not agree that the availability of a claims file to both parties in and of itself is good cause for the failure of either party to comply with affirmative exchange requirements set forth in the 1989 Act. We believe that Section 410.160 and applicable rules make clear that each party must disclose to the other the evidence it intends to bring forward at the hearing. There are no exceptions for documents also contained in the claims file.

However, there was no error in this finding of good cause because it was made for documents that were being officially noticed by the hearing officer. The laws regarding exchange of information and rules do not apply to hearing officers, but to parties. A hearing officer is under the obligation to fully develop facts required for the determinations to be made, Section 410.163, and is not required to make findings of good cause prior to admitting pertinent documents as hearing officer exhibits. (We caution that the hearing officer must also preserve the rights of the parties, and great care should be taken before admitting as hearing officer exhibits any documents that were excluded when offered by a party, pursuant to objection of the opposing party). In this case, several of Dr. B's medical reports admitted

as hearing officer exhibits were not also included in excluded portions of Exhibit No. 1. We do not agree that there was prejudicial error.

WHETHER THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE IS AGAINST THE FINDING OF DISABILITY

TIBS are due when an injured worker has not reached MMI and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as: ". . . the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage."

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). We will not set aside the decision because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We have ruled many times that we will not substitute our judgment for that of the hearing officer absent a "great weight" of contrary evidence.

It may be that another finder of fact could reach a different conclusion as to the extent of disability in this case. The period that claimant went without medical treatment, did not participate in physical therapy, and did not attend at least three ordered medical examinations are factors against claimant's argument of disability. An ability to return to work is not solely based on a doctor's release to work. On the other hand, the hearing officer could have considered that Dr. N speculated (on a TWCC-64 filed in June 1992) that claimant would likely not be able to return to work until December 1992, and along with Dr. B's off work statements that resumed in March 1993, have determined that there was circumstantial evidence of the inability to work for that interval. Testimony about what claimant was capable of doing is argued very specifically in carrier's appeal, but the actual testimony on several of these points is not as definite. Dr. B's assertions do not appear to have been questioned through discovery. Whether more specific facts might be known to the carrier's adjuster or attorney, or were discussed at the benefit review conference, they were not all fully developed as evidence at either hearing in this proceeding.[1] We cannot state that the ability to perform some functions of daily living, developed through generalized testimony at the hearing, equates to a great weight of evidence against the hearing officer's finding on disability.

MMI PRESUMPTION ISSUE

[1]For example, in closing arguments at the first hearing, claimant stated that his father would be willing to hire him for $18,000.00 a year once he received a clean bill of heath. However, this point was not brought forward during the case in chief. We have stated before that argument is not evidence.

MMI was not an issue at the benefit review conference, or allowed as an additional issue at the hearing. It could not therefore be considered. Section 410.151(b)(2). We have before noted that Rule 130.4 does not establish a presumption that MMI was reached, but merely creates a presumption for carrying out a procedure to determine MMI. Texas Workers' Compensation Commission Appeal No. 92389, decided September 16, 1992. Moreover, a statement on a TWCC-64 about when MMI is anticipated does not constitute a "certification" of MMI. Texas Workers' Compensation Commission Appeal No. 92127, decided May 15, 1992.

The hearing officer's order provides that TIBS are not due once MMI is reached. One way in which MMI is "reached" is that 104 weeks have expired since income benefits began to accrue. Section 401.011(30)(B). That may have happened at or near the time that the decision on remand was issued by the hearing officer. Given the wording of the order, however, which is broad enough to provide for this, we cannot find error in the hearing officer's failure to find that claimant reached MMI, especially when not brought forward as an issue.

In this decision, as in the prior decision in this case, we observe that although carrier argues in appeal that the hearing officer should not have granted a continuance, and that it resulted from an *ex parte* contact, it does not appear that carrier's attorney objected at the hearing to the continuance, nor does carrier indicate how such would be reversible error, and we will therefore decline to assign error.

In considering all the evidence in the record, and finding some support for the decision of the hearing officer, we cannot reverse the decision because it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Because there is no reversible error, the decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I respectfully file this dissenting opinion. A time is reached, as here, in my opinion, where the cumulative effects of a course of action, which appears orchestrated if not significantly abusive in failing to meet the requirements and objectives of the 1989 Act, compel a curtailment of benefits. There is convincing evidence that leads me to conclude that the claimant is no longer entitled to benefits. The principal opinion very cogently outlines the pertinent evidence on the disability issue and notes that some matters regarding disability were not particularly well developed factually. However, from the evidence in the record including the limited medical treatment sought by the claimant prior to curtailment of his temporary income benefits, the perfunctory note from the claimant's second treating doctor concerning work capability, the claimant's conduct that led to the failure to obtain an evaluation from the carrier's doctor, the total absence of any effort or inquiry about obtaining any form of employment particularly in view of other activity of the claimant, together with the lengthy passage of time, refusal of therapy, principal complaints and the medical diagnosis of the original treating doctor, I am compelled to conclude that the hearing officer's decision was not supported by sufficient evidence. I would find the greater weight and preponderance of the evidence contrary to her pertinent findings and conclusions regarding the disability issue.

Stark O. Sanders, Jr.
Chief Appeals Judge