APPEAL NO. 94124

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 4, 1994. The single issue at the hearing was whether the respondent (claimant) reached maximum medical improvement (MMI) prior to August 28, 1993, which was his statutory date of MMI pursuant to Section 401.011(30)(B). The hearing officer determined that there was insufficient evidence to establish an earlier MMI and that the claimant, therefore, reached MMI on August 28, 1993. The appellant (carrier) appeals this decision contending that it is not supported by sufficient evidence and that the hearing officer misplaced the burden of proof and gave improper weight to certain evidence. The claimant did not respond to this appeal.

DECISION

Finding the decision and order of the hearing officer to be sufficiently supported by the evidence and to be a correct application of law, we affirm.

It is undisputed that the claimant suffered a compensable injury in the course and scope of his employment on (date of injury), when he injured his left knee by bumping it against a table. He was initially seen on May 13, 1991, by Dr. M who found a bruise of the prepatellar bursa and doubted further treatment would be necessary. X-rays were normal. On August 22, 1991, a Dr. Mc diagnosed prepatellar bursitis. The claimant continued working and did not begin "to lose time" until August 24, 1991. Because the claimant was unresponsive to conservative treatment for the bursitis, Dr. Mc referred him to Dr. B. On October 3, 1991, Dr. B excised the prepatellar bursa. Over a period of weeks fluid re-accumulated in the knee and a drain was inserted on December 2, 1991, which remained in place until December 26, 1991. The claimant continued to have pain and weakness in the knee. Pain relief injections were unsuccessful. On February 5, 1992, Dr. G examined the claimant at the carrier's request and diagnosed subcutaneous neuroma with local sensitivity. He concluded that there was "nothing seriously wrong," and in a Report of Medical Evaluation (TWCC-69), determined that the claimant reached MMI on February 5, 1992 with a zero percent impairment rating (IR). On March 13, 1992, Dr. B referred the claimant to Dr. R who diagnosed possible reflex sympathetic dystrophy.[1] On reviewing Dr. R's report, Dr. G found his diagnosis reasonable, "although a very rare condition which may follow minor trauma." He nonetheless, in a letter of April 7, 1992, affirmed his previous opinion regarding MMI and IR. On July 22, 1992, Dr. J, on referral from Dr. B, diagnosed "neuropathic pain syndrome involving local nerve branches innervating the anterior aspect of the knee." On August 24, 1992, Dr. G issued

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[1]Dorland's Illustrated Medical Dictionary, 27th Edition, defines reflex sympathetic dystrophy as "a disturbance of the sympathetic nervous system marked by pallor or rubor, pain, sweating, edema, or skin atrophy following sprain, fracture or injury to nerves or blood vessels."

a new TWCC-69, after a "repeat independent medical evaluation," in which he disagreed with a diagnosis of reflex sympathetic dystrophy, but nonetheless determined that the claimant had not yet reached MMI and was unable to provide an estimated date of MMI. On August 31, 1992, Dr. B excised hemangioma type inflammatory tissue from the patella. In an undated TWCC-69, Dr. B determined that the claimant reached MMI on December 10, 1992, with a zero percent IR. He stated that the claimant had full range of motion of the knee, but some tenderness and skin color changes.

The claimant continued to see Dr. B throughout 1993, complaining of sensitivity in the knee and numbness in the sciatic nerve distribution from the left knee down. On September 21, 1993, an EMG examination showed peroneal neuropathy of the left leg. On October 10, 1993, the claimant was diagnosed with peroneal nerve palsy and a neurolysis of the left peroneal nerve was performed. He continued to complain of pain after this operation and was diagnosed, on referral to a Dr. W, with intermittent claudication of the left leg and popliteal artery occlusion. By letter of November 8, 1993, Dr. B stated that he earlier felt the claimant had reached MMI on December 10, 1992; however, because of his continuing symptoms and subsequent medical problems, he did not reach MMI on December 10, 1992, as originally thought. An endarterectomy and bypass surgery was performed on the left leg on November 12, 1993. On November 23, 1993, Dr. B recorded in his treatment notes that "[w]e are supposed to be getting an impairment request on him and as soon as we get that tomorrow or the next day we need to get it filled out and sent in." On this same date, Dr. B completed a TWCC-69 to which he attached his treatment notes over the previous two years and gave an MMI date of November 23, 1993 with a 12% IR. On December 15, 1993, the claimant's latest visit after the surgery, Dr. W noted that the claimant's leg "worsened again."

The claimant testified that he was not aware of Dr. B's original determination of MMI with a zero percent IR until his benefit checks stopped in February 1993. The claimant stated that throughout 1993, Dr. B kept telling him his knee would get better. His last visit with Dr. G on August 24, 1992, however, started him thinking that something more was wrong with his knee, yet Dr. B gave an MMI date four months later on a date he said he was not even examined by Dr. B. The claimant's wife testified that she called a Texas Workers' Compensation Commission (Commission) employee in February 1993 to inquire about why the checks stopped and was told that "there was nothing to be done." She did not know what motivated Dr. B to write his letter amending his original TWCC-69 and changing the date of MMI from December 10, 1992 to November 23, 1993.

The issue as framed in this case is not whether the claimant timely disputed IR and MMI pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), *see generally* Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992, but whether, under the circumstances of this case, Dr. B effectively amended his previous TWCC-69 and changed the claimant's date of MMI.

The hearing officer found there was "insufficient medical evidence to establish that the Claimant reached [MMI] prior to August 28, 1993," and concluded that the claimant reached MMI on August 28, 1993. In its appeal, the carrier acknowledged that a doctor may withdraw or amend a previously determined date of MMI, but argues that there "must be some outer limit to the period during which a treating doctor may revise an opinion on the date of [MMI]."

The Appeals Panel has held that in certain circumstances both a treating doctor and a designated doctor may amend a previous determination of a date of MMI and the assignment of an IR. *See* Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993. For example, an amendment may be appropriate when the first opinion was based on incomplete or erroneous facts, *see* Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993; or a previously undiagnosed medical condition, or inadequate treatment, *see* Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993; or a significant error or clear misdiagnosis, *see* Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993; or based on the results of subsequent surgery or the need for further surgery, *see* Texas Workers' Compensation Commission Appeal No. 931107, decided January 21, 1994. *See generally*, Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1994, for a discussion of cases dealing with the amendment of MMI dates and IR determinations. While a subsequent amendment of a medical report by necessity compromises somewhat the goal of the 1989 Act that decisions on benefits be determined with finality as expeditiously as possible, the statute itself places an outside limit on the uncertainty of the date of MMI by establishing a statutory date of MMI at 104 weeks from the date benefits begin to accrue. We are, therefore, unwilling to hold, as the carrier invites us to, that "[r]egardless of subsequent medical developments, . . . simply too much time passed between the date the treating doctor rendered his opinions on [MMI] and impairment and the date he purports to withdraw those opinions," and observe that in Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993, the Appeals Panel found valid an amendment that was made approximately 16 months after the original certification of MMI.

The evidence in this case showed that the claimant was under the treatment of Dr. B and several referral doctors for approximately one year after Dr. B first certified the date of MMI. From the beginning of his treatment, the claimant showed essentially the same symptoms, but was diagnosed with multiple possible pathologies including bursitis, benign tumor, pinched nerve and vascular problems. He underwent three operations in addition to the implanting of a device in the knee for several weeks to drain fluid. In hindsight, Dr. B's initial determination of the date of MMI and IR may be perceived as unrealistically optimistic. Over the course of the succeeding year additional and different diagnoses were made while the claimant continued to feel pain, sensitivity and discoloration in the area of his left knee. We believe the changes made by Dr. B to his

first determination of the date of MMI and assignment of an IR were well supported by this objective medical evidence. The period of 11 months that elapsed between the initial and amended certification was not unreasonable in light of ongoing subsequent treatment and continued medical attention the claimant received. *See* Appeal No. 931107, *supra*. The hearing officer's determination that the claimant did not reach MMI prior to August 28, 1993, is not so contrary to the great weight and preponderance of the medical evidence as to be clearly unjust or erroneous. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier also asserts that the hearing officer misplaced the burden of proof in finding insufficient medical evidence to establish a date of MMI prior to August 28, 1993. We disagree. First of all, the challenged finding in no way explicitly or implicitly establishes or purports to establish or assign a burden of proof. It is simply a finding of what in the hearing officer's opinion, the evidence established. The carrier concedes as much in pointing to "obvious medical evidence to indicate" the contrary. Secondly, the claimant at the hearing presented his case first to which the carrier responded and the claimant was allowed rebuttal. This reflects the normal course of proceedings for the party who bears the burden of proof. Finally, the carrier did not assert error in the assignment of the burden of proof at the hearing. We do not consider assertions of error raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. This argument in fact is one of insufficient evidence to support the hearing officer, which we have addressed above.

Finally, the carrier contends on appeal that the hearing officer incorrectly relied on Dr. G's August 1992 report of no MMI as evidence in reaching his decision because this report "can hardly be considered as overruling the claimant's treating doctor's opinion, four months later, that the claimant had reached [MMI]." Dr. G's opinion was admitted into evidence without objection by the carrier. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Dr. G's opinion was probative evidence on the matter in dispute at the hearing. The hearing officer could give it whatever value deemed appropriate in light of all the evidence presented including his finding that Dr. G found the claimant had not reached MMI.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge