APPEAL NO. 94162

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 January 18, 1994, (hearing officer) presiding. In response to the issues before her, the hearing officer determined that the claimant reached maximum medical improvement (MMI) on August 26, 1993, with a whole body impairment rating of 10%, as found by the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The appellant (hereinafter claimant) contends in his appeal that the designated doctor did not evaluate his "whole body," including other significant impairments, and did not use tools or have a witness present during the examination; he further contends that he is still injured and needs further treatment. The respondent (hereinafter carrier) basically responds that the hearing officer correctly determined that the great weight of the other medical evidence did not overcome the designated doctor's report.

DECISION

We affirm the hearing officer's decision and order.

Many of the facts of this case were stipulated to by the parties, and will therefore be summarized only briefly. The claimant suffered a compensable back injury on or about (date of injury). His treating doctor, (Dr. S), referred the claimant to (Dr. B), who certified MMI on February 26, 1993, with a 27% impairment rating. Dr. B's report noted an earlier MRI and lumbar CT scan, which were essentially negative; it also stated (without further specifics) that "[a]ccording to the TWCC report, only the low back was evaluated. It should be noted that [claimant] has other significant impairments which were not evaluated. This evaluation is restricted to only the area of complaint."

On March 24, 1993, the claimant saw (Dr. K) for an independent medical examination. Dr. K noted that x-rays showed what appeared to be a transitional vertebra at the L5 level, which he said caused claimant to have low back stiffness. He also wrote that "I do think that his work may have mildly aggravated his preexisting condition but it is definitely due for the most part to a congenital defect with a transitional vertebra." He stated that claimant had not reached MMI, that further physical therapy was in order, and that claimant did not at that time need surgery although he could be a candidate for fusion in the future if his pain was not relieved by other methods. He recommended claimant be evaluated by (Dr. N), and on August 19, 1993, claimant saw Dr. N's associate, (Dr. J), who wrote that claimant had a lumbosacral anomaly and could be a candidate for L5-S1 facet block, but that "ongoing conservative measures are really all we can offer." On November 10, 1993, Dr. S wrote that he agreed with Dr. K that claimant had not reached MMI.

Dr. S also referred the claimant to (Dr. ES) and to (Dr. T), neither of whom certified MMI.

The Commission appointed (Dr. V) designated doctor. Dr. V certified MMI as of August 26, 1993, with a 10% whole body impairment rating. Dr. V additionally commented in his report that an inflammatory cause of the claimant's low back pain "should be investigated thoroughly because the congenital findings of sacralization of L5 is (sic) not compatible with the intensity of pain that he has" and "[e]specially in view of the fact that he has some family with arthritis."

Claimant's position at the hearing and on appeal is that he has not reached MMI because all the doctors, including the designated doctor, have stated that he needs further help. He also maintains that Dr. V used no tools and no computer in rendering his impairment rating and did not have a witness to the examination, and that Dr. V's rating would have been higher had he evaluated other significant impairments. He stated his desire to see Dr. N in San Antonio, as recommended by Dr. K.

We point out at the outset that a key provision of the 1989 Act concerns the appointment of a designated doctor to resolve disputes over MMI and impairment ratings. The Act provides that the report of a designated doctor appointed by the Commission shall have presumptive weight and the Commission shall base its determinations on MMI and impairment on that report unless the great weight of the other medical evidence is to the contrary. *See* Sections 408.122(b), 408.125(e). This panel has previously ruled that to overcome the presumptive status accorded the designated doctor's opinion requires more than a mere balancing of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's opinion including the treating doctor, is entitled to such deference. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

Further, the Act defines "maximum medical improvement" as the earlier of 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, or the expiration of 104 weeks from the date on which income benefits begin to accrue. Section 401.011(30). The fact that two doctors apparently have affirmatively declared that claimant has not reached MMI, versus the opinions of the designated doctor and Dr. B that MMI has been reached, equates in our opinion to no more than a balancing of the evidence which is insufficient to overcome the designated doctor's report. *See* Appeal No. 92412, *supra*.

We have also reviewed Dr. V's statement in his report concerning "further investigation" of claimant's low back pain, and conclude that the hearing officer did not err in nevertheless accepting Dr. V's finding that MMI had been reached. Read in context, Dr. V appears to raise a concern that causes of pain other than those related to the compensable injury should be investigated, which is not incompatible with a certification that the claimant is not likely to experience further improvement from the compensable injury. *See, e.g.,* Texas Workers' Compensation Commission Appeal 92255, decided July 27, 1992 (designated doctor's concurrence with work hardening program held not inconsistent with his determination that claimant had reached MMI).

The claimant also contended that the designated doctor failed to consider his "other significant impairments," most probably referring to the aforementioned statement in Dr. B's report. The claimant himself testified that he felt he had knee problems which arose after he had received shots for his back. However, the issue of whether and to what extent any alleged knee problems were the result of his original injury or the treatment for the injury was not raised at the benefit review conference and was not added at the hearing, and the hearing officer correctly did not determine it. *See* Section 410.151.

With regard to claimant's desire to see a specific doctor (Dr. N), that question should more appropriately be addressed to the Commission's medical review division. We note that Claimant's Exhibit No. 5, Dr. J's report, indicates that Drs. J and N are associates.

As to Dr. V's examination of the claimant, while we know of no prohibition against a witness being present at an examination, we also know of no requirement that one be present. Concerning claimant's contention that Dr. V did not use tools or a computer in calculating range of motion (ROM), Texas Workers' Compensation Commission Appeal No. 93483, decided July 26, 1993, addressed a similar complaint by a claimant. In that case, as in the instant one, the designated doctor's report indicated that he had assessed ROM; the hearing officer in that case also pointed out the absence of objective findings of injury and stated that the designated doctor's opinion was consistent with other doctors who had examined the claimant. In addition, Appeal No. 93483 cited Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1992, which in reversing a hearing officer's determination that the report of the designated doctor (who did not use a goniometer or inclinometer) did not comply with the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) stated that a designated doctor's report should not be rejected "absent a substantial basis to do so."

In this case, whether or not the designated doctor used the statutorily required version of the AMA Guides was not an issue. Indeed, Dr. V's report recited that his examination was conducted in accordance with the AMA Guides, and no issue having been raised, the hearing officer was entitled to give credence to that doctor's statement. We also note that Dr. V did measure and evaluate claimant's ROM, and his report assigns specific values for claimant's flexion, extension and lateral motion. We thus distinguish Texas Workers' Compensation Commission Appeal No. 93286, decided May 28, 1993, where the Appeals Panel reversed and remanded for further clarification from a designated doctor who apparently did not address ROM.

As to claimant's contention that he continues to have pain and need further treatment, we have previously remarked that when a doctor finds MMI and assesses impairment, he frequently agrees, in effect, that the injured worker is likely to continue to have effects, and quite possibly pain, from the injury. However, he has determined that there will likely be no further substantial recovery from the injury. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also noted that reaching MMI also does not mean that an employee's entitlement to such medical treatment

as is reasonable and necessary will be terminated. Texas Workers' Compensation Commission Appeal No. 93710, decided September 28, 1993.

Upon review of the record, we find that the hearing officer's decision is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We accordingly affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge