APPEAL NO. 94176

On January 18, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) whether the appellant (claimant) reached maximum medical improvement (MMI), and if so, on what date, and; (2) the claimant's impairment rating. The hearing officer decided that the claimant reached MMI on June 25, 1993, with a one percent whole body impairment rating. The hearing officer decided that the claimant is entitled to three weeks of impairment income benefits. The claimant disagrees with certain findings of fact and requests that the hearing officer's decision be reversed and a decision rendered that he has an eight percent impairment rating or, in the alternative, that the hearing officer's decision be reversed and the case be remanded for further proceedings. No response was filed by the respondent (carrier).

DECISION

The decision of the hearing officer is modified to reflect that the claimant reached MMI on June 22, 1993, and as modified the decision and order of the hearing officer are affirmed.

The parties stipulated that the claimant injured his right ankle at work on (date of injury). The claimant's treating doctor, (Dr. P), reported on a Report of Medical Evaluation (TWCC-69) dated December 8, 1992, that the claimant reached MMI on December 8, 1992, with a one percent impairment rating. On February 18, 1993, the Texas Workers' Compensation Commission (Commission) selected (Dr. C) as the designated doctor to determine MMI and impairment rating. Dr. C examined the claimant and reported on a TWCC-69 dated April 6, 1993, that the claimant had not reached MMI "pending MRI results." (Dr. F) reported that he performed an MRI scan of the claimant's right ankle on May 10, 1993, and that abnormal changes were seen in the articular surface of the distal end of the tibia, more towards the anterior aspect, which was indicative of a previous osteochondral injury. Dr. F further reported that there was no evidence of ligamentous tear or tenosynovitis, and that the "ankle mortise" was still well maintained and that there was no evidence of joint effusion. The claimant was seen again by Dr. C in June of 1993 and in a TWCC-69 dated June 28, 1993, Dr. C reported that the claimant reached MMI on June 22, 1993, with a one percent impairment rating. Dr. C diagnosed "osteochondrosis" and stated that the MRI showed an osteochondral fracture of the right ankle.

Another MRI scan of the right ankle was performed by (Dr. G) on September 27, 1993, and Dr. G reported that it revealed an osteochondral lesion, evidence of a previous ankle sprain, and no other "focal lesions." Dr. P referred the claimant to (Dr. D) who examined the claimant and reviewed the MRI scans of May and September 1993. Dr. D stated in a letter dated September 27, 1993, that the claimant was not a candidate for surgery at the present time, that the claimant has an "interarticular fracture," and that the claimant has a "permanent partial disability to the ankle of about 20%." In a Specific and Subsequent Medical Report (TWCC-64) dated October 13, 1993, Dr. P stated that he

agreed "100% with [Dr. D]" and that the claimant has a "20% disability of the ankle which will increase with time because this is an interarticular fracture." In a TWCC-69 dated October 2, 1993, Dr. D reported that the claimant reached MMI on September 27, 1993, with an eight percent impairment rating.

In his appeal, the claimant states that he "rebuts and contests" the hearing officer's finding that Dr. P certified that MMI was reached on December 8, 1992, with a one percent impairment rating. We find no merit in the claimant's contention because the parties stipulated to this fact at the outset of the hearing.

The claimant further states that he "rebuts and contests" the finding that Dr. C was the designated doctor selected by the Commission and that Dr. C certified that MMI was reached on "June 25, 1993," with a one percent impairment rating. Inasmuch as the parties stipulated that Dr. C was the designated doctor and that he certified that MMI was reached on "June 22, 1993," with a one percent impairment rating, we find no merit in the claimant's contention other than modifying the finding to reflect that Dr. C certified that MMI was reached on June 22, 1993, and not June 25, 1993, as found by the hearing officer.

The claimant also states that he disagrees with the hearing officer's finding that the great weight of the medical evidence was not contrary to the report of Dr. C, the designated doctor, and points to evidence in the record that although Dr. P assigned a one percent impairment rating, Dr. P later stated his agreement with Dr. D's opinion that the claimant has a "permanent partial disability" of 20%.

The 1989 Act provides that where a designated doctor is chosen by the Commission to determine MMI and impairment rating, the report of that doctor shall have presumptive weight, and the Commission shall base the determinations of MMI and impairment rating on that report unless the great weight of the medical evidence is to the contrary. Sections 408.122(b) and 408.125(e). We have commented many times on the "special presumptive status" the designated doctor's report is accorded under the 1989 Act, and on the fact that no other doctor's report, including that of a treating doctor, is entitled to such deference. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992; Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. To overcome the presumptive weight accorded to the report of the designated doctor requires more than a preponderance of the medical evidence; it requires the "great weight" of the other medical evidence to be contrary to the report. Appeal No. 92412, *supra*. Having reviewed the record, we conclude that the hearing officer's finding that the great weight of the other medical evidence did not overcome the report of the designated doctor is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

The claimant further contends that the 1989 Act and the claimant's impairment rating determined by the hearing officer under the 1989 Act are unconstitutional. The question of the constitutionality of the 1989 Act is presently before the Supreme Court of Texas. Since administrative agencies have no power to determine the constitutionality of statutes, we

decline to address the constitutional question raised at the hearing and on appeal. *See* Texas State Board of Pharmacy v. Walgreen Texas Co., 520 S.W.2d 845 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.).

The hearing officer's decision is modified to reflect that the claimant reached MMI on June 22, 1993, and as modified the decision and order of the hearing officer are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge