APPEAL NO. 94255

On February 2, 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 issue at the hearing was whether the first certification of maximum medical improvement (MMI) and assignment of an impairment rating were disputed on or before the 90th day after the appellant (claimant) became aware of the certification. The hearing officer determined that the claimant did not timely dispute the first impairment rating assigned to him and that the claimant reached MMI on January 6, 1993, with a 12 percent impairment rating. The hearing officer decided that the claimant is entitled to 36 weeks of impairment income benefits. The claimant disagrees with the hearing officer's decision and requests that we reverse it and render a decision that he has not reached MMI. The carrier requests that we affirm the hearing officer's decision.

DECISION

The hearing officer's decision and order are affirmed.

The claimant works for State Hospital. The parties stipulated that he sustained a work-related back injury on (date of injury), when a patient fell on him. The claimant said that since his injury pain has radiated throughout his whole back and that he has had muscle spasms in the thoracic and lumbar areas. An MRI scan of the lumbar area done in November 1992 was negative. The claimant underwent eight weeks of physical therapy. In a Report of Medical Evaluation (TWCC-69), the claimant's initial treating doctor, (Dr. E) certified that the claimant reached MMI on January 6, 1993, with a 12 percent impairment rating. The impairment rating consisted of five percent impairment for a specific disorder of the lumbar spine and seven percent impairment for abnormal range of motion. In a report dated January 18, 1993, Dr. E reported that the claimant had pain in the thoracic and lumbar areas and reiterated that the claimant reached MMI on January 6, 1993, with a 12 percent impairment rating. The claimant said he continued treatment with Dr. E until sometime in February 1993.

The claimant testified that by January 18, 1993, he was aware of Dr. E's certification of MMI and assignment of a 12 percent impairment rating and that he discussed the report with Dr. E by that date. The claimant further testified that he never wrote to the Texas Workers' Compensation Commission (Commission) or to the carrier to dispute Dr. E's findings. However, he said that he did call the Commission numerous times and that on some unspecified date disputed Dr. E's findings. Commission contact data logs indicated that the claimant first notified the Commission that he was disputing Dr. E's findings on July 14, 1993. Also in evidence was a Dispute Resolution form dated September 21, 1993, in which it was recorded that the claimant was disputing his impairment rating "after 90 days."

Sometime in December 1992, Dr. E referred the claimant to (Dr. MC) and in a report to Dr. E dated December 15, 1992, Dr. MC stated his impressions as: (1) cervical sprain, (2) lumbar sprain, (3) thoracic sprain, and (4) rule out carpal tunnel syndrome. Among other

things, Dr. MC recommended an MRI scan of the thoracic area and a repeat MRI scan of the lumbar area. In a report dated January 21, 1993, which is not addressed to anyone and does not indicate to whom it was sent, Dr. MC noted that the claimant still complained of severe pain in the lumbar and thoracic areas and stated:

> It is my strong opinion, that to resolve the question in this patient as to what is or is not occurring as to the cause of his pain, that an MRI of the thoracic spine should be performed. I feel that physical therapy would be of great help in helping resolve him of some of the symptoms and in getting him back to work.

In a report to Dr. E dated February 11, 1993, Dr. MC noted that the claimant's condition was unchanged, that he was still not receiving physical therapy, and that his "MRI was denied" by the carrier. He further stated that there was nothing else he could do for the claimant due to "current benefits denial."

On March 26, 1993, the claimant requested Commission approval to change treating doctors from Dr. E to Dr. MC and stated as the reason for the request "[Dr. MC] says he can help me, where [Dr. E] says he can't." The request was approved on April 13, 1993.

In a report dated April 13, 1993, which is not addressed to anyone and which does not indicate to whom it was sent, Dr. MC noted that the claimant still complained of pain in the thoracic and lumbar areas and stated that "it is possible that the patient's injury was more to the thoracic area, but was mis-perceived by the patient as being a lumbar pain due to the radiation from the initial injury." Dr. MC reiterated the need for a thoracic MRI scan. On May 25, 1993, (Dr. C), who is associated with Dr. MC, wrote that the claimant was "Temporary Totally Disabled" and was to remain off work.

The claimant testified that a benefit review conference was held in July 1993 for the purpose of considering his request for an MRI scan of the thoracic spine and that the MRI scan was authorized after the conference. On July 14, 1993, the claimant requested Commission approval to change treating doctors from Dr. MC to Dr. C because Dr. MC had "quit." The request was approved on July 14, 1993.

An MRI scan of the thoracic spine was done on July 29, 1993. (Dr. S) reported the results of the MRI scan as follows:

> 1.Anterior disc bulges or protrusions at T8-T9 and T9-T10 to the right of midline. Both discs show mild loss of height but retain normal stable intensity.
>
> 2.Otherwise normal MRI scan of the thoracic spine. No evidence of encroachment on the spinal canal or neural foramina.

The claimant testifed that Dr. C told him that the thoracic MRI scan did not reveal a problem. On August 9, 1993, the claimant requested Commission approval to change treating doctors from Dr. C to (Dr. ME), which request was approved on August 9, 1993.

On October 1, 1993, (Dr. SC) gave the claimant an epidural steroid injection at T9-T10, and diagnosed "thoracic radicular syndrome with a bulging disc at T8-T9 and T9-T10."

On October 14, 1993, Dr. E, the claimant's initial treating doctor who had certified that the claimant had reached MMI on January 6, 1993, with a 12 percent impairment rating due to impairment of the lumbar spine, reviewed the claimant's thoracic MRI scan and noted that it revealed "only some bulges in the thoracic spine which are not diagnostic for any significant pathology." Dr. E stated that he saw no reason, based on the thoracic MRI scan, to change the MMI date or impairment rating. In giving his opinion, Dr. E noted that he was aware that the claimant had been getting injections and was under the care of Dr. ME.

The claimant said he returned to light duty work with the employer in November 1993.

In a TWCC-69 dated January 28, 1994, Dr. ME reported that the claimant had not reached MMI and that he anticipated that the claimant would reach MMI in two to three weeks. He noted that the claimant was enrolled in a pain management program. On January 31, 1994, Dr. ME advised the claimant's attorney that the claimant was in considerable pain and needed psychological counselling, that the claimant suffered from "thoracolumbar syndrome," and that treatment had consisted of medications and pain management. Dr. ME also stated that the claimant had been in the pain management program for five weeks and that he was doing very well and his pain level had been reduced to the point were he was off his pain medications. The claimant said he has been getting psychological counseling.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) provides that "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." We have held that if the impairment rating becomes final, so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the time period for disputing the rating runs from the time the claimant becomes aware of the impairment rating. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. Notice of dispute by the claimant may be given to the Commission or to the carrier. Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993.

In the instant case, the claimant's 90-day period for disputing Dr. E's report of MMI and impairment rating expired on April 19, 1993. The claimant asserts on appeal, as he did at the hearing, that his March 26, 1993, request to the Commission to change treating doctors from Dr. E to Dr. MC constituted a dispute of Dr. E's report, and that he disputed Dr. E's report with Dr. MC's reports of January 21 and February 11, 1993.

In Texas Workers' Compensation Commission Appeal No. 93684, decided September 21, 1993, (Judge Kilgore dissenting) we reviewed a case in which the hearing officer determined that the claimant had timely disputed the first impairment rating assigned

to him when the claimant requested Commission approval to change treating doctors. We reversed the hearing officer's decision and rendered a decision that the claimant had not timely disputed the impairment rating. We noted that Section 408.022(d) provides that a change of treating doctor may not be made to secure a new impairment rating or medical report, but agreed with the hearing officer's conclusion that a request to change treating doctors for that purpose may constitute a dispute of an impairment rating. We also noted that whether a claimant or carrier has timely disputed an impairment rating is a fact-specific question. We observed that it is not enough for a party to hold a subjective belief that he intends to see another doctor to re-evaluate impairment; that belief must be communicated. We stated that "[w]hether a request for a second treating doctor meaningfully and with clarity conveyed a dispute over MMI or impairment thus must be determined in each situation, on a case by case basis." We held that the claimant's request indicated only a desire for further treatment and was not sufficient to dispute the first impairment rating assigned to him.

In the instant case, the claimant's March 26, 1993, request to change treating doctors simply states that "[Dr. MC] says he can help me, where [Dr. E] says he can't." Based on our holding in Appeal No. 93684, *supra*, we cannot conclude that the hearing officer erred in failing to find that the claimant's request to change treating doctors constituted a dispute of Dr. E's report of MMI and impairment rating.

The claimant has not referred us to any Appeals Panels decisions in which a report of a referral doctor, which is what Dr. MC was at the time of his reports on January 21 and February 11, 1993, was considered to constitute a dispute under Rule 130.5(e) of an initial impairment rating and certification of MMI by a treating doctor. Assuming, without deciding, that under a particular fact situation a referral doctor could, on behalf of a party, dispute the treating doctor's report of MMI and impairment rating, there is no evidence that the reports in question were sent to the Commission or to the carrier, and there is no mention in the reports of any disagreement with Dr. E's report of MMI and impairment rating; the reports mainly express Dr. MC's concern that a thoracic MRI be done and that the claimant continues to experience pain. Under these circumstances, we cannot conclude that the hearing officer erred in failing to find that Dr. MC's reports of January 21 and February 11, 1993, constituted a dispute by the claimant of Dr. E's report of MMI and impairment rating.

The claimant also contends on appeal, as he did at the hearing, that he was misdiagnosed by Dr. E as having a lumbar injury when in fact he had a thoracic injury. The claimant cites Texas Workers' Compensation Commission Appeal No. 93207, decided May 3, 1993, in support of his position that the hearing officer's decision should be reversed due to a misdiagnosis by the treating doctor. We do not find Appeal No. 93207, to be controlling because that decision did not involve the 90-day dispute provision in Rule 130.5(e). It involved a misdiagnosis by a designated doctor whose report was given presumptive weight by the hearing officer. The claimant also cites Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, wherein we affirmed a hearing officer's decision that the treating doctor's findings of MMI and impairment rating became final under the 90-day provision of Rule 130.5(e). However, in doing so we stated that the application of Rule

130.5 is not absolute and that "if an MMI certification or impairment rating were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive." The claimant asserts that due to a misdiagnosis on the part of Dr. E, he was not at MMI when Dr. E certified that he was and that he still has not reached MMI.

In the instant case, there was conflicting medical evidence as to whether Dr. E's January 6, 1993, report of MMI and impairment rating was based on a misdiagnosis. On the one hand, the thoracic MRI done in July 1993 showed bulging or protruding discs and Drs. MC, ME, and SC have indicated that the claimant's pain stems from the thoracic region of his back. On the other hand, Dr. E believed the claimant's problem is with his lumbar area, and gave a 12 percent impairment rating due to impairment of that region of the back, and, upon review of the thoracic MRI, Dr. E stated that the disc bulges did not reveal any significant pathology and refused to change his prior report of MMI and impairment rating. And, according to the claimant, Dr. C did not believe that the thoracic MRI revealed any significant problem.

The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer had the responsibility to weigh the conflicting medical evidence as well as the testimony of the claimant, and to determine what facts had been established. St. Paul Fine & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Having reviewed the record, we cannot conclude that the hearing officer erred in failing to find that Dr. E's certification of MMI and assignment of a 12 percent impairment rating were based on a significant error or clear misdiagnosis. With the exception of Finding of Fact No. 13, we conclude that the hearing officer's findings of fact, conclusions of law, and decision that the claimant did not timely dispute Dr. E's report of MMI and impairment rating, that the report is final, and that the claimant reached MMI on January 6, 1993, with a 12 percent impairment rating, are sufficiently supported by the evidence and are not against the great weight and preponderance of the evidence.

In regard to Finding of Fact No. 13 wherein the hearing officer found that the claimant disputed Dr. E's report of January 6, 1993, on September 21, 1993, we note that the Commission's contact data logs unequivocally show that the claimant notified the Commission on July 14, 1993, that he was disputing Dr. E's findings. However, the July 14, 1993, date of dispute is beyond the 90-day dispute period so the hearing officer's error in finding the date of dispute to be September 21st instead of July 14th would not change the result reached by the hearing officer, and it is not a basis for reversal of his decision. We also observe that the claimant's argument to the effect that he was unable to dispute Dr. E's findings until he had the thoracic MRI is without foundation in the record inasmuch as he disputed Dr. E's findings on July 14, 1993, and the thoracic MRI was not done until July 29, 1993.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge