APPEAL NO. 94279

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 25, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the issue of whether the claimant, BL (also known as BLD), who is the appellant in this case, had reached maximum medical improvement (MMI), and, if so, the percentage of whole body permanent impairment as a result of a compensable injury sustained on (date of injury), while claimant was employed by (employer). (employer).

The hearing officer determined that the opinion of the designated doctor regarding impairment was not contrary to the great weight of other medical evidence, and he accorded it presumptive weight by finding that claimant had a six percent permanent impairment to her lumbar spine, and had reached MMI on March 30, 1993.

The claimant has appealed this decision, arguing that she did not reach MMI because she was still in pain and continued to improve after March 30, 1993. She further argues that the March 30, 1993, date of MMI was first certified by a doctor who did not perform an examination on her, relied on an old MRI, and that the designated doctor simply used this same date from an incorrect assessment. She feels that MMI was reached only after several months treatment by her current treating doctor. The carrier responds that the designated doctor's report was rightfully given presumptive weight by the hearing officer, and that the fact claimant's pain may have continued does not mean she did not reach MMI as defined by the 1989 Act.

DECISION

The decision and order of the hearing officer are affirmed.

The claimant, who was 61 years old at the time of injury, stated that she injured her back on (date of injury), while pushing a cart of clothing which caught in a crack on the floor. When the cart caught, she stated she "went over" the cart. Her first treating doctor for the injury was (Dr. D). She was treated by (Dr. H) on referral from Dr. D. Both Dr. H and Dr. D ordered physical therapy. Dr. H ordered an MRI of her lumbar spine on April 16, 1992. The impression recorded is a mild narrowing of the L4-5 disc; also noted is "no spondylolisthesis or herniated disc elements visible to account for patient's symptoms." A medical report filed by Dr. H on July 9, 1992, anticipated that claimant would reach MMI on August 30, 1992.

Claimant was also referred to (Dr. B), a neurosurgeon, who gave her cortisone shots. She treated with him until January 19, 1993, and the treatment included therapy.

The record also indicates that claimant saw (Dr. G) on November 24, 1992, at the request of the carrier. Dr. G noted degenerative disc disease and possible radicular syndrome of the lower extremity. Dr. G noted a normal gait, negative straight leg raising,

and no specific motor weakness. He stated that with only one MRI, he would be hesitant to release claimant to full duty, but that she could perform light duty.

Claimant said she returned to Dr. D when Dr. B recommended surgery and claimant wished to try other alternatives. (A letter from Dr. B dated January 19, 1993, states, however, that claimant "doesn't need any surgery at present.") She went to therapy again. Claimant said that her back was improving and then in March 1993, she slipped and fell in her kitchen, and her back began to hurt again. Claimant said she was referred to (Dr. O), a neurological surgeon, by Dr. D, although she felt that a nurse for the adjuster had recommended this referral.

A letter from Dr. D indicated that he referred her to Dr. O primarily for a second opinion on surgery. Claimant stated that she saw Dr. O on March 30, 1993, that he came in the room and announced to her what he intended to do, checked her reflexes and had her bend forward once. She disputed that he performed straight leg raising as recorded in his report. Dr. O stated that he agreed that she did not need surgery, that her MRI was essentially normal for her age, that she did not have radicular pain, and that she had reached MMI with an impairment rating of "4-5%" for residual symptoms. Dr. D reviewed this report and agreed that claimant had reached MMI, although he stated that he did not "feel comfortable" rating the claimant because he was not an orthopedist or neurosurgeon. Dr. D released claimant to light duty effective April 7, 1993.

Claimant disputed Dr. O's assessment. A designated doctor, (Dr. BY), was appointed by the Texas Workers' Compensation Commission (Commission) to examine claimant relating to MMI and impairment rating. Claimant agreed that Dr. BY had performed a good examination, and generally agreed with his impairment rating percentage. She stated that she felt by the time she saw him on August 30, 1993, she had improved since March 30, 1993. Dr. BY's report indicated that he reviewed her medical records, and as part of his physical examination performed a range of motion examination and a neurological examination. He assessed a total six percent impairment rating, based upon her specific injury and some right nerve root impairment. Dr. BY stated that March 30, 1993, was an appropriate date of MMI, and certified both this date and his impairment rating.

Claimant changed treating doctors in April 1993 to (Dr. S), a chiropractor. He stated that she continued to improve through his course of treatment. Claimant stated that she felt she reached MMI on December 30, 1993. Dr. S's medical reports initially projected that claimant would reach MMI by September 1, 1993, and he later amended this to December 1, 1993.

"Maximum Medical Improvement" is defined, as pertinent to this case, as "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 . . . ." Section 401.011(30)(A). We have stated many times that the presence of pain is not, in and of itself, an indication that an employee has not reached MMI; a person who is assessed to have lasting impairment may indeed continue to experience pain as a result of an injury.

See Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993.

The use of a designated doctor is intended under the 1989 Act to assign an impartial doctor to finally resolve disputes over MMI and impairment rating. To achieve this end, the report of a designated doctor is given presumptive weight. Sections 408.122(b), 408.125(e). Only the great weight of the other medical evidence can reverse this presumptive status. Section 408.125(e). As the Appeals Panel has stated before, this requires more than a mere balancing of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. A claimant's nonmedical testimony or evidence about his or her condition does not alone provide a sufficient basis to overcome this presumption. Therefore, claimant's self-assessment as to her status of MMI could not be used to overcome a physician's opinion.

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). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). While there was conflicting medical evidence, there was general agreement from her treating doctor, as well as Dr. O, that claimant reached MMI. It was for the hearing officer to weigh the evidence and sort out whether he believed that Dr. O's written report of his examination was accurate as against claimant's recollection of what happened. We have agreed that a designated doctor who reviews a claimant's medical records may determine that MMI was reached on a date before his examination. Texas Workers' Compensation Commission Appeal No. 92453, decided October 12, 1992.

We affirm the hearing officer's decision and order, as based upon sufficient support in the record.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge