APPEAL NO. 94299

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 26, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the issues of whether the claimant, CQ, who is the appellant in this case, had reached maximum medical improvement (MMI), and, if so, the date, and the correct percentage of whole body permanent impairment as a result of a compensable injury sustained on (date of injury), while claimant was employed by (employer). A third issue was also presented as to whether claimant had disability (the inability to obtain and retain employment equivalent to his pre-injury wage as a result of his compensable injury) for the period from March 30, 1992 until August 27, 1993. The carrier's position at the benefit review conference was that claimant's first impairment rating became final, under Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), because it was not disputed within 90 days.

The hearing officer determined that the claimant reached MMI on March 30, 1992, with a 10% impairment rating, in accordance with the certification of his treating doctor, (Dr. A), which became final because the claimant did not dispute it within 90 days after he became aware of the rating. The hearing officer determined that Dr. A's attempted retraction of the certification on June 8, 1993, was not effective because it was not based upon medical misdiagnosis or inadequate treatment. The hearing officer found that a dispute raised by another doctor on behalf of claimant was made at a time several weeks beyond the 90 day deadline. Because claimant was adjudged to have reached MMI on March 30, 1992, the question of disability after that date was not determined.

The claimant has appealed this decision, arguing that Dr. A's retraction should be given effect, because his initial opinion was coerced by the carrier, and other medical opinion shows that claimant has not reached MMI. The claimant argues that because the carrier did not object to a subsequent impairment rating, it has waived its right to complain. Claimant argues that the main reason to rule he has not reached MMI is that "he was not aware of the MMI certification concept" and that he was told by his doctors his claim was being disputed. The claimant argues that there may be the need for additional surgery. Claimant argues that doctors effectively disputed MMI by checking a box on a health claim form to the effect that claimant could not return to work. The carrier responds that the decision should be upheld, and stated that there was no evidence either that the carrier pressured Dr. A to issue a premature certification of MMI, or that claimant needs additional surgery.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant injured his back (date of injury), while working for the employer. Claimant said he was treated by Dr. A from after his injury until March 30, 1992. The records in evidence indicate that claimant did not file a request with the Texas Workers' Compensation Commission (Commission) to change his treating doctor from Dr. A to (Dr. G) until March

25, 1993. Dr. A's diagnoses for the lumbar spine were disc syndrome, spine facet syndrome, sprain/strain, and muscle spasm. Dr. A's initial report states that he will treat claimant every day for a week and then reduce the frequency, and will release him as soon as maximum symptomatic relief is reached. Dr. A's notes from February and March 1992 indicate he saw claimant twice a week and then once a week the last month, and virtually every notation made stated that claimant's condition was unchanged. Dr. A opined that claimant had improved enough to be able to return to work at regular duties on January 14, 1992, but requested the carrier to authorize continued treatment for pain.

On March 30, 1992, Dr. A completed a TWCC-69 Report of Medical Evaluation, with attached schedules, certifying that claimant reached MMI on March 30, 1992, with a 10% impairment. Dr. A's report noted "the fact that he has considerable pain and dysfunction has not been considered since his pain is in the back and non dermatomal and the AMA Guide requires residual pain present in a dermatomal pattern in the lower extremity."

The record indicates that the carrier apparently sought peer review and notified Dr. A after this that it disputed some of Dr. A's treatment on medical necessity, and asserts the carrier's position that MMI appeared to have been reached by February 11, 1992. This dispute form is not dated. However, a letter in the record from the carrier to Dr. A dated March 11, 1993, purports to forward a copy of the peer review. A letter dated August 7, 1992, from Dr. A to the auditor identified on the carrier's dispute form states that Dr. A is in receipt of the dispute and responds to various points raised in that dispute. It does not assert that the carrier caused a premature MMI certification; the letter concluded by citing that claimant was determined to have reached MMI on March 30, 1992, and that "[o]n that day, the patient was told that we felt that he had reached MMI and no further care would be needed. The patient did not agree with me, left my office upset and stated he would seek care from another doctor." Another letter from Dr. A to the Commission on October 9, 1992, filed pursuant to a fee dispute, states that claimant was placed on MMI "due to the pressures of the carrier and auditing company who were refusing to pay for any more services. . . . " On June 8, 1993, Dr. A filed a TWCC-69 which stated that the claimant was erroneously placed on MMI by Dr. A. Dr. A stated that claimant was not at MMI and should be allowed to seek care from Dr. G. Claimant stated that he was aware of Dr. A's certification and impairment rating at the time it was given on March 30, 1992, because Dr. A gave him a letter to that effect. He did not contact the Commission or the carrier to dispute it. There was no evidence that it was disputed by the carrier.

To briefly summarize the remaining evidence, claimant saw (Dr. D), who wrote the carrier on August 18, 1992, regarding payment for claimant's treatment, which letter included an opinion that claimant was not at MMI. (This is the date that the hearing officer first determined that Dr. A's certification was disputed on claimant's behalf.) Objective tests, including x-rays and an MRI, have determined that claimant had slight bulging and mild spondylosis with mild degenerative disc disease at L4-5 and L5-S1. (Dr. B) certified that claimant reached MMI August 27, 1993 (the date of his examination) with a seven percent impairment rating. (Dr. B's role is not clear, although his report was submitted by the

claimant.) The claimant said that he could not work due to continued pain, but, he stated that he had looked for work.

First of all, there is no issue of waiver by the carrier for not disputing Dr. B's seven percent impairment rating because Rule 130.5(e) provides that the first impairment rating assigned to an injured worker becomes final if not disputed within 90 days. Dr. B's impairment rating was the second rating assigned, and the rule would not operate to finalize it.

"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. Claimant testified that he had not reached the point where he did not need medical treatment, and he still needed it. He also stated that he disagreed with Dr. A's MMI because he was not feeling well. This testimony indicated that claimant believes that he would no longer need medical treatment, and would feel well, if he had reached MMI. However, an injured employee has a right to reasonable and necessary medical treatment of his work-related injury for life. "Impairment" is defined in the 1989 Act as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). A person who has been adjudged to have a permanent impairment of 10%, as claimant was, might well require further treatment although his condition has improved as much as it ever will.

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.). Although the claimant in his appeal cites Texas Workers' Compensation Commission Appeal No. 93089, decided March 18, 1993, as authority for the right of a doctor to amend or retract an MMI certification, we note that this decision grants no such unrestricted right. First of all, the facts of that case made clear that the claimant had made a timely dispute of MMI; it was not decided on any amendment issue. Further, that decision notes that a doctor can amend or revise a prior determination of MMI "under proper circumstances, recognizing that resolution of questions of MMI and impairment should not be indefinitely deferred to an open-ended series of tests." The case does not stand for an unrestricted right of a doctor to change his professional opinion. *See also* Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994.

Whether or not an attempted retraction or amendment to an opinion should be given effect is a matter of fact for the hearing officer to determine. In this case, although the hearing officer finds that the "retraction" of Dr. A's MMI certification was flawed because of the passage of time (approximately fifteen months), he may well have considered it also at odds with Dr. A's notes that were made around the time of the original certification, which show that claimant remained essentially stable. He may well have considered that the medical records primarily indicate that claimant strained his back, and that there is no objective evidence of a herniated disc. He apparently determined that there was no evidence to support Dr. A's belated assertion that he was pressured by the carrier, when compared to earlier correspondence with the carrier.

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

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge