APPEAL NO. 94359

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 28, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) reached maximum medical improvement (MMI) on October 12, 1993, with eight percent impairment and has had disability from July 6, 1992 to October 12, 1993. Claimant requests Appeals Panel review of the decision. Respondent (carrier) replied that the hearing officer should be affirmed, referencing the medical evidence of record. Claimant then attempted to take issue with a reference to (Dr. R) and discussed (Dr. N) report, but her submission was untimely and will not affect the decision on appeal.

DECISION

We affirm.

Claimant is 58 years old and had worked for (employer) since 1974; at the time of injury on (date of injury), claimant was working as a relief bag catcher. She testified that her back started hurting when she was using a dolly that day. While the hearing officer did not question claimant about venue at the hearing, claimant attended both the benefit review conference (BRC) and the hearing without indicating any objection to the distance she had travelled, and she did not question venue in her appeal. Her residence at the time of both the BRC and the hearing was Call, Texas. *See* Texas Workers' Compensation Commission Appeal No. 93900, dated November 18, 1993, in which the appeal attacked a finding that claimant lived within 75 miles of the site of hearing at the time of injury, and that case was remanded for reconsideration.

Claimant was found to have spondylolisthesis; she states she was advised that surgery may be necessary, but was not told that she should have it to treat the current condition of her back. She saw several doctors, stating that she first saw (Dr. S) on (date of injury) and that his adjustments helped her. Dr. S referred her to (Dr. H). Dr. H acknowledged claimant's longstanding history of back pain and prescribed physical therapy; he mentioned the possibility of surgery but said he could only recommend "a floating fusion." She also saw (Dr. D), who claimant testified advised surgery. (Dr. R) was then seen for a second opinion as to surgery. Dr. R in October 1992 reported that he agreed that spondylolisthesis is present at L4-5 but saw no disc that needed surgery. He added that if conservative treatment is not satisfactory, then a "Gill procedure" or a procedure to realign her back would be appropriate. Claimant saw (Dr. Sa) for pain management; he found her to be at MMI on May 17, 1993, with nine percent impairment.

On September 29, 1993, claimant was notified that she should see (Dr. HO) on October 12, 1993, to determine if MMI has been reached and, if so, a percentage of impairment. Dr. HO, who was referred to as the designated doctor, noted evaluations by Dr. R, Dr. H, and Dr. Sa; he also reviewed reports of EMG and MRI testing. He mentioned a herniated disc at L2-3 but said the MRI did not show encroachment. He evaluated claimant as having reached MMI with eight percent impairment based on Table 49, Section

III-A, a grade II spondylolisthesis in the lumbar area. Dr. HO noted that range of motion testing was within normal limits. He indicated that surgery was an option, but claimant had chosen not to undergo it at this time. Claimant testified that his examination was conducted in a short period of time.

Dr. S then referred claimant to (Dr. N) for an impairment evaluation which Dr. N performed on December 28, 1993. Dr. N found that claimant had spondylolisthesis and assigned her nine percent for this impairment. (Table 49 provides eight percent for grade II and 10% for grade III - Dr. R had commented that claimant's spondylolisthesis was borderline between the two.) Dr. N also allowed seven percent for loss of range of motion, which he then totalled as 16%, not 15% as the combined value chart indicates.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In considering whether to apply the presumption to Dr. HO's opinion, found in Sections 408.122 and 408.125, she could consider that Dr. S had previously said claimant reached MMI and assigned an impairment rating of nine percent, compared to Dr. HO's eight percent, agreeing that the basis for the rating was the spondylolisthesis, but considering it to be borderline between grade II and III. Only Dr. N added an amount for range of motion; his remaining impairment figure was also nine percent for spondylolisthesis bordering between grade II and III.

In claimant's submission subsequent to the carrier's reply, she gave her reasons for not discussing a certain problem with Dr. R (which carrier had noted in its reply), but she did not dispute that she had not discussed the problem with Dr. R. She also discussed the range of motion testing done by Dr. N, but did not take issue with testing done by Dr. HO or his findings that range of motion results were within normal limits.

The medical evidence sufficiently supported the hearing officer's determination that Dr. HO's opinion as to MMI and impairment rating was entitled to presumptive weight; the great weight of other medical evidence was not contrary to it. Dr. HO's opinion sufficiently supported the determination that MMI was reached on October 12, 1993, with eight percent impairment. With an MMI date of October 12, 1993, claimant's temporary income benefits could not continue past that time. Section 408.101 provides that temporary income benefits are paid to a claimant who has disability until MMI is reached. With neither impairment income nor supplementary income benefits based on disability, there is statutory support for the decision of the hearing officer that disability is moot after the date MMI is reached.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge