APPEAL NO. 94368
FILED MAY 6, 1994

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 14, 1994, in _____, Texas, with (hearing officer) presiding. The hearing officer decided in accordance with the report of the Texas Workers' Compensation Commission (Commission) selected designated doctor that the appellant (claimant) reached maximum medical improvement (MMI) on May 10, 1993, with a four percent whole body impairment rating (IR). The claimant appeals only the date of MMI, arguing that her medical condition has significantly improved since that date and that the great weight of the other medical evidence is contrary to the report of the designated doctor. The respondent (carrier) replies the decision of the hearing officer was proper in this case and supported by sufficient evidence.

DECISION

We affirm.

It is undisputed that the claimant suffered a compensable knee injury on _____, in the course and scope of her employment in an assembly line production job. She has sought treatment from and has been examined by numerous doctors. Claimant's initial treating doctor was Dr. CE who on June 8, 1992, diagnosed a minimal contusion to the right knee. Though she displayed some tenderness of the knee, there was no evidence of swelling or bruising. Dr. CE found the claimant to have reached MMI on June 30, 1992, with a zero percent IR. Although the status of Dr. H is not clear, on September 23, 1992, he diagnosed post traumatic chondromalacia of the left patella and a second or third degree anterior cruciate tear. He noted a history of the knee locking up and believed surgery (chondroplasty) was indicated. He was of the opinion that the claimant, as of the date of his examination, had not yet reached MMI. On January 7, 1993, Dr. SH performed arthroscopic surgery with apparently little or no improvement. The claimant began, but was unable to complete a work hardening program. On June 25, 1993, Dr. SH determined that the claimant reached MMI on May 10, 1993, with a four percent IR for the chondromalacia.

On March 16, 1993, Dr. SP, a carrier selected doctor, examined the claimant and found her status to be "post chondral fracture of the left patella with resultant chondromalacia." He found no evidence of instability in the cruciate ligament and no range of motion (ROM) deficit. In a Report of Medical Evaluation (TWCC-69), dated September 9, 1993, he determined MMI had been reached on April 1, 1993, with a four percent IR on the basis of "suspected chondral fracture resulting in chondromalacia."

The claimant also received treatment from a Dr. M who, on May 27, 1993, found a swollen left knee with mild tenderness over the patella. Dr. M provided her a limited duty excuse of no more than six hours per day and indicated that the prognosis at that time was "undetermined." The claimant then went to a local emergency center where on June 24, 1993, she was diagnosed with "effusion" of the right knee and referred to Dr. SI and to Dr. SU on referral from Dr. SI. As a result of an examination of November 5, 1993, Dr. SU determined she had reached MMI as of that date with a four percent IR for chondromalacia with degenerative changes. An MRI done on August 30, 1993, at Dr. SI's request showed evidence (in the claimant's words "reoccurrence") of chondromalacia. On November 5, 1993, Dr. SI stated:

This patient does present somewhat of a dilemma. It did seem to be a reasonably mild injury, namely bumping her knee on the corner of a desk, but she did not have complaints of knee pain prior to this injury, and does give a consistent history of pain and physical findings that are compatible with her diagnosis and treatment.

On February 10, 1994, Dr. SI determined in a TWCC-69 that the claimant had reached MMI on that date and assigned a seven percent IR based on a diagnosis of chondromalacia, ROM impairment and loss of strength of the lower left extremity.

Dr. CH was selected by the Commission as a designated doctor to determine the date of MMI and the percentage of impairment. As a result of his examination of the claimant on July 27, 1993, and after a review of the claimant's course of treatment with various doctors, Dr. CH concurred with Dr. SH's determination of May 10, 1993, as the date of MMI. He believed that as of May 10, 1993, her condition had stabilized and "I would not anticipate her condition to change by more than 3% over the next year which meets the Guides[1] criteria of MMI." He assigned a four percent IR for chondromalacia. He expressly found no ROM or neurologic deficits.

The claimant, both at the hearing and now on appeal, challenges only Dr. CH's determination that she reached MMI on May 10, 1993. She asserts that Dr. SI's determination of February 10, 1994, constitutes the great weight of the medical evidence contrary to Dr. CH's report and that the MRI taken after her surgery showed her condition had not changed. She asserted at the hearing that she had a "gut feeling that I have gotten a lot better" since May 10, 1993, and questions how Dr. CH, who had never seen her before, could make a decision like this.[2]

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[1]The American Medical Association Guides to the Evaluation of Permanent Impairment, third edition, second printing, February 1989.

[2]The claimant also asserts for the first time on appeal that she disagrees with the selection of Dr. CH as the designated doctor. Because she did not raise this

We note at the outset of this opinion that an assignment of an IR cannot be made without a determination that MMI has been reached, and that an attack on the date of MMI can be considered an attack on the IR. *See* Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992, and Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. Were we to find the great weight of the medical evidence in this case to be contrary to the report of Dr. CH on the date of MMI, we would also consider his IR invalid. However, given our resolution of the issue as raised by the claimant, we need not address the correctness of the IR.

Section 408.122(b) provides in pertinent part that the report of the designated doctor selected by the Commission has presumptive weight and the Commission shall base its determination of whether the employee has reached MMI on that report "unless the great weight of the other medical evidence is to the contrary." The Appeals Panel has noted in the past that the designated doctor holds a "unique position" in the dispute resolution process under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. Under the presumptive weight standard, it is not just equally balancing evidence or even a preponderance of the evidence that can outweigh the report of the designated doctor, but only the "great weight" of the other medical evidence can overcome the presumptive validity of this report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. This presumptive validity exists even though the time spent with the designated doctor will almost never be equal to that the claimant spends with a treating doctor. *See* Texas Workers' Compensation Commission Appeal No. 93647, decided September 13, 1993.

"Maximum medical improvement" is further defined in the 1989 Act, as relevant to this case, to mean "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." (Emphasis added.) Section 401.011(30)(a). Because the claimant's opinion as to when she reached MMI does not constitute medical evidence, we do not deem it constituting medical evidence contrary to Dr. CH's report as to MMI. Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992. Claimant contends, in addition however, that Dr. SI's TWCC-69 of February 10, 1994, constitutes the great weight of the medical evidence. In the report attached to this TWCC-69, Dr. SI's only rationale for the later date of MMI is the comment that "[i]t was my impression she should complete her work hardening before the MMI date." He goes on to note that she never did complete a work hardening

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either at the Benefit Review Conference or the Contested Case Hearing, we will not consider it for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 93833, decided October 25, 1993.

program, but she did nonetheless improve. The Appeals Panel has observed that neither the continued existence of pain, nor participation in a work hardening program are inconsistent with the achievement of MMI. *See* Appeal No. 92394, *supra*; Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992.

Inherent in the concept of MMI is the notion of reasonable, not absolute, stability of the medical condition being examined. *See* Section 2.1 of the Guides and accompanying sample Report of Medical Evaluation. Dr. CH commented in the report accompanying his TWCC-69 after an extensive review of the claimant's injury, course of treatment, symptoms and objective testing (including the latest MRI of August 30, 1993) that: "At this juncture, her condition appears stable, and I would not anticipate her condition to change by more than 3% over the next year, which meets the Guide's criteria of MMI." The Guides, in the sample Report of Medical Evaluation referenced above, consider a likely improvement of no more than three percent in impairment to be consistent with stability. Dr. SI's assigned IR meets the three percent standard set out in the Guides.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. As the fact finder and the sole judge of the relevance and materiality of the evidence and of its weight and credibility under Section 410.165(a), the hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). With the exception of Dr. SI, finding MMI on November 10, 1993, and Dr. SU, finding MMI on November 5, 1993, three other doctors found a date of MMI either the same as or before the date determined by Dr. CH. Having reviewed the record in this case, we conclude that the opinion of Drs. SI and SU as to the date of MMI do not constitute the great weight of the other medical evidence and that the hearing officer correctly accorded presumptive weight to the designated doctor's report and just as correctly determined that the claimant reached MMI on May 10, 1993, with a four percent IR. We will not substitute our judgment for that of the hearing officer where the findings are support by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W Potts
Appeals Judge

Thomas A Knapp
Appeals Judge