APPEAL NO. 94728

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 17 and March 24, 1994, a contested case remand hearing was held in (City 1), Texas. The Appeals Panel decision in which the remand was directed is Texas Workers' Compensation Commission Appeal No. 93763, decided October 8, 1993. The limited purposes for which the case was remanded were to clarify various aspects of the designated doctor's opinion. The aspects to be clarified were the inconsistencies in the certification of maximum medical improvement (MMI) (having to do primarily with the date the designated doctor found claimant had reached MMI), whether claimant's compensable injury (or impairment) included any aggravation of pre-existing spondylosis, and whether the designated doctor understood that maximum medical improvement was a different consideration from the ability to return to work.

In between the sessions of the remand hearing, the hearing officer wrote to the designated doctor, Dr. P, to clarify these matters. After the record closed, which also consisted of more medical evidence provided by the claimant, the hearing officer determined that Dr. P's report was entitled to presumptive weight and not overcome by the great weight of contrary medical evidence, and he determined that claimant reached MMI on October 23, 1992, with zero percent impairment for his compensable injury.

The claimant has appealed. As he did in his previous appeal, he argues that the designated doctor has lied and misrepresented various aspects of his condition or dates of MMI, and that this hearing officer and the previous hearing officer have acted intentionally and in bad faith to misrepresent or deny evidence. He complains that evidence he tried to present was not allowed. He complains that the hearing officer changed the concept of aggravation by asking the designated doctor if his spondylosis was exacerbated by his injury. The claimant argues various parts of evidence that he believes prove he had a changed medical condition and that prove he had impairment and did not reach MMI at the date found by Dr. P. The carrier responds that the decision should be upheld.

DECISION

We affirm.

The claimant had injured his back on _____, while carrying a refrigerator down some stairs with a co-worker.

At the first session of the remand hearing, claimant represented himself and was not assisted by an ombudsman; he stated that he did not believe the ombudsman to be helpful. The hearing officer gave both parties copies of a letter that he had drafted seeking clarification and additional information from Dr. P. He indicated that he would provide the parties with copies of any response, and allow the presentation of medical evidence relevant to the issues before him, as well as medical evidence claimant wished to submit on his contention that he had a changed medical condition. While the hearing officer

allowed some testimony regarding claimant's contention of collusion and conspiracy between the Texas Workers' Compensation Commission (Commission), the previous hearing officer, the carrier, and the designated doctor, he ascertained from claimant that there was an ongoing investigation by the Compliance Division of the Commission and thus deemed it would not be appropriate to hold a second hearing on such matters. He further indicated that such assertions were generally not relevant to the specific issues he was to consider on remand. The hearing officer urged the claimant to seek the assistance of the ombudsman as there was indication he did not fully understand how the process worked and was experiencing frustration as a result.

At the reconvened remand hearing on March 24, 1994, the claimant proceeded without the assistance of an ombudsman, and the hearing officer provided parties with copies of a second response he had from Dr. P. A continuance that claimant requested in order to see another doctor was denied, although the hearing officer held the record open to receive any further information claimant wished to submit. Claimant submitted additional evidence. Claimant argued that he had a changed condition as manifested by radiculopathy and fecal incontinence. The medical records do not connect any incontinence to the compensable injury.

The hearing officer has, in his decision, accurately recounted the exchange of clarifying correspondence between the previous hearing officer, Dr. P, and himself. Dr. P ultimately responded that claimant had reached MMI on October 23, 1992, with a zero percent impairment, and that his spondylosis had not been aggravated by the injury. Dr. P stated that his spondylosis would rate five percent. (Evidence developed at the previous hearing was to the effect that Dr. P certified zero percent impairment for the compensable injury, which he stated did not include the spondylosis.)

Many applicable decisions and quotes from the statute are listed in our previous opinion and will not be repeated here. A party who seeks to overcome the designated doctor's report must realize, however, that such report is given presumptive weight. Sections §§ 408.122(b), 408.125(e). The amount of evidence required to overcome the presumption, a "great weight", is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. It is medical evidence, not lay testimony, that is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92166, decided June 8, 1992. When we remanded the case for clarification of the date of MMI, we noted that there was much evidence already in the record from which it could be concluded that MMI had actually been reached much earlier than the October 23, 1992, date. In light of this, we cannot agree that the hearing officer's decision to accord presumptive weight to the October 23, 1992, date is against the great weight and preponderance of the evidence.

Whether there has been an aggravation is a matter of fact for the hearing officer to determine. We do not agree with claimant that the hearing officer, by asking Dr. P whether the work-related injury exacerbated his spondylosis, somehow misled the designated

doctor as to aggravation. The hearing officer's inquiry is in tune with the law on what constitutes an aggravation that constitutes an new injury. A compensable "aggravation" is not merely a recurrence of pain, it is a worsening, exacerbation, or acceleration of a pre-existing condition by a work-related injury. *See* Texas Workers' Compensation Commission Appeal No. 93416, decided July 8, 1993. The hearing officer's determination that any impairment relating to spondylosis was not part of the compensable injury is sufficiently supported by the evidence. So far as claimant's contention that he had a changed condition, there was no evidence linking incontinence to the compensable back injury, or to demonstrate that there was an actual change after Dr. P's certification as opposed to differing medical opinions or continuation of similar symptoms.

Claimant complains that the hearing officer's decision is in error because he states that no Exhibit No. 14 was admitted. The hearing officer did, on the record, admit Exhibit No. 14, an Employability Status Report, which is the same record we commented about in our previous decision. As noted there, this document had already been admitted as part of Exhibit No. 11, making its further admission somewhat academic. We have no reason to believe that the hearing officer failed to consider the document; in any case, it is part of the evidence this Panel considered, and it simply does not swing the balance of evidence into a great weight against the designated doctor's opinion.

As in his previous appeal, the claimant has challenged the fairness of the second hearing officer. Again, we believe this to be primarily based in claimant's dissatisfaction with the results of the hearing. The hearing officer is required to rule on the admissibility of evidence when a party objects. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.2(8) (Rule 142.2(8)). Rulings were made in this case both for and against the carrier, and for and against the claimant. Most of the evidence not admitted, generally as not relevant to the limited issues to be determined on MMI and impairment, consisted of compliance matters, medical billing disputes, or letters setting out claimant's viewpoint of the evidence which were essentially argument rather than evidence. We do not find error in his rejection of such evidence, nor in his denial of a continuance under the circumstances.

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge