APPEAL NUMBER 94985
FILED AUGUST 31, 1994

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 14, 1994, in (City), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were date of maximum medical improvement (MMI), impairment rating (IR), disability and whether the respondent (carrier herein) is required to pay for private vocational rehabilitation for the appellant (claimant herein). The hearing officer found the claimant attained MMI on September 14, 1993, with an eight percent IR. The hearing officer also ruled that the claimant had disability from _____, continuing through the date of the hearing and that the carrier is not required by the 1989 Act to pay for private vocational services for the claimant. The claimant appeals challenging a number of the Findings of Fact and Conclusions of Law of the hearing officer. The carrier responds arguing that the claimant's request for review was filed untimely and further contending that the decision of the hearing officer was supported by the evidence, legally correct and should be affirmed.

DECISION

Finding our jurisdiction properly invoked, sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Prior to considering the merits of the case we must determine whether we have jurisdiction. The carrier raises this issue when it contends that the claimant's request for review was filed untimely. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was mailed to the claimant on July 6, 1994. The claimant recites that he received the decision on July 21, 1994. We note July 11, 1994, is the date we would normally deem receipt under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)). The claimant mailed his request for review to the Commission postmarked July 22, 1994, and the Commission received it on July 25, 1994. Thus, since the claimant mailed his request for review to the Commission within 15 days of the date he was deemed to receive the hearing officer's decision and it was received within 20 days of that date, the claimant's request for review is timely. *See* Section 410.202(a); Rule 143.3(c).

At the time of the CCH, the claimant had been off work since he was injured in a fall at work on _____. His diagnosis included degenerative disc disease as well as prolapse of the L5-S1 disc. Dr. S, who appears to be a medical examination order doctor chosen by the carrier, examined the claimant on September 14, 1993, and certified on a Report of Medical Evaluation (TWCC-69) that the claimant reached maximum medical improvement (MMI) on that date with a zero percent impairment rating (IR). The claimant disputed this evaluation and the Commission chose Dr. P as the designated doctor, requesting he express an opinion both as to MMI and IR. Dr. P examined the claimant on

January 11, 1994, and on a TWCC-69 certified that the claimant had attained MMI on September 14, 1993, with an eight percent IR. Dr. Pe, the claimant's treating doctor, certified on a TWCC-69 dated April 21, 1994, that the claimant reached MMI on March 25, 1994, with a 10% IR.

The claimant testified at the CCH that he did not believe he had reached MMI because of his continuing back problems, but if he has, then the findings of his treating doctor regarding MMI and impairment are correct. The claimant testified that prior to the injury he could lift 150-200 pounds easily. The claimant testified that he was told by both the treating doctor and the designated doctor that he now cannot lift more than 15 pounds. The claimant testified that this lifting restriction prevents him from returning to the only types of work with which he has experience--laborer and construction worker. The claimant also testified he needed vocational rehabilitation and had been in contact with the Texas Rehabilitation Commission, but stated that he believed that the carrier, and not the taxpayers of Texas, should be required to pay for vocational rehabilitation. The claimant argued at the hearing that he is entitled to private vocational rehabilitation at the carrier's expense.

The claimant argues that the hearing officer erred in adopting the MMI date and IR of the designated doctor, arguing that he has not reached MMI, or alternatively that the hearing officer should have adopted the MMI date and IR certification of his treating doctor.

Section 408.122(b) provides:

> If a dispute exists as to whether the employee has reached maximum medical improvement, the commission shall direct the employee to be examined by a designated doctor chosen by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor chosen by the commission. The designated doctor shall report to the commission. The report of the designated doctor has presumptive weight, and the commission shall base its determination of whether the employee has reached maximum medical improvement on the report unless the great weight of the other medical evidence is to the contrary.

Section 408.125(e) provides:

> If the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence

contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

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. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying the above standard of appellate review we cannot say that the hearing officer's adoption of the MMI date and IR of the Commission-selected designated doctor was erroneous. The MMI date was supported by the report of Dr. S and we cannot say that the opinion of Dr. Pe as to a later date constituted the great weight of medical evidence to the contrary. As to the claimant's testimony that he still has pain and restrictions due to the injury, we have previously held that the achievement of MMI does

not necessarily equate to a pain-free recovery or to claimant's being restored to the preinjury condition. *See* Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992; Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993; Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993.

The hearing officer found that the claimant had disability from the date of the injury continuing through the date of the CCH, but that the claimant's entitlement to temporary income benefits (TIBS) ended once he reached MMI. The claimant argues that his TIBS should continue because he continues to have disability. Pursuant to Section 408.102(b) TIBS only continue until the claimant reaches MMI. Thus having determined that the claimant attained MMI on September 14, 1993, the hearing officer correctly determined that this ended the claimant's entitlement to TIBS.

Finally the claimant argues that he has a right to choose between public and private vocational rehabilitation and that the carrier, not the taxpayers, should have to pay for vocational rehabilitation. We have previously held that under the 1989 Act the carrier is not responsible for such vocational rehabilitation. Texas Workers' Compensation Commission Appeal No. 91125, decided February 18, 1992.

For the foregoing reasons the decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge