APPEAL NO. 950105
FILED MARCH 3, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. On December 19, 1994, a contested case hearing was. The appellant, who was the claimant, was injured on _____, while employed by (employer). The issues at the hearing were whether claimant reached maximum medical improvement (MMI) from his spinal and gastrointestinal (umbilical) hernia injuries, and, if so, on what date; and second, the claimant's impairment rating (IR) if he was found to have reached MMI.

The hearing officer determined that the claimant reached MMI on August 8, 1993, with a nine percent IR, in accordance with the amended report of the designated doctor. The claimant has appealed this decision; the document that was filed within the period of time allowed for appeal generally states that that claimant wishes to appeal the decision. A document entitled a "brief" was filed beyond the expiration of fifteen days after the receipt of the hearing officer's decision and has not been considered. The carrier responds that claimant presented no medical evidence to support a 70% IR he contended at the hearing he should have and that the decision should be affirmed.

DECISION

The decision and order of the hearing officer are affirmed.

We cannot consider appeals filed beyond fifteen days. Section 410.202. Further, we are restricted to reviewing the record in the case, and appeals responses and responses which are directed to that record. Section 410.203(a). The "brief" which was filed by claimant raises some specific points of error regarding the qualification of the designated doctor that were not previously raised. These matters were not raised in a timely appeal, nor were they made part of the record in the hearing. We therefore cannot consider them. The claimant's first appeal is postmarked January 20, 1995, and is enough to invoke our jurisdiction to review the decision of the hearing officer as to whether the evidence is sufficient to support the decision.

Claimant injured his cervical and lumbar spine on _____, and also sustained an umbilical hernia. Claimant had surgery to repair his hernia on July 22, 1993. There was no testimony about how the accident happened, although medical records indicate a lifting incident. It was claimant's position that he was not at MMI because he was still in pain, and that his ability to do activities of daily living had been reduced by 70%. He equated this 70% to an IR.

(Dr. O) was appointed as designated doctor by the Texas Workers' Compensation Commission (Commission). Concerning his examination by Dr. O, claimant stated he was

examined for five hours by "a girl" and saw Dr. O when he went for the results. He said his examination involved bending and raising his legs.

Claimant had refused the assistance of an ombudsman, and the exhibits he submitted were not admitted after objection by the carrier that they had not been timely exchanged.

The medical records in the file may be summarized as follows:

-May 19, 1992: Lumbar MRI, desiccation of three discs, mild bulging of two discs.

-January 14, 1993: Dr. O certifies MMI on September 17, 1992, with a 14% IR. This is derived from nine percent for specific disorder of the spine and five percent for abdominal hernia. Dr. O found no strength or sensory deficits, and noted that physical examination did not yield same results as inclinometer for range of motion (ROM). Lumbar ROM was invalid.

-July 22, 1993: (Dr. C) repaired claimant's umbilical hernia, and stated in October that the incision had healed and claimant's abdomen would not restrict his activities.

-November 12, 1993: (Dr. G) administered electrodiagnostic tests, and found them unremarkable.

-November 10, 1993: Dr. O amended his certification, finding that claimant reached MMI on August 8, 1993, with nine percent IR. Dr. O took out claimant's original hernial IR because of surgery, which left nine percent IR due to the spine.

-TWCC-69: (Report of Medical Evaluation) by (Dr. W), found that claimant reached "statutory MMI" (104 weeks after the date income benefits accrued), and that he had a five percent IR, as of January 10, 1994.

"Maximum Medical Improvement" is defined as the earlier of either the date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated or the expiration of 104 weeks from the date income benefits accrued. Section § 401.011(30)(A) and (B). 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.

It is possible for a person who has not reached medical MMI to reach the 104 week point (or "statutory" MMI) first. We note that the date of MMI found by the hearing officer in this case is very close to the date of "statutory" MMI.

"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 § 408.122(a).

The claimant's self-assessment that he has a 70% IR based upon his decreased abilities is not "impairment" unless it were verified through objective clinical or laboratory findings. Because no medical evidence certified such a rating, it could not be considered as part of the great weight against Dr. O's report.

The report of a Commission-appointed designated doctor is given presumptive weight. Section §§ 408.122(b), 408.125(e). The amount of evidence needed 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. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

In this case, the only other IRs in the record were those of Dr. W and the prior rating of Dr. O, which he amended. 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.).

We do not agree that the decision of the hearing officer has incorrectly interpreted the law, or is against the great weight of the evidence. We therefore affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge