

APPEAL NO. 980035

On December 12, 1997, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the respondent (claimant) reached maximum medical improvement (MMI), and if so, on what date; and (2) whether the claimant had disability from August 6, 1996, through February 7, 1997. The appellant (carrier) requests review and reversal of the hearing officer's decision that the claimant reached MMI on February 7, 1997, as reported by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission) and that the claimant had disability from February 12, 1995, to December 12, 1997. The claimant requests affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he injured his neck, upper back, and shoulder areas unloading boxes off a truck at work; that he has had pain since his injury; that his symptoms have been the same since his injury; and that due to his injury he has been unable to return to work since the date of the injury. The claimant said that soon after his injury he saw (Dr. H), his family doctor, several times for his injury; that the employer sent him to (Dr. G); that Dr. G referred him to (Dr. GR); that Dr. GR referred him to (Dr. F); that Dr. GR then referred him to (Dr. HA), who became his treating doctor; that Dr. HA kept him off work; that he was examined by (Dr. U), a neurologist, at the carrier's request; that Dr. HA referred him to (Dr. D); that Dr. D referred him to Dr. (Dr. R); and that in about May 1997 he changed treating doctors to Dr. H.

Dr. H wrote on February 24, 1995, that the claimant had a shoulder strain, and in a Report of Medical Evaluation (TWCC-69) reported that the claimant reached MMI on February 20, 1995, with a zero percent impairment rating (IR). A radiologist reported that an MRI of the claimant's thoracic spine done in March 1995 showed a probable disc herniation at T9-10 which indents and deforms the dural sac. Dr. HA wrote in February 1996 that the claimant would need a neurosurgical opinion on thoracic surgery. (Dr. A) examined the claimant at the carrier's request in May 1996 and he wrote that the claimant had not reached MMI and that he opposed the claimant's returning to work until further surgical evaluations were done. Dr. HA referred the claimant to Dr. F, who performed two thoracic epidural blocks in June and July 1996 and noted that the blocks were of no benefit.

Dr. F noted that Dr. GR did not think that surgery would help the claimant. Dr. HA wrote in September 1996 that the claimant continued to complain of pain in his mid-back, legs, and shoulder blades, and that it would be a good idea for a neurosurgeon to take one last look at the claimant before the claimant is rated at MMI. Dr. HA also noted that he was referring

the claimant to Dr. D to check his shoulders. Dr. D examined the claimant on October 3, 1996, and wrote that the claimant had possible rotator cuff tears of both shoulders and recommended an arthrogram and CT scan of both shoulders.

Dr. U saw the claimant at the carrier's request on November 4, 1996, and he reported in a TWCC-69 that the claimant had reached MMI on August 5, 1996, with a nine percent IR. On November 13, 1996, Dr. HA marked at the bottom of Dr. U's TWCC-69 of November 4, 1996, that he agreed with the MMI date and IR reported by Dr. U. The claimant said that he disputed Dr. U's report and the Commission chose Dr. Blau (Dr. B) as the designated doctor. In a report dated February 7, 1997, Dr. B wrote that the Commission had requested that he determine whether the claimant reached MMI and the claimant's IR. Dr. B examined the claimant on February 7, 1997, and he reported that the claimant reached MMI on February 7, 1997, with a 13% IR. An arthrogram of the claimant's right shoulder done in August 1997 was reported as essentially normal. Dr. D wrote in November 1997 that it was his opinion that the claimant was not at MMI in August 1996 and that the claimant had remained off work as of the last clinic note of Dr. R in September 1997.

Section 408.122(c) provides that the report of the designated doctor has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI on the report unless the great weight of the other medical evidence is to the contrary. The hearing officer found that the other medical evidence was not sufficient to overcome the presumptive weight afforded to the findings of the designated doctor, and he concluded that the claimant reached MMI on February 7, 1997, as reported by Dr. B, the designated doctor. The carrier contends that the great weight of the medical evidence is contrary to the February 7, 1997, MMI date reported by Dr. B; that Dr. B's report is not entitled to presumptive weight; that the great weight of the medical evidence established an MMI date of August 5, 1996, as reported by Dr. U and agreed to by Dr. HA; that the claimant should be presumed to have reached MMI on August 5, 1996, due to a lack of medical improvement; that Dr. B was unaware that he was to determine the date of MMI (we note that Dr. B states in his report that the Commission asked him to determine MMI and IR); that Dr. B's report does not contradict an MMI date of August 5, 1996 (we note that Dr. B states in his report that the claimant reached MMI "as of today, 2/7/97"); and that Dr. B was not aware of Dr. U's report. Dr. U reported in November 1996 that the claimant had reached MMI on August 5, 1996, and Dr. HA, the claimant's then treating doctor, agreed with the MMI date found by Dr. U; however, Dr. D wrote that the claimant was not at MMI in August 1996 and Dr. B, the designated doctor, reported that the claimant reached MMI on the date of his examination of the claimant, February 7, 1997. The hearing officer determined that the claimant reached MMI on February 7, 1997. We conclude that the hearing officer's finding and conclusion on the MMI issue are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to disability, the hearing officer found that the claimant had disability from February 12, 1995, through December 12, 1997, the date of the CCH; however, the hearing officer wrote in his order that the claimant's entitlement to temporary income benefits (TIBS) ceased on February 7, 1997, the date the hearing officer determined that the claimant had reached MMI. Section 408.101(a) provides that an employee is entitled to TIBS if the employee has a disability and has not attained MMI. There was no dispute at the CCH that the claimant had disability prior to August 5, 1996. The carrier contends that the claimant is not entitled to TIBS after August 5, 1996, because he reached MMI on that date. The hearing officer's determination on the disability issue is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*. Since we have found the evidence to be sufficient to support the hearing officer's determinations on the date of MMI and period of disability, we conclude that the carrier has not shown error in the hearing officer's determinations on the period of disability and the claimant's entitlement to TIBS based on its contention of an earlier date of MMI.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge