APPEAL NO. 990056

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The first contested case hearing (CCH) was held on July 29, 1998. The issue at the first CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) of four percent certified on June 26, 1997, by Dr. L (the first certification) became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 130.5(e) (Rule 130.5(e)). The hearing officer determined that claimant did not dispute the first certification within 90 days and that it became final. Claimant appealed, contending that she did dispute within 90 days and that respondent (carrier) accepted a new MMI date after her dispute. The Appeals Panel reversed the hearing officer's decision and remanded the case to the hearing officer for findings of fact on the fact issue regarding whether Dr. L rescinded the first certification by issuing another Report of Medical Evaluation (TWCC-69) within the 90-day period. Texas Workers' Compensation Commission Appeal No. 982002, decided October 5, 1998. A second CCH was held on December 1, 1998. After the CCH on remand, the hearing officer determined that, although Dr. L "amended" the MMI date within 90 days, he did not rescind the first certification. Claimant again appealed hearing officer's decision, contending that Dr. L rescinded the first certification.

DECISION

We reverse and render.

Claimant contends the hearing officer erred in determining that the first certification became final. She asserts that Dr. L amended the first certification by issuing a second TWCC-69 and that he rescinded the first certification. She contends that the hearing officer did not consider all the evidence, including Dr. L's explanation regarding why he issued an amended TWCC-69.

The facts of the case are stated in our decision in Appeal No. 982002. Briefly, claimant was injured on _____, when a robber attacked her while she worked at a convenience store. The record contains Dr. L's first TWCC-69 certifying that claimant reached MMI on April 29, 1997, with an IR of four percent. Because claimant received notice of the first certification on July 12, 1997, or July 14, 1997, the 90-day period would end on approximately October 10, 1997. The record contains a second TWCC-69 certified by Dr. L on July 15, 1997, 19 days after the first certification, which stated on its face that it was an "amended" TWCC-69 and that the MMI date changed from April 29, 1997, to July 14, 1997. The four percent IR stayed the same. In this case, Dr. L filed a report with his second TWCC-69. In it, he said:

> We increased her Paxil to twice a day, asking her to continue her therapy at a decrease of once a week for a month and return for reevaluation on April 29th. In the interim, we had contacts with her on April 2nd, 22nd, 24th, and 25th. She was complaining of neck and shoulder pain with no change. She

> tried to go without medications one or two days. She complained of nausea and vomiting. Symptoms increased over the past month, and we increased her Xanax to .25 mg four times a day.
>
> I met on June 3rd with [a rehabilitation nurse], and we reviewed [claimant's] case, as well as her functional capacity evaluation. We had evaluated her for an [IR] on April 29th. We were trying to reach the patient, who was at the [clinic], and *it was not until today that she came into the office, and I completed her examination.*
>
> She continues to see a psychiatrist for her post traumatic stress disorder. . . . As far as her medical condition, she says she is feeling no [better], but she feels drugged out on medication *and says she has had a cat bite and was sick from the rabies injections she was getting, and for that reason was unable to come in for her previous appointments.*
>
> I am going to proceed at this point with her [MMI] rating.
>
> * * * *

[Emphasis added.] Claimant testified at the first CCH that she was unable to come in for her appointments in April 1997 because her rabies shots made her very ill. She said she was so ill that "they had to back [her] off some of the medications" and that she was unable to hold down fluids. On his first TWCC-69, Dr. L stated that the "date of this visit" was "June 23, 1997." Claimant said she also did not see Dr. L on that date, even though an appointment was scheduled. She said Dr. L canceled and was unable to attend the appointment. In the report accompanying the first certification, Dr. L did not mention a doctor's visit of June 23, 1997.

The Texas Workers' Compensation Commission (Commission) wrote to Dr. L and asked whether he had rescinded the first certification. In a November 17, 1998, reply, Dr. L explained why he had amended the TWCC-69, said he saw claimant on April 29, 1997, and said he "began working on [his] report" for "maximal medical improvement." Dr. L then said:

> The patient did not come into the office until July 14, 1997. The first report was my working copy. When the patient did not come in on May 29th, I began compiling the report from my previous examination. The patient did make it back in on July 14, 1997, and I completed the examination at that time. I had been planning to have an opportunity to examine the patient before I sent out the final report. By accident, the incomplete report was certified . . . . I had wanted to check her range of motions before certifying her, and that was accomplished on my visit of July 14, 1997. . . . Therefore, I feel that her date of [MMI] was July 14, 1997, as per the amended TWCC-69 and the report completed on July 15, 1997.

In his second decision and order, the hearing officer determined that: (1) on July 15, 1997, Dr. L amended the date of MMI and changed it from April 29, 1997, to July 14, 1997; (2) Dr. L found that the claimant had the same impairments on April 29, 1997, as she did on July 14, 1997, and he made no changes in the four percent IR from one date to the other; (3) Dr. L did not change or amend the first IR of four percent; (4) "[Dr. L] amended only the date of [MMI] and he did not rescind the first [IR] he gave"; (5) Dr. L's amendment of the date of MMI was not a rescission, and the first certification became final.

In certain circumstances, either a treating doctor or a designated doctor may amend a previous determination of a date of MMI and the assignment of an IR. The Appeals Panel has indicated that a first certification of MMI and IR may be rescinded by the certifying doctor for a proper reason. For example, the first certification doctor may rescind a first certification and amend it within the 90-day period and an example of a "proper reason" would be that the doctor did not believe the employee had actually attained MMI. Texas Workers' Compensation Commission Appeal No. 950358, decided April 18, 1995. The Appeals Panel has found that facts show "rescission" of a first certification where, within 90 days after the first certification and after a second surgery, the doctor referred the claimant for another IR and signed the other doctor's TWCC-69 stating that he agreed with the new IR. The Appeals Panel stated that the doctor's "action of sending the claimant to [the other doctor] for an IR in conjunction with the statement that he agreed with [that new IR] certification, was a rescission of [the first certification]." On the other hand, the Appeals Panel has concluded that there was no rescission of a first certification of MMI and IR where the doctor sent out a second TWCC-69 within the 90-day period due to mistake, or where the doctor could not explain why he certified a new TWCC-69. *See* Texas Workers' Compensation Commission Appeal No. 94365, decided May 11, 1994 (doctor said second TWCC-69 sent by mistake and first one was correct); Texas Workers' Compensation Commission Appeal No. 961787, decided October 25, 1996 (doctor said it was "unknown" whether he rescinded the first TWCC-69). The Appeals Panel has also indicated that an amendment of a TWCC-69 for an improper reason within the 90-day period is not a rescission of the first certification. Texas Workers' Compensation Commission Appeal No. 971053, decided July 14, 1997. In Appeal No. 971053, the Appeals Panel also noted that merely sending out a second TWCC-69 without explanation does not "necessarily translate into a rescission." We note that, for purposes of Rule 130.5(e), MMI and IR are "inextricably intertwined." Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the hearing officer said Dr. L was not credible regarding why he amended the first certification within the 90-day period. However, in this case, Dr. L affirmatively stated on the face of the TWCC-69 that he was amending it. This is not a case where a second TWCC-69 was sent out by mistake or without explanation regarding whether it was intended to replace the first TWCC-69. Further, there was evidence from Dr. L that he had not yet measured claimant's ROM at the time of the first certification, and that the first certification was sent out by mistake. The hearing officer found that Dr. L was not truthful in this explanation. However, the fact that Dr. L sent out an amended TWCC-69 within 19 days after the first certification and stated that it was an "amended" TWCC-69 supports Dr. L's explanation. It is not apparent to this panel what other reason Dr. L would have for amending claimant's MMI date on an "amended" TWCC-69 and why he would not be truthful about his amendment. Neither is it apparent what evidence indicates that Dr. L was not truthful.

We remanded this case for the hearing officer to make fact findings regarding rescission, which we could then review for factual sufficiency. There is no dispute that Dr. L amended the TWCC-69 within the 90-day period. Regarding whether the amendment was done for a proper reason, Dr. L stated that he had not conducted a complete examination and that the first certification was sent out by mistake. This constitutes a proper reason for amending a TWCC-69. The hearing officer made a fact finding in this case that there was no rescission. However, the hearing officer also stated that Dr. L did "amend" the MMI date, acknowledging that Dr. L did intend the second TWCC-69 to be the effective TWCC-69. The hearing officer apparently did not believe Dr. L's explanation regarding why he amended the TWCC-69 and changed the MMI date. We have reviewed this determination for factual sufficiency and have considered the record in this case. The hearing officer did not discuss the evidence that claimant was very ill in April 1997, due to rabies shots, which could have caused Dr. L to delay a full examination. We conclude that the hearing officer's determination that there was no rescission is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, we reverse this determination and render a determination that Dr. L rescinded the first certification by sending out an amended TWCC-69 19 days after the first certification. Because there was a rescission, the first certification did not become final.

Carrier asserts that, in issuing a second TWCC-69, Dr. L was merely correcting a "clerical error." However, from Dr. L explanation, it is clear that he did more than correct a clerical error. He indicated that the first report was not a valid certification in that he had not completed his examination and that only the second TWCC-69 was intended as his certification. This is more than the "correction of a clerical error." Carrier also indicates that there was "inadvertent error" in the issuing of the second TWCC-69. However, Dr. L stated that the second TWCC-69 was amended quite purposefully and indicated that he intended that it be considered as his certification of claimant's MMI date and IR.

We reverse the hearing officer's decision and order and render a determination that the first certification of MMI and IR did not become final in this case.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge