APPEAL NO. 990115

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 9, 1998, a hearing was held. He (hearing officer) closed the record on December 21, 1998, and determined that the appellant's (claimant) impairment rating (IR) is 11% and that his date of maximum medical improvement (MMI) was January 24, 1997. Claimant asserts that other doctors stated that claimant was not at MMI in January 1997 because he had lumbar surgery in January 1998; therefore the designated doctor should not be given presumptive weight. He also states that evidence of range of motion (ROM) was not provided, the entire injury was not rated, and IR of the cervical spine was inaccurate. Finally, he says that his treating doctor is not a chiropractor so the designated doctor should not be a chiropractor. Respondent (carrier) replied that the decision should be affirmed, stating that the validity of the IR was not questioned at the hearing.

DECISION

We affirm.

Claimant worked for (employer) on _____. Additional facts about the injury are not clear because claimant did not testify. In addition, no treating records of Dr. B, D.C., who appears to have been a treating doctor, were provided–Dr. B's deposition of November 20, 1998, states that on July 16, 1997, "as the treating physician," he disputed an IR and MMI date provided by Dr. C. The only other record of Dr. B is a short letter of July 17, 1997, in which he gives his "approval" for Dr. S to become the treating doctor. (Dr. S performed surgery on claimant at L5-S1 on January 8, 1998.)

Dr. C examined claimant on behalf of the carrier on January 24, 1997, found him to be at MMI on that date, and assigned a two percent IR. The designated doctor, Dr. Sc, D.C., first examined claimant on March 24, 1997. While the Texas Workers' Compensation Commission (Commission) later sent claimant back to Dr. Sc for reexamination, the evidence in this record under review indicates that Dr. B was the treating doctor as late as July 16, 1997, approximately four months after the designated doctor's first examination of claimant. Therefore, the assertion that the designated doctor should have been "licensed by the same board as the treating doctor" does not state any basis for remand or for overturning the hearing officer's decision–the designated doctor was of the "same board" as the treating doctor, Dr. B. Because the claimant may have changed doctors later does not require a change of the designated doctor in this case. In addition, there is no evidence in the record that the claimant changed treating doctors through the Commission.

A spinal surgery second opinion by Dr. P is dated August 7, 1997; it indicates that claimant fell at work when he slipped "landing on his back," with pain radiating from the back "up into the neck area." On the other hand, Dr. C's record indicates that claimant fell into a "three foot deep hole" at work landing on his "left posterior scapular area and across the side of his neck." He said that "a couple of days later" claimant went to an emergency

room and then began seeing Dr. Be, who also noted lumbar pain. Dr. C also said that an MRI was said to show a herniated disc at L5-S1 but without significant thecal sac or nerve root impingement. A hole was also mentioned by Dr. Sc in April 1997; he noted that claimant "stepped into a hole and fell on to his left posterior scapula area and also struck the left side of his neck." He added that claimant first saw Dr. Be over a week later, and Dr. Be diagnosed a "soft tissue" injury to the "cervicothoracic spine and left shoulder." Just as with Dr. B, the record under review also contains no records from Dr. Be, but Dr. Sc states that claimant quit seeing Dr. Be and began seeing Dr. B in November 1996. As stated, claimant had his L5-S1 disc excised in January 1998.

Claimant's appeal also raises questions of the manner in which Dr. Sc provided an IR, saying that evidence of ROM was not provided, that the entire injury was not rated, and that an IR for lateral ROM should have been assigned for the cervical spine. While some comment will be made concerning these assertions, we first observe that claimant did not raise these points in his argument at the hearing. In addition, the record includes reference to a prior hearing officer's Order dated May 13, 1998, in which the hearing officer returned the case to the benefit review officer (BRO) with the following comment:

> After the claimant underwent spinal surgery, [BRO], wrote the designated doctor for clarification. Although the designated doctor increased the claimant's IR to reflect the impairment resulting from the spinal surgery, he did not examine the claimant to determine if the claimant had lost [ROM].

No other request or statement was made by the hearing officer in returning the case to the BRO to obtain a reexamination from the designated doctor. Claimant did not assert at the hearing and does not assert on appeal that he asked for more clarification from the designated doctor but that the hearing officer refused to order it. The above order relates to the January 1998 lumbar spinal surgery as the basis for a reexamination; it does not question the manner in which Dr. Sc conducted his IR exam and in particular it does not question the cervical lateral ROM provided in 1997 by Dr. S which assigned no IR for cervical right lateral flexion, which measured 43E. When claimant returned to Dr. S on July 17, 1998 (in response to the above order), Dr. S again measured claimant's cervical right lateral flexion at 43E. This measurement of 43E, found by the designated doctor in both 1997 and 1998, was assigned no IR by the designated doctor in either 1997 or 1998. While the absence of any IR for such limitation was attacked on appeal, no question regarding it was made at the hearing or when claimant was being returned to the designated doctor. No change will now be ordered in the IR assigned to the cervical lateral ROM. (Table 52 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) provides that no motion is lost when the measurement is 45E or greater, while if 15E are lost and 30E of motion are retained, the IR assigned is one percent.)

Dr. Sc in his 1998 evaluation states that he considered the lumbar and cervical spine and the left shoulder. (He provided one percent for the shoulder as opposed to the three percent he provided in 1997, but he now provided 10% for the lumbar spine based on the 1998 surgery.) The claimant on appeal states that the "entire injury" was not taken into

account but does not state what is missing from the "entire injury." Whether or not Dr. Sc provided an IR for each of the three areas mentioned above, he did take them into account. We find no error as to this assertion.

Claimant also states that Dr. Sc did not provide "the required charts to show that three attempts at validation of ROM were performed." The designated doctor's report does provide four pages of charts. The charts provided do show that the procedure for measuring lumbar, cervical, and shoulder motion was repeated three times. While Texas Workers' Compensation Commission Appeal No. 950248, decided April 5, 1995, stated that when ROM cannot be obtained on a particular test, a hearing officer may call for a "recheck" when an initial test is invalid. In this instance, Dr. Sc examined claimant in 1997 and found lumbar ROM invalid while cervical ROM produced no deficit (other than the lateral which has previously been addressed). Claimant was reexamined, as stated, in July 1998 at which time lumbar ROM was again invalid, as shown by three measurements; cervical again was found to show no deficit (other than the lateral which was previously addressed). There is no basis to remand or overturn the hearing officer's decision because of the charts provided by the designated doctor or because of his manner of determining IR.

The final point of the appeal, and the point made at the hearing, was that the designated doctor's report as to IR and MMI date was against the great weight of other medical opinion because of the January 1998 surgery. Dr. S in a deposition dated November 30, 1998, said that he did not believe claimant had reached MMI "prior to June 6, 1997"; he relied on MRIs and a CT/myelogram rather than pending surgery for his opinion. (The record provides no answer as to what the significance of "June 6, 1997" is.) Dr. P on December 2, 1998, in his deposition states that MMI was not reached as of "August 7, 1997" and he referred to disc herniation and pending surgery as the basis for his opinion. (Dr. P's second opinion for surgery, dated August 7, 1997, was previously mentioned as in this record for our review–from these dates, we may surmise that "June 6, 1997," has some relation to when Dr. S treated claimant.) Dr. B's deposition is dated November 20, 1998; he said that claimant's pain and an MRI indicated that MMI had not been reached on January 24, 1997. None of the depositions address what the IR is, or even what it should be; all indicate opinions that MMI had not been reached at certain times, but none indicate that Dr. S erred in his manner of performing an IR examination.

In addition to the three depositions just described, a letter from Dr. S dated March 9, 1998, to claimant, states that the designated doctor is not a spinal surgeon. Dr. S adds that MMI was not reached in January 1997 because of the spinal surgery provided in January 1998, and states that the herniation (at L5-S1) was "most certainly" caused by the fall into a ditch "landing on your back." While Dr. S stated in this letter that claimant was not at MMI, he opined that three percent IR for the claimant's shoulder "must be" added to "the 10% IR." Except for the designated doctor, the only other reference to an IR was made by Dr. C, who assigned a two percent IR.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In considering whether the great weight of other medical evidence

was contrary to Dr. Sc's August 1998 opinion, he was obligated to consider all the medical evidence provided by Dr. C, Dr. S, Dr. P, Dr. B, and Dr. Sc. He could consider that some of the medical evidence did not reflect notes or comments referring to treatment or examinations conducted at the time of the document provided, and he could also consider the roles of the various doctors.

While the parties stipulated that the date of "statutory MMI" is October 8, 1998, there is no evidence from any of the doctors cited by claimant, Dr. S, Dr. P, or Dr. B, that claimant did not reach MMI prior to that date or that October 8, 1998, was the date of MMI. Dr. S spoke in terms of reference to June 7, 1997, in his deposition, and March 9, 1998, in his letter to claimant. Dr. P said that MMI had not been reached as of August 7, 1997, and Dr. B in his deposition refers only to January 24, 1997, while in his letter approving Dr. S as treating doctor, he negates MMI up to July 17, 1997. The hearing officer is not obligated as a layman to determine MMI as occurring on October 8, 1998, when no doctor has addressed that date. (The evidence does not preclude any of the three doctors cited by claimant from giving an opinion that MMI was reached in April, May, June, July, August, or September 1998.) The date of MMI selected, January 24, 1997, may appear early, but it is the opinion of both Dr. C and Dr. Sc, who adhered to that date upon reexamination of claimant in 1998. No other date of MMI is proffered, even though it is clear that the date of statutory MMI has passed, so some MMI date should be chosen. The hearing officer's determination that the designated doctor's date of MMI of January 24, 1997, is not contrary to the great weight of other medical evidence (*see* Section 408.122) is not against the great weight and preponderance of the evidence. Similarly, the hearing officer's determination that the designated doctor's opinion of August 20, 1998, that said the IR is 11% (based on one percent ROM for the shoulder and 10% based on Table 49, paragraph II E for lumbar surgery with residuals) is not contrary to the great weight of other medical evidence is also not against the great weight of the evidence.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

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Tommy W. Lueders
Appeals Judge