APPEAL NO. 990268

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 3, 1998, a hearing was held. She (hearing officer) determined that the respondent (claimant) reached maximum medical improvement (MMI) on May 1, 1998, with a 21% impairment rating (IR) as found by the designated doctor, Dr. B, D.C. She also found disability from December 11, 1996, to May 1, 1998. Appellant (carrier) asserts that the first opinion of the designated doctor should be given presumptive weight, stating that a designated doctor should only provide another evaluation for a proper reason and in a reasonable time, and adding that surgery had not been recommended "through the summer of 1997." Carrier also stated that it appealed the determination as to disability but provided no basis for overturning that determination. The appeals file contains no response from the claimant.

DECISION

We affirm.

Claimant worked for (employer) when, he stated, he fell against a wall while cleaning on _____. There was no issue as to compensable injury. He said he was taken off work the next day by Dr. S. While claimant states that he was referred to a surgeon, Dr. V, he did not state the date when he first saw Dr. V. The first document from Dr. V is a letter dated February 24, 1997, in which Dr. V thanked Dr. H for the referral, said that a myelogram was needed of the cervical spine, and said the claimant would return in two months, which could be late April 1997.

A doctor selected by carrier, Dr. K, evaluated claimant prior to late April; this evaluation took place on March 4, 1997, less than three months after the injury. Dr. K found MMI on March 4, 1997, with a zero percent IR. Dr. B was appointed as a designated doctor and saw claimant on April 14, 1997; he stated that the MMI date of March 4, 1997, was appropriate and assigned an eight percent IR, with six percent thereof being for cervical limitations on range of motion (ROM).

Dr. V then noted on April 25, 1997, that the myelogram showed a herniated disc at C5-6 and said, "I think that this would best be treated surgically and I have recommended an anterior cervical discectomy and fusion." Carrier's assertion that surgery was not recommended through the summer of 1997 is without merit.

The record shows that second opinion physicians provided their opinions in July 1997. A note indicates that in October 1997, surgery was "waiting approval." Surgery was performed on December 31, 1997; it included a discectomy and fusion at C5-6. (The medical records also show that prior to seeing Dr. V in April 1997, physical therapy was recommended for claimant; the hearing officer could reasonably conclude that claimant was not trying to delay the process in order to draw more benefits, especially with surgery actually taking place within three weeks of one year after the injury.)

Claimant was returned to the designated doctor on July 17, 1998. Another examination resulted in an IR of 21% with MMI assigned on May 1, 1998. After that report, Dr. C evaluated the records for carrier; he said that claimant still had pain after the surgery so the original MMI date of March 4, 1997, should be used; he also said that Dr. B's IR should be 11%, not 21% and that an IR of seven to 13% "would be expected" for this injury. Dr. B replied to a letter from the Texas Workers' Compensation Commission (Commission) (the letter from the Commission was not included). Dr. B stated his disagreement with Dr. C in his letter of September 22, 1998, pointing out that his ROM figures had not been invalidated, and concluding that he saw no need to "modify my report of July 20, 1998."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Sections 408.122 and 408.125 provide that the opinion of the designated doctor will have presumptive weight as to MMI and IR. The carrier is correct in saying that a designated doctor should not reevaluate a claimant except for a proper reason in a reasonable time. As the fact finder, the hearing officer determines the proper reason and reasonable time. She indicated in her opinion that she knew of this guidance and had considered it.

The hearing officer could note that the first evaluation by a designated doctor occurred just over four months (April 14, 1997) after the injury (_____), that a surgeon recommended surgery that same month, that conservative care had been provided before that time, that the evaluation process for surgery was being conducted in July 1997 and that surgery then took place in December 1997. She could reasonably infer that another IR could not be conducted until some recovery time elapsed after spinal surgery, when a fusion was involved, and could conclude therefore that the second evaluation by a designated doctor on July 17, 1998, was conducted for a proper reason and in a reasonable time. When two opinions are provided by a designated doctor, the hearing officer may choose which one is accurate so long as there is a proper reason for the second opinion and it was provided in a reasonable time. In determining that the second opinion should be given presumptive weight the hearing officer could consider that the first designated doctor's evaluation took place only four months after the injury after an independent medical examination had been provided less than three months after the injury. The hearing officer commented about the times involved and noted that statutory MMI was not involved in this case.

Carrier on appeal did not provide argument that Dr. B's second IR was defective through some improper examination or conclusion made by Dr. B, but rather that the first opinion should be used because there was, in effect, no proper reason or reasonable time. The determination that the 1998 opinion of Dr. B should be given presumptive weight is sufficiently supported by the evidence. The determination that the great weight of other medical evidence is not contrary to the designated doctor's 1998 opinion is not against the great weight and preponderance of the evidence.

No argument was made on appeal as to disability. Medical and chiropractic documents and claimant's testimony sufficiently support the determination that disability extended from December 11, 1996, to May 1, 1998.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge