APPEAL NO. 990547

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 17, 1999, a hearing was held. She (hearing officer) determined that the appellant's (claimant) request for spinal surgery was not approved. Claimant appeals saying that presumptive weight should have been given to the recommendation for surgery by Dr. S and the concurring opinion of Dr. H. Respondent (carrier) replied that claimant did not establish a proper concurrence and requested affirmance.

DECISION

We reverse and remand.

Claimant worked for (employer) on _____. The parties stipulated that he sustained a compensable injury on that date. The only issue before the hearing officer from which this appeal was taken was spinal surgery.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k)(4) (Rule 133.206(k)(4)) provides for presumptive weight to be given to the two opinions of the three (which include the recommendation for surgery and the two second opinion doctors' opinions) which "had the same result," and their indication as to surgery will be upheld "unless the great weight of medical evidence is to the contrary." While there is no finding of fact that Dr. S recommended surgery, such a finding may be implied from the finding of fact that the great weight of other medical evidence is contrary to the recommendation for spinal surgery.

We do not disagree with a finding of fact that Dr. S on July 6, 1998, referred to a possibility of surgery and noted that claimant was to be reevaluated in three months, but we note that Dr. S's July 6, 1998, record also shows that he intended to confer with Dr. A about surgery. Dr. S's letter of July 7, 1998, states that he conferred with Dr. A about surgery and claimant's thrombosis (indicating that Dr. A had no problem with surgery). He then said in that letter that he would proceed with the "Second Opinion process" and then added, "we will proceed with surgery when able." The form recommending surgery appears to have been initiated by Dr. S in September 1998.

One of the reasons for remand is that the hearing officer refers to two reports from Dr. H, a second opinion doctor. These reports are said by both the Statement of Evidence and a finding of fact to have been dated September 23, 1998, and December 11, 1998. While a form, appearing to be signed by Dr. H, which states that he agrees with the surgery, is dated December 11, 1998, and that form is accompanied by a letter dated December 3, 1998, the appeals record does not contain a copy of a report from Dr. H dated September 23, 1998. Therefore, a complete record is not available for review, so a remand is necessary.

Remand is also necessary because of a finding of fact that states that Dr. H and Dr. S did not "refer" to existing x-rays. (Emphasis added.) In addition to this finding of fact, similar language was used in the Statement of Evidence; when referring to Dr. H, the hearing officer commented, "[h]is letter does not reflect an interpretation of the x-rays taken on March 23, 1998," which may indicate that the hearing officer's concern was that there was no reference to films rather than that Dr. H was not persuasive by providing little basis for his opinion that surgery was needed. As to the requirement that a second opinion doctor review films, *see* Texas Workers' Compensation Commission Appeal No. 970176, decided February 21, 1997, which remanded for another opinion to be secured from a second opinion doctor, who had noted in his opinion, which was considered at the hearing, that he needed to see the films but they had not been provided. That case cited Rule 133.206(i)(2), which at that time said the second opinion doctor's opinion must be based on a physical examination and review of medical records and films. (We note that Rule 133.206(i)(2) still contains a requirement for the opinion to be based on a physical examination, and a review of medical records and films.) Prior to the hearing on remand, Dr. H should be queried as to whether he reviewed x-rays, and if he has not, he should be provided relevant films for review consistent with Rule 133.206(i)(2). (We also note that there is some indication in the record that Dr. H reviewed the films; claimant testified, on page 17 of the transcript, "[h]e looked at all my x-rays . . ." when talking of the examination of Dr. H; and Dr. H's December 3, 1998, letter contains, in handwriting, the words, "Dr. reviewed films 12/18" with a signature that appears to be "JM.")

In addition to the need to query Dr. H about x-rays, we request that the hearing officer make clear in her decision, after the remand hearing, whether Rule 133.206 requires the second opinion doctors to "refer" to having reviewed films, as opposed to requiring the second opinion doctors to have reviewed the films. Our review of Rule 133.206 does not find the language quoted by carrier in its response to the appeal (saying that a concurring opinion "must indicate . . . reviewed any actual films . . ."), in Rule 133.206(a)(13), and that language was not found in any other part of Rule 133.206. Certainly a hearing officer may consider the explanation provided by any second opinion doctor for his or her concurrence or nonconcurrence. However, under the findings of fact as provided, it is not clear whether the hearing officer considered the absence of a reference to having examined x-rays by Dr. H and Dr. S (not a doctor's failure to have examined "films"), as significant (and if so, why) in determining that the "great weight of the other medical evidence is contrary to the recommendation of spinal surgery" which was provided by Dr. S and Dr. H.

The appeals file contained a letter from Dr. S dated March 12, 1999. That letter did not reflect that it was sent to the carrier and it did not indicate that information it contained could not have been provided at the hearing. For these two reasons it was not considered on appeal.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge