APPEAL NO. 990612

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). On March 3, 1999, a contested case hearing (CCH) was held. The issues before the hearing officer were: (1) whether the Texas Workers' Compensation Commission (Commission) abused its discretion in selecting Dr. SP, a medical doctor, to be designated doctor and, if so, whether the Commission properly appointed Dr. HU, a chiropractor, as the "new" designated doctor; (2) what is the date of maximum medical improvement (MMI); (3) what is claimant's impairment rating (IR); and (4) whether claimant had disability resulting from the injury sustained on _____, and, if so, for what periods. The hearing officer determined that: (1) the Commission erroneously selected a medical doctor instead of a chiropractor to be the designated doctor in this case; (2) the Commission properly appointed a new designated doctor who is a chiropractor; (3) claimant is not at MMI and her IR cannot be determined; and (4) claimant had disability from April 3, 1998, to the date of the CCH. Appellant (carrier) appeals the hearing officer's determinations on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that the appointment of the first designated doctor, Dr. SP, was "invalid" and asserts that there is no legal precedent for such a determination. Carrier asserts that there is nothing to show that Dr. SP's Report of Medical Evaluation (TWCC-69) was invalid. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE '130.6(b)(4) (Rule 130.6(b)(4)) states, in pertinent part, as follows:

(b) In order to be a designated doctor for a dispute, the doctor shall:

* * *

(4) to the extent possible, be in the same discipline and licensed by the same board of examiners as the employee's doctor of choice.

In this case, various medical records and reports state that claimant changed treating doctors from Dr. R to Dr. FR. However, a July 30, 1998, form EES-14 states that claimant's treating doctor is Dr. R, a medical doctor, and says that Dr. SP, a medical doctor, is the designated doctor. That form is written in English and claimant said she did not think she received a copy of the form in Spanish. There is no copy of a Spanish-language version of the form in the record. Claimant testified at the CCH through a Spanish language interpreter. Claimant attended the designated doctor examination with Dr. SP on August 17, 1998, and he issued his report on that same date certifying a two percent IR. In his report, he noted that claimant said her treating doctor was Dr. FR. On

October 1, 1998, Dr. FR wrote to the Commission to state that claimant should have been examined by a designated doctor who is a chiropractor because he is a chiropractor. In a November 15, 1998, report, the new designated doctor, Dr. HU stated that claimant has not yet reached MMI. There is no Commission document in the record stating that claimant changed treating doctors to Dr. FR, however it was undisputed at the CCH that claimant had done so. Carrier's position at the CCH was that claimant had waived the right to complain that the designated doctor was not a chiropractor because claimant waited until after Dr. SP had issued his report to complain. Claimant testified that, after she had already seen Dr. SP, Dr. FR told her that Dr. SP is not a chiropractor. Claimant said she did not know the significance of the letters "D.C." and "M.D." after a doctor's name.

The hearing officer determined that: (1) it was possible for the Commission to select a designated doctor of the same discipline as the claimant's treating doctor; (2) due to an error in the Commission's records, the Commission improperly appointed a designated doctor who is a medical doctor instead of a chiropractor; (3) on October 14, 1998, the Commission properly appointed a new designated doctor of the same discipline as claimant's treating doctor; (4) the report of Dr. HU, the properly appointed designated doctor, is entitled to presumptive weight; (5) the great weight of the other medical evidence is not contrary to Dr. HU's report; and (6) the Commission abused its discretion in initially selecting Dr. SP as the designated doctor. In the decision and order, the hearing officer stated that claimant "did not know until her treating doctor told her" that Dr. SP is not a chiropractor. The hearing officer stated that the Commission should have been aware that claimant's treating doctor is Dr. FR since claimant had been treating with him since April 15, 1998.

In this case, we conclude that the hearing officer did not err in determining that: (1) the Commission abused it discretion in initially selecting Dr. SP as the designated doctor; and (2) the Commission properly selected Dr. HU as the new designated doctor. Given the hearing officer's determinations in this case and considering Rule 130.6(b)(4), we perceive no error. We have reviewed the hearing officer's determinations and we conclude that they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.[1]

Carrier complains that the hearing officer stated that the appointment of Dr. SP was "invalidated." The appointment was not automatically "invalidated" and we disregard Finding of Fact No. 6 because it is not necessary to the decision in this case. We perceive no error in the hearing officer's conclusion, however, that the Commission properly obtained a new designated doctor, given the facts of this case.

Carrier contends that the hearing officer erred in determining that claimant is not at MMI and that her IR could not be determined. However, we have affirmed the

[1] We note that this case did not involve an assertion by the claimant at the CCH that she was ignorant of the law, but instead that claimant was unaware of the facts regarding whether a designated doctor of the same discipline had been selected.

determination that the Commission did not abuse its discretion in appointing Dr. HU as the new designated doctor. In a November 15, 1998, Report of Medical Evaluation (TWCC-69), Dr. HU determined that claimant is not yet at MMI. Based on this report, the hearing officer made her determinations regarding MMI and IR. We have reviewed the record and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

Carrier contends that claimant was at MMI because the new designated doctor, Dr. HU, stated that claimant should undergo work hardening before she is evaluated for her IR, but that claimant had already undergone work hardening. The record contains reports dated in May 1998 regarding "work hardening activities." However, it is clear from Dr. HU's November 3, 1998, report that, as of the date of that report, he believed that further work hardening was necessary. He noted that he believed this would increase claimant's strength and range of motion (ROM). Carrier asserts that claimant is at MMI because Dr. SP and Dr. HE certified that she had reached MMI as of July 13, 1998. Although these doctors did certify that claimant has reached MMI, we cannot say that, based on the evidence in the record, the hearing officer erred in according presumptive weight to the designated doctor in his case, Dr. HU. Carrier contends that, because the hearing officer found that claimant is not at MMI, this "prohibits the designated doctor from determining the date of MMI." We find no merit to this contention.

Carrier contends the hearing officer erred in determining that claimant had disability from April 3, 1998, to the date of the CCH. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Claimant had the burden of proving by a preponderance of the evidence that she sustained disability because of the compensable injury. The existence of disability is a question of fact to be determined by the hearing officer from all the available evidence. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992; Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. The burden of proof may be met by the injured employee's testimony alone if the hearing officer finds the testimony credible. Texas Workers' Compensation Commission Appeal No. 93858, decided November 9, 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 overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that on _____, she was working as a housekeeper and she injured her back while "pulling out a sleeper." Claimant said she was first treated by the "insurance doctor," who released her to return to work after a few days. Claimant said she could not do her work, so she changed treating doctors to Dr. FR at that time. Claimant

testified at the CCH that she has continuing back pain and that when she is active, she must stop and lie down because of the pain. Claimant said she had been unable to do her job and that she still suffers from pain. Claimant said Dr. FR has not released her to return to work. The record contains several off-work slips from Dr. FR dated between April 28, 1998, and December 11, 1998. In the decision and order, the hearing officer noted that claimant had continuing back pain and that she had not been released to return to work by her treating doctor, Dr. FR. From the evidence in this case, the hearing officer could and did find that claimant had disability from April 3, 1998, to the date of the CCH. Her disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge