APPEAL NO. 990758

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 22, 1999. She determined that the appellant (claimant) had disability since May 8, 1997, and that he reached maximum medical improvement (MMI) on May 8, 1997, with a five percent whole body impairment rating (IR) as certified by Dr. S, a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals the determinations of MMI and IR, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The disability finding has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant sustained a compensable right knee injury on _____. Dr. ST became his treating doctor on November 8, 1996. Conservative treatment proved unsuccessful. An MRI on January 3, 1997, was negative for a meniscal tear or acute ligament injury. On April 28, 1997, Dr. T performed arthroscopic surgery. On May 8, 1997, Dr. T completed a Report of Medical Evaluation (TWCC-69) in which he found the claimant at MMI on that date and assigned a two percent IR. He dismissed the claimant from his care.

On July 21, 1997, Dr. W completed an independent medical evaluation. In his report of this examination, Dr. W commented that the claimant's present treatment program consisted of exercise only and that the claimant informed him that this was "helping his condition." The claimant was reported as noting "occasional discomfort in his right knee." Dr. W found the claimant reached MMI on the date of his examination (July 10, 1997) and assigned a three percent whole person IR, presumably only for range of motion (ROM) deficit.

Dr. S, the designated doctor, examined the claimant on September 9, 1997. In the report attached to his TWCC-69, he wrote that the pain was described to him as "minimal to none." In his testimony, the claimant admitted telling this to Dr. S. Dr. S adopted Dr. T's date of MMI (May 8, 1997) and assigned a five percent whole person IR, consisting of loss of ROM, specific disorder, and sensory loss.

The claimant testified that his first surgery was unsuccessful and he continued to have pain. He was referred to Dr. G, who examined him on October 16, 1997, for "extreme pain" and swelling of the knee. Dr. G diagnosed a neuroma in the incisions from the first surgery and possible residual internal derangement of the right knee. Dr. G performed a second surgery on December 16, 1997, in which he excised the neuroma and repaired a partial torn meniscus. In a letter of November 11, 1998, Dr. G commented that the first surgery "overlooked" the small meniscal tear and that because there was no significant

improvement after this first surgery, "quite obviously [claimant] was not at [MMI] . . . . "The claimant testified that this second surgery and rehabilitation made his knee "better."

On May 9, 1998, Dr. ST completed a TWCC-69 in which he certified that the claimant reached MMI on this date and assigned an eight percent IR based solely on the torn meniscus and collateral ligament loss. In a letter of December 8, 1998, to the Commission, Dr. ST wrote that he disagreed with Dr. S's date of MMI and IR, noting that a date of MMI, May 8, 1997, was "a mere 10 days post op, the day sutures were removed." He did not believe the claimant could be at MMI this early, especially because Dr. T, the surgeon, recommended three weeks of post-surgery therapy and because the first surgery was apparently unsuccessful.

In a letter of December 30, 1998, to the Commission, Dr. S wrote that he reviewed the claimant's case and noted his second surgery. He commented that at the time the claimant saw him, the claimant described his pain as minimal to none, except for occasional stiffness. Dr. S considered the claimant's condition stable at that time and was unwilling to concede that a second surgery was necessary. He further observed that his and Dr. ST's ratings were not "severely different" and that if the claimant "was at 5% when I saw him and 8% after the second surgery, I cannot conclude that he improved significantly assuming the system of rating is consistent."

The 1989 Act provides that where a designated doctor is selected by the Commission, the report of that doctor shall have presumptive weight, and the Commission shall base the determination of MMI and IR on that report unless the great weight of the other medical evidence is to the contrary. Sections 408.122(c) and 408.125(e). As noted by the hearing officer, the dispute in this case centers primarily on whether the claimant was at MMI at the time certified by Dr. S before the second surgery or only approximately a year later, after the second surgery, as certified by Dr. ST. The claimant urges that Dr. ST's TWCC-69 constituted the great weight of the other medical evidence and should be adopted by the Commission. For purposes of this case, MMI is defined as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 401.011(30)(A). We have observed that the attainment of MMI does not mean a pain-free status or that further medical treatment may not be necessary. Texas Workers' Compensation Commission Appeal No. 931048, decided December 28, 1993. Dr. S was advised of the second surgery and the opinion of Dr. ST with regard to MMI and IR and, nonetheless, concluded that the difference in IRs was not significant, which in turn suggested to him that the claimant did not experience significant improvement after the surgery. He also stressed the claimant's statement to him that his pain was minimal to none at the time of his certification. The claimant relied on the opinions of Dr. G and Dr. ST that the further relief from pain that he experienced only after the second surgery constituted medical evidence that he was not at MMI on May 8, 1997. The hearing officer discussed this evidence in her decision and order and commented that she perceived the differing opinions as to the date of MMI to be no more than a professional disagreement, which did not overcome the presumptive weight accorded the report of Dr. S. She also

stated that she did not believe the medical evidence established further material recovery after the second surgery, thus indicating that the claimant achieved MMI sometime before the second surgery.

We have commented in the past about the special status accorded the designated doctor under the 1989 Act, Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. The "great weight" determination amounts to more than a mere balancing of the evidence and is a higher standard than of a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 93432, decided July 16, 1993. Whether the great weight of the other medical evidence is contrary to the report of the designated doctor is a factual determination of the hearing officer which, in turn, is subject to reversal on appeal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we cannot conclude that the determination of the hearing officer that Dr. ST's and Dr. G's opinion did not constitute the great weight of the other medical evidence contrary to Dr. S' report, was not supported by sufficient evidence. For this reason, we affirm her determinations that the claimant reached MMI on May 8, 1997, with a five percent IR as certified by Dr. S.

Although the claimant had disability after May 8, 1997, he was not entitled to temporary income benefits for this period of disability because he attained MMI on May 8, 1997. *See* Section 408.101(a).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge