APPEAL NO. 990910

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 6, 1999, a hearing was held. She determined that appellant (claimant) reached maximum medical improvement (MMI) on December 12, 1996, with a six percent impairment rating (IR) and that he had disability from February 10, 1998, to the date of the hearing but is entitled to no temporary income benefits for that period of time because MMI preceded that period. Claimant asserts that the initial report of the designated doctor was changed for a proper reason and within a reasonable time, also mentioning that surgery was under consideration at the time of statutory MMI and that his condition after the initial report of the designated doctor substantially worsened. Respondent (carrier) replied that the decision should be affirmed.

DECISION

Reversed and remanded.

Claimant worked for (employer) on _____, the date of injury. On that date claimant hurt his low back lifting at work. Claimant had previously had low back surgery in 1991.

Claimant's treating doctor, Dr. C, provided a Report of Medical Evaluation (TWCC-69) dated December 24, 1996, in which he said that claimant reached MMI on December 12, 1996, with a 15% impairment rating. He cited an MRI that showed a herniated disc at L4-5, degenerative disc disease at L3-4, L4-5, and L5-S1, and probable segmental spinal instability. The carrier disputed this rating and a designated doctor, Dr. S, examined claimant on January 29, 1997. She found MMI on December 12, 1996 (just as did Dr. C), but assigned an IR of six percent. She referred to the MRI as showing a torn disc at L4-5 and degenerative disc disease at L3-4, L4-5, and L5-S1. She also noted that claimant said Dr. C "wanted to do a triple fusion"; this appears to be in regard to the current 1996 injury, but its positioning in the narrative would not rule out that Dr. C in 1991 had wanted to do a triple fusion, inferring that something less had been done at that time. (Interpretation of such a comment would be a question for the hearing officer to determine.) With a reference to possible surgery in Dr. C's notes of August 1, 1996, the hearing officer could consider that surgery had been considered at the time of the designated doctor's opinion. Dr. S did not comment further as to her basis for finding MMI.

Claimant testified that he was not treated after December 1996 until February 1998. While claimant's testimony varied, it appeared to indicate that his back felt worse beginning in approximately June or July 1997. He stated that he began calling Dr. C's office in December and got through to Dr. C in February 1998; he had some pain-killing drugs which he had taken from about June to September 1997. Dr. C obtained another MRI and a myelogram and discogram; the latter two types of testing had not been done prior to the 1996 designated doctor's opinion. Dr. C in a work up on May 7, 1998, said that claimant's symptoms had initially responded to conservative care and he had reached MMI "from a

nonoperative point of view. The patient's symptoms have gradually recurred." While Dr. C did not provide a new TWCC-69, his May 7, 1998, note made it clear that he no longer thought claimant reached MMI in 1996 since "nonoperative care" did not result in improvement of claimant's condition. He added that claimant's current problem resulted from the 1996 injury and stated that since MMI in December 1996, "unfortunately the patient's symptoms have reoccurred." Dr. C proposed surgery in this note. Claimant underwent surgery on July 8, 1998 based on "recurrent L4-5 herniated disc, post laminectomy syndrome, moderate chronic L5 radiculopathy, and L5-S1 foraminal stenosis." An L4 to S1 fusion with instrumentation was performed. Dr. L, who concurred in this surgery as a second opinion doctor, stated in June 1998 that after the 1996 injury, claimant had "recurrent symptoms," mentioning a "recurrent disc at L4-5" and listed his diagnostic studies; he added that fusion had been advised "because of continued back symptoms and radicular symptoms." (The MRI of June 1996 had shown a torn disc at L4-5 and a progress note in July 1996 had referred to L5-S1 radiculopathy.)

The Commission inquired of Dr. S after the surgery and she examined claimant on January 15, 1999. Dr. S said that her impairment rating was revised "according to the express written request of . . . benefit review officer . . . ." She provided that the date of MMI was May 31, 1998, and the IR was 18%. Again, Dr. S said very little in her narrative, commenting, "the patient has had subsequent surgery following his previous impairment rating which changes the statutory date of [MMI] as of 5-31-98, and changes the [IR]." In response to a question from the Commission Dr. S had said in November 1998 that claimant's condition is a "natural progression of his disease."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. When the hearing officer is considering an issue of MMI and/or IR for which a designated doctor has provided an opinion, Sections 408.122 and 408.125 provide that the designated doctor's opinion will be given presumptive weight.

The designated doctor may revise his opinion when presented with material evidence relative to the claimant's condition and when the change is provided in a short period of time. *See* Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. Texas Workers' Compensation Commission Appeal No. 94806, decided July 29, 1994, said that the revised opinion of a designated doctor "may" be given presumptive weight when the first report was incomplete or erroneous and when the second report is provided "fairly soon." From these opinions evolved the question of whether a designated doctor had revised his opinion for a proper reason within a reasonable time. This standard was frequently used in cases in which an initial designated doctor's evaluation and statutory MMI occurred very close in time to each other or when the date of statutory MMI preceded the initial designated doctor's opinion. *See* Texas Workers' Compensation Commission Appeal No. 970871, decided June 27, 1997.

The case under review, while it makes some reference to statutory MMI, does not turn on that point because statutory MMI was not reached until after the spinal surgery process had been intiated; the case was litigated by the parties in regard to whether there was a substantial change of condition, with claimant so asserting, and carrier primarily

countering by stating that claimant did not timely question the initial opinion of the designated doctor, pointing out the extended period after the first opinion of the designated doctor in which no medical care was provided.

The hearing officer did not directly address the questions of whether the designated doctor had revised her opinion for a proper reason and whether this occurred in a reasonable time. *See* Texas Workers' Compensation Commission Appeal No. 971339, decided August 28, 1997. The record does not disclose any allegation that the Commission sought another opinion of the designated doctor for an improper reason. Matters such as substantial change of condition and active consideration of surgery relate to revisions sought in which statutory MMI plays a significant part. *See* Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999. The evidence of claimant's surgery being in process in May 1998, of statutory MMI on May 31, 1998, or later, of surgery on July 8, 1998, of the decision of the Commission in September 1998 (based on agreement by the parties) that claimant's 1996 injury is a cause of his "laminectomy syndrome," and the Commission's communication to Dr. S in December 1998 stating that surgery had taken place, indicate that the Commission contacted the designated doctor in December 1998 for a proper reason. Her revised opinion in January 1999 resulted from these events.

Texas Workers' Compensation Commission Appeal No. 970344, decided April 9, 1997, stated that a revision by the designated doctor was done in a reasonable time when it was tied to an initial MRI study that was not performed until just before statutory MMI after the designated doctor's first report had been provided 20 months earlier. The question of "reasonable time" must be approached in the context of the facts and whether or not there was a proper reason for seeking a revision. As such, Texas Workers' Compensation Commission Appeal No. 981778, decided September 17, 1998, said that peer review reports sent to a designated doctor, which generated a new IR approximately 18 months after the first opinion of the designated doctor, amounted to the last opinion being provided without a proper reason and not within a reasonable time. On remand, the hearing officer should consider the facts of this case and determine whether the request for a second designated doctor's opinion was within a reasonable time; there is no standard addressed by the finding of fact that said "too much time had elapsed since the first report of the designated doctor." *See* Texas Workers' Compensation Commission Appeal No. 971770, decided October 23, 1997, which said there was no time limit in the statute or rules for disputing a designated doctor's report, but that case, which dealt with a revision approximately three years after statutory MMI, remanded for a determination as to reasonable time based on Appeals Panel decisions.

The hearing officer should also determine which of the two designated doctor's opinions is entitled to presumptive weight. *See* Texas Workers' Compensation Commission Appeal No. 961217, decided August 9, 1996. In so doing, consideration should be given to the medical evidence relative to the 1996 designated doctor's report and whether there is any medical evidence that now supports that report, and to the medical evidence relative to the January 1999 report and whether there is any medical evidence that now supports that report. Similarly, the hearing officer should consider medical evidence that differs from

each report. If new findings of fact affect disability and TIBS, then added findings addressing those points should also be made.

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 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

_____
Susan M. Kelley
Appeals Judge