APPEAL NO. 991185

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 11, 1999. The issue at the CCH was whether respondent (carrier) is liable for spinal surgery related to the compensable injury of the appellant (claimant). The hearing officer determined that claimant was not entitled to spinal surgery. Claimant appeals the hearing officer's determination. Carrier replies that the Appeals Panel should affirm the hearing officer's determination.

DECISION

We affirm.

Claimant appeals the hearing officer's determination that she is not entitled to spinal surgery. Claimant states that Dr. C was not her chosen second opinion doctor; that carrier's second opinion doctor, Dr. B, met with her briefly but did not examine her; that the designated doctor, Dr. R, believes she needs surgery; and that the second opinion doctors did not do a good job in reviewing her spinal surgery request.

The parties stipulated that on _____, claimant sustained a compensable injury while working for (employer). On July 10, 1998, claimant's treating doctor, Dr. W, recommended discectomy surgery and "PLIF w cages L5 S1," and submitted a Recommendation for Spinal Surgery (TWCC-63). Neither the carrier's nor the claimant's second opinion doctor agreed that claimant should have spinal surgery. On February 17, 1999, Dr. W submitted an amended TWCC-63 again recommending spinal surgery. He recommended "internal fixation" and "PLIF w cages L5 S1." In March 1999, both second opinion doctors submitted reports and neither agreed that claimant should have spinal surgery. Claimant testified that she is still having severe pain in her back, hips, and legs and said that she believes she will benefit from surgery.

Dr. W testified at the CCH. He stated that claimant's facet joints are the source of her pain and that he believes she would benefit from fusion surgery. He indicated that claimant's MRIs and discograms do not reflect the sources of her pain. He stated that there was a mistake regarding the type of surgery that had been recommended in his TWCC-63. Dr. W testified that Dr. R believes that claimant should have spinal surgery. In a March 1999 report, Dr. R states that he believes claimant should have laminotomies and posterior fusion surgery, but not interbody fusion surgery at L5-S1.

The hearing officer determined that Dr. W recommended spinal surgery and that the carrier's and claimant's second opinion doctors, Dr. C and Dr. B, did not concur in Dr. W's spinal surgery recommendation. The hearing officer also determined that the "great weight of the other medical evidence is not contrary to the recommendations against spinal surgery . . . . "

Section 408.026(a)(1) provides in pertinent part that, except in medical emergencies and other situations not relevant in this case, an insurance carrier is liable for medical costs related to spinal surgery only if before the surgery the employee obtains from a carrier or Commission-approved doctor "a second opinion that concurs with the treating doctor's recommendation; . . ." This statute is implemented by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §133.206 (Rule 133.206) which generally provides a procedure whereby an employee recommended for spinal surgery by the treating doctor selects a second opinion doctor from a Commission-approved list, the carrier does likewise and, of the three recommendations and opinions, presumptive weight is given to the two which "had the same result, and they will be upheld unless the great weight of medical evidence is to the contrary." Rule 133.206(k)(4).

Here, the two like opinions were that there should be no spinal surgery. The Commission notified claimant that carrier would not be liable for spinal surgery. At the CCH, the disputed issue presented a fact question for the hearing officer. She was the sole judge of the materiality, relevance, weight, and credibility of the evidence in this case. Section 410.165(a). She resolved any inconsistencies in the evidence and determined that claimant was not entitled to spinal surgery. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We conclude that sufficient evidence supports the hearing officer's determinations. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). After reviewing the record, we are satisfied that the hearing officer's findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain. We note that resubmission of a spinal surgery request is covered in Rule 133.206 (l)(3). We further note that there is nothing in the record to indicate that claimant did not choose Dr. C as her second opinion doctor. Claimant did not raise this complaint at the CCH.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge