APPEAL NO. 991233

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 12, 1999, a hearing was held. He did not approve appellant's (claimant) request for spinal surgery. Claimant asserts that the determination should be reversed, stating that the second opinion doctors did not have "complete medical records"; claimant also said that his treating doctor, Dr. O, had found a typographical error on a myelogram report. Respondent (carrier) replied that neither the reference to a typographical error nor to second opinion doctors not having all records was made at the hearing.

DECISION

We affirm.

Claimant testified that he hurt his neck lifting at work on _____, while working for (employer). He said he now has headaches, his neck hurts, and his arm tingles. The parties stipulated that the injury was compensable and that Dr. R recommended that claimant have surgery, while Dr. S and Dr. W, the second opinion doctors, recommended against spinal surgery.

Claimant's treating doctor, Dr. O, testified that while this is not the classic case of cervical surgery, the claimant's background of failed conservative treatment made the surgical option necessary. He added that he disagreed with the second opinion doctors and believes there is evidence of radiculopathy, myelopathy and foraminal encroachment. Dr. O said that he referred claimant to Dr. R to see if surgery was viable and said he agreed with Dr. R that it was. Dr. R, in a letter dated March 29, 1999, said that claimant has radiculopathy and a 2 mm disc protrusion at C5-6; he added that his experience has shown that the size of the disc "herniation" does not correlate with the amount of pain. He concluded that the claimant's left cervical radiculopathy with neck and left arm pain is caused by the "C5-6 disc herniation." He stated that a C5-6 anterior cervical discectomy and fusion is the only "viable option" for the pain.

Dr. S examined claimant in March 1999; he mentioned that claimant has undergone "all manner of conservative management" and recently was told that he has a herniated disc in his neck. Dr. S noted no history of sensory loss, no definitive weakness, and no signs of myelopathy. His examination was within normal limits "without any evidence of focal neuropathy, radiculopathy, or myelopathy." Dr. S considered the studies provided to show "very mild disc bulges without evidence of foraminal encroachment." He said he did not believe claimant would benefit from the surgery and marked, "No, I do not concur. Surgery is not indicated for this patient."

Dr. W provided a report dated January 28, 1999, in which he said he examined the claimant. He said the neurological examination was unremarkable; reflexes were good and there was no sensory or motor deficit. He noted that the myelogram was not available. He

stated he wanted to see it before giving a final opinion, saying that "if it is positive, then I would probably concur . . . ." He added that claimant would try to get the films and bring them to him. Claimant testified that he did get the myelogram for Dr. W to review. He said he had taken the x-rays and MRI to Dr. W before. In a typed addendum, initialed but not signed, Dr. W said on May 4, 1999, that he reviewed the films provided; and a bulge, "but no herniation" is showen at C5-6. There is no stenosis and "no nerve root cutoff." Dr. W said he did "not see any indication for surgery at this time."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. While claimant states that the second opinion doctors did not have all the medical records, Tex. W.C. Comm'n, TEX. ADMIN. CODE §§ 133.206(e)(2) and (i)(2) (Rules 133.206(e)(2) and (i)(2))state respectively:

> The surgeon shall ensure that all medical records and films arrive at each second opinion doctor's office prior to the date of the scheduled second opinion.
>
> The second opinion doctor's opinion must be based on physical examination of the injured employee and review of the medical records and films forwarded by the surgeon.

These rules place the responsibility upon the surgeon recommending surgery to forward documents for the second opinion doctor to review. While the Appeals Panel has pointed out that the second opinion doctors need to review films, not reports about films (*see* Texas Workers' Compensation Commission Appeal No. 970176, decided February 21, 1997), it has not said that a recommending surgeon has to forward a copy of every office visit or all laboratory reports accumulated in the weeks, months, or years of treatment since the compensable injury. With the applicable rule requiring the recommending surgeon (who may generally be perceived as acting in the claimant's interest) to forward the medical record, we will not find harm to claimant by that surgeon forwarding less than all the records, without a more specific assertion as to particular records omitted and how the absence of those records affected the determination. One reason why there may be no specificity as to particular medical records not included was that this point was not raised at the hearing, which provides another basis to the Appeals Panel not to consider overturning the decision based on this point.

While the claimant refers to a typographical error found by Dr. O in regard to the myelogram, that would not affect the outcome. As stated, second opinion doctors' opinions are based on their interpretation of films, not the reports of films. Both second opinion doctors said there was only a bulge, not herniation, with neither taking issue with whether Dr. R said it was on the right, the left, or "bilateral."

Rule 133.206(k)(4) provides that of the three recommendations and opinions (recommending surgeon and two second opinion doctors), presumptive weight will be given to the two that agree and that opinion will be upheld unless the great weight of medical evidence is to the contrary. The hearing officer is the sole judge of the weight and

credibility of the evidence. *See* Section 410.165. He applied the criteria found in Rule 133.206(k)(4) and determined that spinal surgery should not be ordered since the two second opinion doctors nonconcurred. The evidence sufficiently supports that determination.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge