

APPEAL NO. 991243

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 12, 1999, a contested case hearing (CCH) was held. In response to the issues at the CCH, the hearing officer determined that: (1) the date of maximum medical improvement (MMI) and the impairment rating (IR) of the respondent (claimant) cannot be determined; and (2) claimant was injured during the designated doctor examination of Dr. MC. Appellant (carrier) appeals, contending that: (1) the hearing officer should have given presumptive weight to the designated doctor's report; and (2) the hearing officer erred in determining that claimant sustained a further aggravating injury to his back during the designated doctor examination. In his response, claimant contends that the Appeals Panel should affirm the hearing officer's determinations.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that the designated doctor's report is not entitled to presumptive weight, that the MMI issue is premature, and that the IR issue is not ripe for determination. Carrier complains that the hearing officer did not apply the proper standard and that she did not make any findings regarding whether the designated doctor's report is contrary to the great weight of the other medical evidence. Carrier asks the Appeals Panel to reverse the hearing officer's determination and render a determination that the designated doctor's report is entitled to presumptive weight.

Claimant testified that he sustained a compensable back injury at work on _____, which caused him a "considerable" amount of pain. He said he underwent spinal surgery in September 1997, which provided pain relief. He said he returned to work December 1, 1997, "in good shape." He said he went to the designated doctor examination on February 4, 1998, and that he was injured when he was pushed during range of motion (ROM) testing. Claimant said that when he complained of the pain, he was told it was "just a muscle pulling." Claimant said he waited a few weeks for the pain to resolve and then called Dr. ME, who told him to go back to Dr. L.

A September 10, 1997, operative report states that claimant underwent a laminotomy with disc removal. In an October 3, 1997, report, Dr. L stated that claimant is progressing quite well and that he will "most likely dismiss him to work." On November 26, 1997, Dr. L noted that claimant had no significant problems, that his examination was normal, and that claimant "can be released to work." In a December 9, 1997, report, Dr. G stated that claimant "made a good recovery postoperatively," that he has returned to full duty, that "he has done well at work," and that he has some "dull backache" that is aggravated by positioning. In a February 4, 1998, report, the designated doctor noted that claimant said his pain is a seven on a one to ten scale and that claimant walked with a slow gait and a limp. The designated doctor invalidated claimant's ROM and certified that

claimant reached MMI on November 26, 1997, with an IR of eight percent. In a March 23, 1998, report, Dr. L stated that claimant came in complaining of pain and that he had been tolerating things well until the designated doctor examination on February 4, 1998. Dr. L reported that claimant stated that he was pushed and forced to bend during the examination and that he immediately felt pain that radiated into his leg. In a July 1998 office note, Dr. L stated that claimant is now "listing" to the left, and that he has constant pain in the lumbar area and down both legs. In an August 12, 1998, office note, Dr. L stated that a myelogram shows a "large defect at the L3-4 level on the left side" and that he thinks that claimant may require more surgery. In a September 2, 1998, office note, Dr. L stated that claimant needs decompression and fusion surgery at L3-4.

The parties stipulated that claimant sustained a compensable injury on _____, and that Dr. MC was the designated doctor. The hearing officer determined that: (1) claimant sustained a "further aggravating injury to his back" during the designated doctor examination on February 4, 1998; (2) there was a substantial change in claimant's medical condition due to this injury from the designated doctor's examination; (3) the designated doctor "now has a substantial interest in the case" and can no longer be impartial, so a new designated doctor needs to be appointed; (4) because there is no designated doctor, the MMI issue is premature; and (5) the IR issue is not ripe for adjudication. In the decision and order, the hearing officer stated that "the great weight of the other medical evidence was contrary to the report of" the designated doctor.

The report of a Commission-selected designated doctor is generally given presumptive weight with regard to MMI status and IR. Sections 408.122(b) and 408.125(e). The amount of evidence needed to overcome the presumption is the "great weight" of the other medical evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. A designated doctor's report is not given presumptive weight regarding the extent of the injury or whether there is an aggravation of a preexisting condition that needs to be rated. Texas Workers' Compensation Commission Appeal No. 950789, decided June 30, 1995.

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 great weight and preponderance of the evidence as to be clearly or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the hearing officer found that claimant sustained a "further aggravating injury to his back" during the designated doctor examination. Because of this, the hearing officer could find that, at the time of the designated doctor's report, the designated doctor had not considered the entire extent of claimant's injury. Based on the reports of Dr. L and claimant's testimony, the hearing officer could determine that claimant was not at MMI at the time the designated doctor drafted his report because claimant was injured during the

designated doctor's examination to such an extent that he is now being evaluated regarding the need for further surgery. For this reason, there is some evidence that claimant is not at MMI and that the IR issue is not ripe for determination. The hearing officer did not actually determine that claimant is not at MMI. However, she did determine that there was a substantial change in claimant's condition and she stated that the great weight of the other medical evidence was contrary to the designated doctor's report. We will construe this as a determination that claimant's condition had changed so that he was not yet at MMI, making the MMI determination premature. The judgment of the fact finder should be affirmed if it can be sustained on any reasonable theory supported by the evidence. See Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993. We affirm the hearing officer's determination that the MMI issue is premature in this case and that the IR issue is not ripe for determination.

In its appeal, carrier's specific assertion is the designated doctor's report was entitled to presumptive weight. Considering our affirmance of the determination that the MMI issue is premature, we conclude that the hearing officer did not err in failing to accord presumptive weight to the designated doctor's report.

Carrier asserts that the hearing officer erred in determining that claimant sustained a further aggravating injury during the designated doctor's examination. Carrier first asserts that this issue was not before the hearing officer and that she should not have addressed this issue. The benefit review conference (BRC) report reflects that claimant's position at the BRC was that:

[claimant] has not reached [MMI]. He is scheduled for another surgery. During the visit at the designated doctor's office, the assistant to the doctor used excess force during the range of motion testing, causing additional harm. . . .

The recommendation of the benefit review officer was that claimant was not at MMI. At the CCH, claimant made the same argument that he is not at MMI for the same reason. A hearing officer must decide any issue regarding extent of the injury before reaching the IR issue. This issue regarding any injury sustained in the designated doctor examination relates to extent of injury and the issue of whether claimant is at MMI. We perceive no error in the adding of this issue.

Carrier contends that the evidence does not show that claimant sustained an injury during the designated doctor's exam. It asserts that there was no "substantial change" in claimant's condition from the exam and that any change in his condition was due to "a chronic process" and mere "degeneration." Whether claimant sustained an injury during the designated doctor exam was a fact question for the hearing officer. Claimant testified that he felt a pulling or tearing sensation while being pushed by an assistant during the designated doctor examination. Dr. L noted that claimant reported this injury and documented the deterioration in claimant's condition. Dr. L stated that he believed claimant's version of the events regarding the reason for the worsening of his condition.

The hearing officer's determination in this regard is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

We note that carrier did not specifically complain of the determination regarding the appointment of a second designated doctor. The carrier's assertion was the the report of the designated doctor should be given presumptive weight. We will not address this unappealed determination regarding the appointment of a second designated doctor.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge