APPEAL NO. 991417

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 7, 1999, a contested case hearing (CCH) was held. The issues concerned whether the appellant, (claimant), had reached maximum medical improvement (MMI), and, if so, on what date, and his impairment rating (IR) for his compensable injury. Further, there was an issue concerning whether the Texas Workers' Compensation Commission (Commission) abused its discretion in not allowing the claimant a change in his treating doctor.

The hearing officer determined that the Commission did not abuse its discretion in denying the claimant's requested change of doctor, and that he reached MMI on December 22, 1998, with a nine percent IR, in accordance with the designated doctor's report, the great weight of the other medical evidence not being contrary to that report.

The claimant has appealed, and argues that he should have been allowed, after his surgery, to transfer from his treating doctor, who was a chiropractor, to the "gate-keeper" care of the surgeon. He argues that the assessment of MMI is premature and he continues to require treatment for the effects of his surgery. The claimant argues that the great weight of the medical evidence was against the determination of MMI and IR. The respondent (carrier) responds that the decision is supported by the record in this case.

DECISION

Affirmed on issue of MMI and IR, reversed and rendered on choice of treating doctor.

The claimant was employed as a maintenance worker for the a self-insured political subdivision that shall be referred to herein as "carrier." On _____, the claimant sustained a back injury. He was 30 years old at the time. He was initially treated by Dr. LD, and then by Dr. B, an orthopedic surgeon. Surgery was recommended by Dr. B in December 1997, and approved in March 1998; however, claimant did not want surgery at that point and requested a change of doctor to Dr. L, D.C., which was approved on April 16, 1998. His reason for changing at that time was that it was hard to get an appointment with Dr. B and he was located "really out of the way."

Claimant then for several months treated with Dr. L, but his pain was unresolved and, at his request, Dr. L referred him back to Dr. B in August 1998. Claimant had a laminectomy at the L4-5 level on October 6, 1998. Claimant said that Dr. L had originally wanted him to see another surgeon, but he concurred with claimant's requested referral to Dr. B.

The claimant said that he preferred to have Dr. B follow his progress after surgery. The claimant said that Dr. L called the week after surgery and stated that his office would follow up on a weekly basis, but did not. The claimant said that someone from Dr. L's office

called once and offered to deliver an ice pack, but the claimant declined and also said he did not want further manipulation. Subsequently, on November 16, 1998, Dr. L certified that claimant had reached MMI on that date, with a zero percent IR. The Report of Medical Evaluation (TWCC-69) noted that the claimant was in "noncompliance." The claimant disputed this IR.

On November 18, 1998, the claimant also filed an Employee's Request to Change Treating Doctors (TWCC-53) to change to Dr. B. The reason for the change that was cited was: "I was referred back to [Dr. B] so he could perform the surgery needed. [Dr. B] had handled my previous treatment and will resume as before and is handling my medical treatment." Although it was undisputed that Dr. L was not of the discipline able to perform surgery, the Commission denied this request on December 9, 1998, citing that Dr. L could make the appropriate referral. Claimant stated that he may have spoken in anger with Dr. L's office when contacted at some point prior to the CCH. He had not asked for a referral to Dr. B. The record indicated that the carrier had continued to pay for follow-up treatment from Dr. B; however, claimant said he had gone for seven months without treatment from Dr. B until the month before the CCH. A Dispute Resolution Information System (DRIS) note dated January 28, 1999, records the claimant's complaint that the carrier was not paying for medical treatment.

There was testimony to the effect that claimant may have refiled a request for change of doctor on February 19, 1999, which was again refused. A DRIS note dated on that date shows that an employee of the Commission called Dr. L's office to ask if there was a conflict, and was advised by an employee of Dr. L, and not Dr. L himself, that there was no conflict as claimant had been noncompliant. In spite of the assertion that there was no conflict, this employee also agreed that there had been a profane conversation with claimant. A specific referral in this conversation to Dr. B was not made. The employee said that claimant could continue to treat with them and "use another doctor." He expressed the opinion that "there are about six doctors there" that could treat the claimant.

A designated doctor, Dr. LF, D.C., was appointed shortly thereafter; claimant was examined on December 22, 1998, and Dr. LF certified that claimant reached MMI on that date, with a nine percent IR. This resulted from specific disorders of the lumbar spine combined with sensory impairment. It appears from the detailed report that range of motion testing was invalidated by the straight leg raising test.

The claimant contended that work hardening therapy prescribed by Dr. B was not approved by the carrier. When he was asked again on cross-examination why he had not attended work hardening, he stated that they did not return his calls. There are no medical reports in evidence that contradict or dispute the accuracy of the IR assigned by Dr. LF.

The report of a Commission-appointed designated doctor is given presumptive weight. Sections 408.122(c) and 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No.

92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992. With no evidence to contradict the designated doctor's report, the hearing officer was correct in according the statutory presumptive weight to the report, and finding that claimant had reached MMI with a nine percent IR.

However, concerning the requested change of doctor, we find that the Commission abused its discretion by not allowing the change and accordingly render a decision that claimant's treating doctor was changed to Dr. B, effective November 18, 1998, when he requested the change. As the filing of a zero percent IR, without examination, six weeks after spinal surgery, shows, the relationship between the claimant and his treating doctor was in conflict to the point where the doctor-patient relationship was impaired, thereby justifying a change in and of itself. Section 408.022(c)(4). However, the recited desire to change to a medical doctor for post-surgical treatment, when the treating doctor was without the ability to perform surgery, was sufficient also to compel approval. The claimant quite logically felt that there was no further benefit to be obtained from conservative chiropractic treatment methodologies after his operation. The offer of Dr. L's office to have one of its other doctors treat claimant was not responsive to this concern. The denial of the requested change to his surgeon was therefore an abuse of discretion. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

For these reasons, we affirm the findings of fact, conclusions of law, and order of the hearing officer on the matter of MMI and IR, but we reverse and render the decision that claimant's treating doctor as of November 18, 1998, was Dr. B.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge