APPEAL NO. 991443

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 June 25, 1998. The issues at that CCH were whether the appellant (claimant) had disability from January 25, 1995, to April 17, 1996, resulting from an injury on _____; what was his impairment rating (IR); and whether he was entitled to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer determined that the claimant had disability for the period in issue, that his IR was 16%, and that he was not entitled to SIBS. The respondent (carrier) appealed the disability and IR issues and no appeal was made concerning the finding of non-entitlement to SIBS. In Texas Workers' Compensation Commission Appeal No. 982079, decided October 13, 1998 (Unpublished), it was determined that the appeal filed by the carrier appeared to be untimely. A motion for reconsideration was filed with proof of depositing the appeal in a United States Postal Service (USPS) depository for mail on the final day of the appeal period although the postmark was dated the following day. No response was filed in opposition to the motion. In Texas Workers' Compensation Commission Appeal No. 982712, decided November 23, 1998, the motion was granted and the appeal considered on the issues of disability and the IR. In that decision, the Appeals Panel affirmed the hearing officer's determination regarding disability; however, reversed and remanded the case concerning the IR. In her decision, the hearing officer had rejected two doctors' reports that had been exchanged before the benefit review conference on discovery grounds, and the Appeals Panel held this to be error and remanded for further consideration. The Appeals Panel also remanded for two other matters: the lack of a response in the record to an inquiry by the Texas Workers' Compensation Commission (Commission) to the designated doctor, and matters regarding the conducting of, and basis for, range of motion (ROM) ratings in the designated doctor's report. A hearing on remand was ordered for December 1998, but several continuances were granted and the hearing on remand took place on May 27, 1999. The hearing officer held, following the hearing on remand, that the claimant's IR was zero percent as certified by the designated doctor in his revised and most recent report. The parties having stipulated to the timely exchange of the two doctors' reports previously excluded, they were admitted at the hearing on remand. The claimant now appeals, urging initially that although no response was filed to the motion to reconsider, the claimant opposes the reconsideration, arguing that the carrier's initial appeal was not timely filed. Claimant also appeals the hearing officer's determination to give presumptive weight to the revised report of the designated doctor, urging that the first report of 16% should be adopted and that it was error for the hearing officer to refuse the claimant's request for clarification from the designated doctor. Carrier responds that the decision of the Appeals Panel regarding the motion for reconsideration was correct, that it was not opposed or brought up at the hearing on remand, and that no evidence has been offered to counter the evidence presented by the carrier to prove a timely deposit in the USPS system. Carrier also urges that there is sufficient evidence to support the determinations made by the hearing officer according presumptive weight to the revised designated doctor's report and determining that the correct IR is zero percent.

DECISION

Affirmed.

The factual background of this case and the matter of the timely filing of carrier's appeal of the first CCH is fully set forth in our prior decision, Appeal No. 982712, *supra*, and will not be repeated here. On the matter of the timely filing of the original appeal by the carrier, as indicated no opposition was filed to the motion for reconsideration and the matter was not brought forth at the CCH nor was additional or new evidence offered. We do not find any new evidence to consider on this issue and do not conclude that there is any convincing legal basis to reject or modify our holdings that a timely filing is made when an appeal, properly addressed and post paid, is deposited in a post office or official USPS depository on or before the final date for filing. Appeal No. 982712; Texas Workers' Compensation Commission Appeal No. 982047, decided September 28, 1998.

Regarding the reports of the two doctors, Dr. F and Dr. P, which were rejected by the hearing officer at the original CCH when offered into evidence and which we held to be error, on remand the parties stipulated that the reports had been properly exchanged. They were properly admitted into evidence. These reports, as well as other medical reports, disagree with the initial ROM ratings by the Commission-selected designated doctor, Dr. B, who had examined the claimant on April 14, 1997, and who rendered a report with a 16% IR based on a ROM report (Impairment Rating/Disability Evaluation Report, CA-6000 Spine Motion Analyzer) signed by a JW, no further qualification mentioned. In the hearing on remand, it was brought out that JW had never received Commission-approved training (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(l) (Rule 130.6(l)), and that while JW stated that another male member of his staff who performed most of the ROM evaluations had been so trained, the claimant testified that his ROM testing was performed by a female. In any event, Dr. B in his final revised report on IR, rejected the ROM ratings he initially relied on and rendered a final revised report that the claimant's IR was zero percent. This is the report the hearing officer determined was entitled to presumptive weight and that the great weight of the other medical evidence was not contrary thereto. Section 408.125.

In accordance with the directions on remand (Appeal No. 982712, *supra*), on December 10, 1998, the hearing officer corresponded with Dr. B concerning an unanswered letter from the Commission's disability determination officer regarding the ROM ratings and included a peer report of a Dr. BL which questioned the validity of the ratings. Both Dr. P and Dr. F disagree with the rating and opined that the ROM ratings were invalid and that the IR was zero percent. Dr. B stated he did not need to reexamine the claimant unless the claimant so desired, and after reviewing the records, concurred that 10 of the 16% of the ROM ratings was invalid and inconsistent with the claimant's physical ability. He reported that subtracting the 10%, the rating would be six percent. The claimant disagreed with the rating and pursuant to the claimant's specific request, the hearing officer approved a reexamination by Dr. B which was performed on January 14, 1999. Following this reexamination, Dr. B certified that the claimant's IR was zero percent. His narrative

report stated that the claimant did not give maximum effort on ROM testing, and from his observations of claimant's physical activity, ROM findings were invalid. An undated evaluation form without narrative by the claimant's treating doctor, Dr. G, indicates a rating of 16%. Claimant subsequently, at the hearing on remand, sought to make further inquiry of Dr. B, which was rejected by the hearing officer.

Claimant urges that the final revised report of Dr. B was not entitled to presumptive weight because it was not done for a proper reason and not done in a reasonable period of time, urging that the original report should be accorded presumptive weight. While we agree that it is far more preferable that an initial report of a designated doctor be correctly prepared and accorded presumptive weight in establishing an IR, we have recognized that desired result is not always attainable and that limited revisions may be necessary in some cases. We have held that revisions or amendments to be accorded presumptive weight should be done within a reasonable amount of time, and for a proper reason. Texas Workers' Compensation Commission Appeal No. 941087, decided September 26, 1994; Texas Workers' Compensation Commission Appeal No. 972112, decided November 25, 1997. Here, the invalidity of the ROM rating signed off by JW became apparent, as shown in other medical reports, in not complying with Rule 130.6(l) requirements, and from professional judgment and observation of Dr. B. Upon reexamination by Dr. B at the specific request of the claimant, Dr. B determined that the ROM findings were invalidated. He had never found any impairment other than the ROM findings. While there was a considerable passage of time between the first report of Dr. B, the great delay was occasioned by the protracted nature of the dispute resolution process involved in this case. We find no basis to conclude as a matter of law, and contrary to the determinations of the hearing officer, that the final report from Dr. B accepted by the hearing officer was not prepared for proper reasons and within a reasonable period of time under these circumstances. *See* Texas Workers' Compensation Commission Appeal No. 981111, decided July 1, 1998.

Noting no new or previously unknown evidence regarding or concerning Dr. B's rating, we do not find error in the hearing officer rejecting yet further inquiry (claimant's request dated April 26, 1999) of the designated doctor after his reexamination of the claimant and February 3, 1999, report. An abuse of discretion in the hearing officer's ruling has not been shown. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The hearing officer found that the great weight of the medical evidence was not contrary to the February 3, 1999, report of the designated doctor, Dr. B, and, according presumptive weight to that report, determined that the claimant's IR was zero percent. We have reviewed the evidence and cannot conclude that her determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Finding the evidence sufficient and no prejudicial legal error, we affirm the decision and order.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge