

APPEAL NO. 991600

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 21, 1999. She (hearing officer) determined that the appellant's (claimant) date of maximum medical improvement (MMI) was August 21, 1997, as certified by Dr. B, a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable upper right extremity injury, originally a cut to his right ring finger, on \_\_\_\_\_. He first received medical treatment from Dr. C in October 1996 and was referred to Dr. V, who, on April 2, 1997, diagnosed right carpal tunnel syndrome, right cubital tunnel compression of the ulnar nerve, right elbow lateral epicondylitis, and, by then, a well-healed laceration of the ring finger. On April 29, 1997, he performed a cubital and carpal tunnel release and a lateral epicondylitis release with removal of bone. The claimant went through physical therapy for several months thereafter, but testified he never recovered his grip strength, always had elbow problems, and was told that it may take up to a year for the pain to go away. Dr. V's reports during this period routinely reflect "good progress." On August 26, 1997, Dr. V completed a Report of Medical Evaluation (TWCC-69) in which he assigned an eight percent impairment rating (IR) and a date of MMI of August 21, 1997. Meanwhile, on (alleged date of injury), the claimant said, he was at home when he extended his right arm and heard a "snapping" in his elbow with subsequent pain and swelling. He testified that he told Dr. V about this at his visit on August 21, 1997, and Dr. V did an x-ray, found no fracture and declined to do more testing. The claimant apparently then became dissatisfied with Dr. V and returned to Dr. C, who referred him to Dr. CX. Dr. CX diagnosed right ulnar neuropathy, which he believed was caused by the prior surgery. On March 2, 1998, he performed a transposition and neuropathy of the right ulnar nerve.

Because Dr. V's certification of MMI and IR was disputed, Dr. B was selected as a designated doctor by the Commission. On November 20, 1997, Dr. B examined the claimant and completed a TWCC-69 in which he assigned a five percent IR and an August 21, 1997, date of MMI, consistent with Dr. V's date of MMI. The claimant said he told Dr. B that surgery was likely and asked Dr. B, without success, to postpone the examination.

The claimant underwent physical therapy after the second operation and described it as a success, with most of his grip strength returned. On July 2, 1998, Dr. B completed an amended TWCC-69 in which he considered additional medical records and the second operation. He concluded that "this imparted either a significant vascular injury to the nerve,

or represents additional injury as a direct result of the surgical treatment protocol." In the amended TWCC-69, Dr. B assigned a 19% IR, but maintained the original date of MMI because he considered this to be when claimant had "reached a static course under appropriate medical treatment and there has been no change in the clinical condition . . . after three months . . . ." On March 17, 1999, the Commission wrote Dr. B with attached "pertinent records" and asked whether he believed the claimant was still at MMI. Dr. B responded on March 19, 1999, that he still believed the claimant reached MMI on August 21, 1997, as he originally certified, because, in his opinion, the claimant "demonstrated no evidence of significant improvement" when he last examined him and his symptoms persisted throughout his subsequent treatment. He doubted any additional treatment would provide significant relief, and found evidence of "significant symptom magnification."

The parties do not dispute that the correct IR in this case is 19% and presumably do not consider the questions of MMI and IR to be "inextricably intertwined" in this case. See, e.g., Texas Workers' Compensation Commission Appeal No. 93435, decided July 16, 1993. Section 408.122(c) provides that the report of the designated doctor selected by the Commission has presumptive weight and that the Commission shall base its determination of MMI on that report "unless the great weight of the other medical evidence is to the contrary." The great weight of the evidence required to overcome the report of the designated doctor is more than a mere balancing of the evidence or even a preponderance of the medical evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Only medical evidence, not lay opinion, can overcome the presumptive weight given the report of the designated doctor. Thus, the claimant's opinion, however credible, as to whether and when he reached MMI is not medical evidence and is not probative on the issue under consideration. Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. Section 401.011(30)(A) and (B) define MMI for purposes of this case as the earlier of the date "after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated" or "the expiration of 104 weeks from the date on which income benefits begin to accrue." While the concept of MMI implies that the medical condition is more or less stable and significant improvement cannot reasonably be expected (Texas Workers' Compensation Commission Appeal No. 931010, decided December 16, 1993) it does not equate to a pain-free status nor does it suggest that further medical treatment, including surgery, will not be necessary. Texas Workers' Compensation Commission Appeal No. 94045, decided February 17, 1994; Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993.

The claimant argues that his condition "was not static for three months" as evidenced by his dissatisfaction with Dr. V's treatment, particularly his ignoring of the incident on (alleged date of injury), when his elbow "popped," and by later surgery for an ulnar condition. This is not a case where the designated doctor is unaware of additional treatment or diagnoses. On the contrary, Dr. B was provided the records of such continuing care and, nonetheless, maintained his belief that the original date of MMI remained correct. While the records presumably reviewed by Dr. B and introduced into evidence do show medical care consistent with the claimant's entitlement to lifetime

medical benefits for the compensable injury, the records do not directly discuss MMI except in one letter of January 29, 1999, from Dr. CX to the claimant's attorney in which Dr. CX wrote: "I believe at this point, [claimant] has not reached MMI. The fact that his ulnar nerve was damaged and that the reparative process is an ongoing function which may take anywhere from one to two years total, does not, in my opinion, . . . make it a static lesion . . . . His disease process was not in fact static at the time of his surgery, in fact, he was having extreme pain and difficulty along with other psychosocial problems due to the extreme pain and discomfort." He further commented that improvement "will not occur over the next several months due to the nature of the nerve healing, and may take another year or two."

Whether the great weight of the other medical evidence was contrary to the report of the designated doctor on the issue of MMI was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. This determination in turn is subject to reversal on appeal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We are unwilling to conclude that the change in IR associated with Dr. B's review of his original certification requires as a matter of law that the date of MMI also be changed, particularly, where, as here, Dr. B reviewed the pertinent medical records and continued to believe that the claimant reached MMI on the date originally certified. Texas Workers' Compensation Commission Appeal No. 982333, decided November 6, 1998. Similarly, we cannot agree that a record of continuing treatment after the date of MMI, as interpreted by Dr. CX, necessarily constituted the great weight of the other medical evidence contrary to Dr. B's report or that the decision of the hearing officer lacked sufficient evidentiary support in the record.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge