APPEAL NO. 991647

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 21, 1999. With respect to the issues before him, the hearing officer determined that: (1) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on September 1, 1997 (the statutory MMI date); (2) claimant's impairment rating (IR) is 26%; and (3) claimant had disability from February 1, 1996, to September 1, 1997. Claimant appeals only regarding the date of the designated doctor's reexamination and contends it should be January 4, 1999, rather than January 11, 1999. The file does not contain a response from respondent/cross-appellant (carrier). Carrier filed a cross-appeal complaining of the MMI, IR, and disability determinations. The file does not contain a response from claimant to the cross-appeal.

DECISION

We affirm as reformed.

Claimant contends the hearing officer erred in determining in Finding of Fact No. 8 that "[o]n January 11, 1999, [the designated doctor] re-examined and re-evaluated the claimant . . . ." Claimant contends that the date of the reexamination was January 4, 1999. The designated doctor's Report of Medical Evaluation (TWCC-69) does state that the date of the visit was January 4, 1999, and indicates that this was an error in the decision and order. We reform Finding of Fact No. 8 and substitute the date "January 4, 1999," for the stated date "January 11, 1999."

In its cross-appeal, carrier first contends that the hearing officer erred in determining that claimant reached MMI on the statutory MMI date, September 1, 1997. Carrier contends that the hearing officer should not have given presumptive weight to the designated doctor's MMI date in the second report, because the designated doctor was to reexamine claimant on January 4, 1999, to determine the IR only.

The report of a Texas Workers' Compensation Commission (Commission)-selected designated doctor is 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. *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. *See* Texas Workers' Compensation Commission Appeal No. 92166, decided June 8, 1992.

In this case, the designated doctor was selected on June 3, 1996, to certify both the MMI date and the IR and he did so in both his original report of June 25, 1996, and his second report of January 11, 1999. MMI was an issue at the benefit review conference (BRC) and at the CCH. After the first designated doctor report, a disability determination officer (DDO) wrote to the designated doctor on November 24, 1998, and told him that the

Commission had determined that the compensable injury includes cervical and urological problems. The DDO asked the designated doctor to reexamine claimant and "determine if this changes your opinion on the [IR]." The designated doctor reexamined claimant and changed both the MMI date and the IR. Because the designated doctor did not know that the cervical and urological conditions were part of the injury during his first examination in 1996, he could not have addressed the issue of MMI regarding those conditions. The designated doctor must decide the IR with reference to the MMI date. Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. Further, we do not agree that the designated doctor was instructed that he could not reconsider MMI when he reconsidered claimant's IR. We conclude that the hearing officer did not err in according presumptive weight to the designated doctor regarding both MMI and IR.

Carrier next contends that the hearing officer erred in determining that claimant's IR is 26%, in accordance with the second report of the designated doctor. Carrier asserts that the designated doctor's amended report was not done within a reasonable time or for a proper purpose. Carrier contends that the delay between the designated doctor's first and second reports was caused by claimant's own actions, in that claimant failed to provide new medical evidence regarding the urological and cervical conditions so that the designated doctor could rate them. Carrier asserts that the only possible valid reason the designated doctor could have had to amend his report was the fact that the previously undiagnosed bladder condition had not been rated. Carrier asserts that the designated doctor certified impairment regarding the cervical spine only because of the "persistence" of the claimant.

We have held that "[a] designated doctor may, with proper reason, and in a reasonable amount of time, amend his original report of MMI and IR, for various reasons which can include, but are not limited to, the need for surgery." *See* Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994. The report may be amended to consider the entire compensable injury or where there are incomplete or erroneous facts when the first report is rendered that are subsequently taken into account in amending the report. Texas Workers' Compensation Commission Appeal No. 941600, decided January 12, 1995; Texas Workers' Compensation Commission Appeal No. 94435, decided May 27, 1994, Whether a doctor has amended his report for a proper reason and within a reasonable amount of time is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996.

Claimant testified that she sustained a compensable injury to her back, legs, neck, and abdominal region when she slipped and fell at work. In his first report of June 25, 1996, the designated doctor, Dr. J, certified that claimant reached MMI on February 1, 1996, with an IR of 14%. In an accompanying report, the designated doctor stated under "impression," "lumbar degenerative disc disease," and "lumbar strain with mild lumbar radiculopathy." His 14% IR included diagnosis-based impairment for the lumbar spine under Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and impairment for loss of lumbar range of motion (ROM).

On November 20, 1996, which was before the September 1, 1997, statutory MMI date, Dr. G stated that he had conferred with claimant and that they would be proceeding with spinal surgery. Claimant went through the spinal surgery process and underwent lumbar laminectomy, diskectomy, and fusion surgery on March 11, 1997. In June 1997, a CCH was held regarding whether claimant's cervical and urological problems were part of the compensable injury and also whether carrier waived the right to contest the compensability of these conditions. The hearing officer determined that carrier waived the right to contest the compensability of these conditions and on August 18, 1997, the Appeals Panel affirmed that decision. Thereafter, on October 31, 1997, and again on November 1, 1998, claimant's attorney wrote to the Commission requesting that the designated doctor reevaluate claimant because of these two conditions that had been "added" to the compensable injury. A January 14, 1998, Dispute Resolution Information System (DRIS) note indicates that the insurance carrier did not agree regarding the sending of a letter to the designated doctor, and that a BRC was scheduled. A DRIS entry indicates that a BRC was held February 5, 1998, and that the recommendation was to send new medical evidence to the designated doctor and to ask him to consider the new medical evidence. A February 17, 1998, operative report states that claimant underwent testing and that she was diagnosed with bladder prolapse and urinary incontinence. In February and March 1998, there were DRIS entries regarding the fact that claimant's attorney had not obtained all the new medical evidence, presumably regarding the bladder and cervical conditions, which were to be sent to the designated doctor. On May 13, 1998, claimant underwent bladder suspension surgery and also the removal of a battery spinal stimulator. An October 1998 DRIS entry states that claimant's attorney still had not obtained all of claimant's medical records that were to be sent to the designated doctor. A December 3, 1998, DRIS entry states that the attorney for carrier asked the Commission to cancel the claimant's December 7, 1998, appointment for re-examination by the designated doctor, and that the attorney asked for another BRC. Claimant was reexamined by the designated doctor on January 4, 1999, and the designated doctor's second report is dated January 11, 1999.

In his amended report of January 11, 1999, the designated doctor stated that he had been asked to reexamine claimant. The designated doctor stated that a lot of changes had taken place regarding claimant's care and noted that claimant's urological and cervical conditions were now part of the compensable injury. He certified a 26% IR, which included impairment for loss of cervical ROM, diagnosis-based impairment for the cervical spine, impairment for surgically-treated disc lesions of the lumbar spine with one additional level, loss of lumbar ROM, and bladder impairment.

The designated doctor's second report was dated January 11, 1999, which was two years and seven months after his first report. However, after the designated doctor's first report, claimant underwent spinal surgery, which had been contemplated before the date of statutory MMI. Further, after the designated doctor's first report, it was determined that, due to carrier waiver, claimant's compensable injury included a cervical and urological condition, neither of which had been rated by the designated doctor in his first report. Claimant did not have her bladder and spinal surgeries until after the designated doctor's first report. The delay in obtaining an amended report from the designated doctor can be

attributed to the factors listed above. Within 14 months of the designated doctor's first report, and two months after the Appeals Panel affirmed the decision regarding the carrier waiver and the urological and cervical conditions, claimant's attorney was requesting that the designated doctor reexamine the claimant. Further, claimant's attorney was pursuing extent of injury regarding these conditions beginning with the request for the April 9, 1997, BRC regarding carrier waiver and extent of injury. Given the ongoing dispute resolution regarding what is included in the compensable injury, the fact that part of the injury had not been rated by the designated doctor, the ongoing treatment which did not begin for the bladder condition until 1997, and the fact that claimant's spinal surgery was contemplated at the time of statutory MMI, we conclude that the hearing officer did not err in determining that the designated doctor amended his report within a reasonable time and for a proper purpose. Two years and seven months is a considerable delay; however, given the facts of this case, we perceive no error.

To the extent that carrier complains that the great weight of the other medical evidence is contrary to the designated doctor's report because he included impairment for claimant's cervical condition, we would first note that the Commission has determined that the cervical condition is to be considered part of the compensable injury. A review of the medical evidence shows that claimant complained of cervical pain to Dr. G, Dr. A, Dr. P, and Dr. M. In a September 30, 1998, report, Dr. G stated that claimant had seen Dr. A regarding an IR and that her IR included impairment for her cervical injury. In his January 11, 1999, report, the designated doctor noted that claimant said her neck condition had worsened over the years, that her neck cracked when she turned it, and that her cervical ROM was somewhat limited. After reviewing the medical evidence and the designated doctor's report, we conclude that the hearing officer did not err in determining that the great weight of the other medical evidence is not contrary to the designated doctor's report.

Carrier contends the hearing officer erred in determining that claimant had disability from February 1, 1996, to September 1, 1997. Carrier's argument in its brief actually concerns the MMI date and the payment of temporary income benefits (TIBS), which is a different concept. Carrier asserts that it should have to pay TIBS only through February 1, 1996, which it contends is the correct MMI date as originally determined by the designated doctor. Carrier does not make any specific assertion regarding whether claimant was unable because of the compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The concepts of disability and TIBS entitlement are distinct. We note that the hearing officer apparently allowed the concept of TIBS entitlement to drive the disability determination in this case in that he found no period of disability after the MMI date that he determined. TIBS payments do cease once MMI is reached. *See* Sections 408.101 and 408.102. With an affirmed date of MMI occurring on September 1, 1997, TIBS would no longer be payable. We note that that does not mean disability, as defined in the 1989 Act, cannot exist. *See* Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. However, given the fact that carrier does not have any specific complaints regarding the disability determination, we affirm that determination.

As reformed, we affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge