

APPEAL NO. 991856

Following a contested case hearing held on August 3, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by concluding that the Texas Workers' Compensation Commission (Commission) "did not abuse its discretion in denying [Dr. VB] as an alternate doctor." The appellant (claimant) has requested our review of this conclusion and one of the factual findings, asserting that while she does not contend that the Commission abused its discretion in denying her request to change treating doctors from Dr. S to Dr. VB, she nonetheless became dissatisfied with Dr. S's treatment and believes "a substantial conflict existed" between them. The respondent (carrier) urges the sufficiency of the evidence to support the challenged finding and conclusion.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury. Claimant indicated that she was first seen for her bilateral carpal tunnel syndrome (CTS) injury by Dr. RJB who said she needed surgical treatment and that she requested to change treating doctors to Dr. S, an orthopedic surgeon. Claimant's Employee's Request to Change Treating Doctors (TWCC-53) dated "3-2-98" requesting the change from Dr. RJB to Dr. S was approved by the Commission on "3/5/98." This TWCC-53 stated as claimant's reason for requesting the change that Dr. RJB told her both times she saw him that if he could not perform surgery, he had nothing else to offer her; that she is in pain and needs some type of treatment besides surgery; and that Dr. RJB was rude to her.

Also in evidence is claimant's TWCC-53 dated "7/16/98" requesting to change treating doctors from Dr. S to Dr. H for the reasons that she can no longer treat with Dr. S because they have "had some conflicts" and the doctor-patient relationship has "become unprofessional"; that she needs medical treatment; and that she is "not happy" with Dr. S. The Commission denied this request on "8-1-98," stating on the form that claimant already had her choice of alternate treating doctor and her reason for the change did not qualify as an exception.

Claimant testified that after receiving conservative treatment from Dr. S, he began talking about surgery which she, apparently, did not want; that she was subsequently seen by a designated doctor, Dr. R; and that she indicated to Dr. R that she was then receptive to surgery. Dr. R signed a Report of Medical Evaluation (TWCC-69) on "12/7/98" certifying, as a designated doctor, that claimant had not reached maximum medical improvement (MMI). In his accompanying narrative report, Dr. R summarized claimant's medical records and noted that on April 21, 1997, claimant stated that she was going to quit occupational therapy (after three weeks) "because it is too inconvenient"; that Dr. RJB advised claimant on February 4, 1998, that prolonged compression of the median nerve without surgical relief may make eventual surgical relief unsuccessful due to chronic damage; and that Dr.

RJB reviewed the pros and cons with claimant and would remain at her disposal should she decide on operative or nonoperative therapy. Dr. R further noted that a May 14, 1998, record, possibly that of Dr. S, stated that since claimant did not want surgery, she had reached MMI and was given a 14% impairment rating for her bilateral condition. Dr. R concluded that claimant has had some waxing and waning of symptoms "but overall with conservative therapy, she has actually had worsening of her symptoms"; that she has been treated for CTS and has been advised to have surgery but has refused and has had worsening; that she had also previously refused surgery for a left rotator cuff injury; and that she "now comes with a change of heart and a desire to attempt surgery to improve her condition."

Claimant further testified that on some occasion when she saw Dr. S, she inquired about a laser light surgery procedure for her hands which she had seen on TV and said that Dr. S became upset, "blew his top," and "disrespected" her as a patient. Claimant also stated that Dr. S referred her to Dr. RGB, apparently a neurosurgeon, with whom he shared offices; that Dr. RGB examined her hands, reviewed her records, and told her she had been neglected and needed some type of therapy; and that she heard Dr. S and Dr. RGB talking in the hall and Dr. S saying, "No, she went to the designated doctor and wanted surgery and that's what she's going to get." Claimant further stated that she changed her mind about going through with surgery after seeing Dr. RGB and being told she needed some type of therapy; that Dr. S advised her of a directory she could consult with the names of approximately 20 hand specialists and of two hospitals staffed with hand specialists; that she is not saying she does not want surgery; and that Dr. VB, a chiropractor who does not perform surgery, can refer her to another doctor should she require surgery.

Dr. RGB's initial evaluation of January 5, 1999, states that claimant had a positive EMG; that she has failed conservative treatment and he believes the only thing left is for her to consider surgical intervention; that she wants to hold off for another month; that he explained to her the risk of permanent damage if her condition is left unchecked; and that he increased her Motrin, will reevaluate her in two or three weeks, and if she is not improved, he will set her up for surgery.

Also in evidence is claimant's TWCC-53 dated "2/23/99" requesting to change from Dr. S to Dr. VB for the reasons that "an incurable conflict" has come to exist between her and Dr. S; that "due to this conflict [her] medical treatment has suffered"; that she had another injury on (alleged date of injury), for which Dr. S was also her doctor and Dr. S "allowed her to change" to Dr. VB. The Commission denied this request on "7/7/99," stating that Dr. S's office advised that a personal conflict between claimant and Dr. S does not exist.

Section 408.022(b) provided that if an employee is dissatisfied with the initial choice of a doctor, the employee may notify the Commission and request authority to select an alternate doctor. Section 408.022(c) provides that the Commission shall prescribe criteria to be used by the Commission in granting the employee authority to select an alternate

doctor which may include: (1) whether treatment by the current doctor is medically inappropriate; (2) the professional reputation of the doctor; (3) whether the employee is receiving appropriate medical care to reach MMI; and (4) whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(e) (Rule 126.9(e)) provides that the reasons for approving a change in treating doctor include but are not limited to (1) the reasons listed in Article 8308-4.63(d) (now Section 408.022(c)) and (2) the selected doctor chooses not to be responsible for coordinating the injured employee's health care as described in Rule 133.3.

The hearing officer found that claimant is dissatisfied with Dr. S as her treating doctor; that Dr. S wishes to continue as her treating doctor; that Dr. S's care has not been inappropriate; that because Dr. S wishes to continue as the treating doctor, the doctor-patient relationship is not jeopardized or impaired; and that there is no sufficient basis to change to Dr. VB as the treating doctor. Claimant specifically challenges the next to last above stated finding.

Notwithstanding claimant's assertion that she does not contend that the Commission abused its discretion in denying her request to change to Dr. VB, the Appeals Panel reviews the issue of whether the Commission properly approved or denied a request to change treating doctors under an abuse of discretion standard, that is, whether the Commission acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 941281, decided November 4, 1994. Further, the issue as to whether the Commission abused its discretion must be determined based on the information known to the Commission official acting on the request at the time the decision was made. Texas Workers' Compensation Commission Appeal No. 990328, decided April 5, 1999. Claimant does not contend that in reaching his decision the hearing officer relied on evidence not known to the Commission when the decision was made to deny her request.

At the time of acting on her request to change to Dr. VB, the Commission knew from the TWCC-53 that claimant's previous request to change from Dr. RJB to Dr. S had been approved and from that form, and from Dr. R's report, which the Commission presumably had given that he was a designated doctor, that there was a medical treatment issue with claimant concerning the necessity for and her willingness to undergo surgical treatment; that claimant's request to change from Dr. S to Dr. H had been denied; that Dr. VB is a chiropractor; and that Dr. S communicated through his office that no conflict existed with claimant. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and as the trier of fact resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We cannot say, given so much of the evidence as was known to the Commission at the time, that the hearing officer erred in determining that the Commission did not abuse its discretion in denying claimant's request to change treating doctors to Dr. VB. Compare Texas Workers' Compensation Commission Appeal No. 991417, decided August 19, 1999, where the Appeals Panel

reversed and rendered a decision that the Commission had abused its discretion in denying the employee's request to change from her current treating doctor, a chiropractor, back to his former treating doctor, the surgeon who operated on his spine.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge