APPEAL NO. 991932

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 August 6, 1999. She (the hearing officer) determined that the appellant (claimant) reached maximum medical improvement (MMI) on January 30, 1998, with an impairment rating (IR) of 14% as certified by Dr. S, a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals these determinations, contending that the great weight of the other medical evidence, specifically the opinion of Dr. R, D.C., then his treating doctor, was to the contrary, and arguing that certain evidence should not have been admitted. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

We address the evidentiary matter first. At the CCH, the claimant offered eight exhibits, which were admitted with the exception of part of Claimant's Exhibit No. 8. The carrier stated that its exhibits duplicated the claimant's exhibits and for this reason did not again offer them into evidence. In his appeal, the claimant seeks the exclusion of four of the exhibits he offered into evidence, presumably seeking only to include evidence he feels is most favorable to his position. Because this evidence was admitted on his motion and at his urging, we decline to find error in its admission.

The claimant sustained a compensable low back injury on _____, as a result of which he underwent surgery in February 1997. On February 6, 1998, Dr. S, the designated doctor, completed a Report of Medical Evaluation (TWCC-69) based on an examination of January 30, 1998, and in which he certified January 30, 1998, as the date of MMI and assigned a 14% IR. The elements of this IR consisted of 11% for a specific disorder of the lumbar spine under Table 49, Part II.F 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 three percent for loss of lateral flexion. He invalidated lumbar flexion and extension. He gave no IR for sensory or motor impairment. In an accompanying report, Dr. S commented that the sensory examination was within normal limits and that the strength test was normal bilaterally.

On February 24, 1998, Dr. R examined the claimant. In a TWCC-69, he assigned a 23% IR consisting of 12% for a specific lumbar disorder under Table 49, Part IV.C of the AMA Guides; 10% for loss of lumbar range of motion; and three percent for motor/sensory loss of the lower extremity. On December 15, 1998, Dr. R wrote the Commission "disputing" Dr. S's report. In this letter, he challenged Dr. S's invalidation of flexion and extension, noted that the claimant displayed significant strength deficits, and asserted that the correct category under Table 49 was Part IV, not Part II. On December 18, 1998, the

Commission forwarded a copy of Dr. R's letter to Dr. S and asked for comments. On January 7, 1999, Dr. S responded that he reviewed the claimant's file, did not believe repeat testing was indicated, and declined to amend his report.

Sections 408.122(c) and 408.125(e) provide that the report of a Commission-selected designated doctor shall have presumptive weight and that the Commission shall base its determinations of MMI and IR on this report unless the great weight of the other medical evidence is to the contrary. We have pointed out that "great weight" means more than a mere balancing or a simple preponderance of the evidence and that only medical evidence, not lay opinion, can be weighed against the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Whether the great weight of the other medical evidence is contrary to the report of the designated doctor is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93469, decided July 23, 1993. This determination is, in turn, subject to reversal on appeal only if so contrary to 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). The hearing officer in this case found that the great weight of the other medical evidence was not contrary to Dr. S's report. The claimant appeals this determination for essentially three reasons: first, because he continued to receive medical treatment from Dr. R after Dr. S's certification and, thus, he was not at MMI as of Dr. S's certification; second, that the carrier failed to provide Dr. S all the medical records as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(j) (Rule 130.6(j)); and, third, that Dr. S failed to correctly perform neurological testing.

Section 401.011(30), for purposes of this case, defines MMI as the earliest 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. *See also* Rule 130.2(a). We have noted that the achievement of MMI does not mean that a claimant has reached a pain-free status or that further medical treatment will not be necessary. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Whether the claimant reached MMI as of the date of Dr. S's examination was a medical question. Both Dr. S and Dr. R found the date of MMI to be the date of their examinations, a common practice. The hearing officer found that the different opinion of Dr. R regarding the date of MMI did not rise to the level of the great weight of the other medical evidence.

The claimant also argues on appeal that Dr. S did not have all his medical records from Dr. R. Rule 130.6(j) provides that the designated doctor "must evaluate the complete clinical and non-clinical history of the medical condition(s)." In his report, Dr. S commented that he reviewed the claimant's progress notes and test reports. At the CCH, the claimant testified that, to the best of his knowledge, Dr. S had all his medical records. In Texas Workers' Compensation Commission Appeal No. 991702, decided September 24, 1999, we wrote that this rule and Rule 130.6(h) do not require the designated doctor to look at literally "all" records. It was incumbent upon the claimant to identify with supporting medical

evidence what record was essential but not made available to Dr. S. He contends that Dr. S never saw Dr. R's report of the February 24, 1998, visit. However, the attachment to the Commission's letter to Dr. S was Dr. R's critique of Dr. S's report. The hearing officer could conclude that the critique offered virtually the same information as contained in the actual report of the February 24, 1998, visit.

Finally, the claimant argues that Dr. S's examination was brief (no more than 15 to 20 minutes), that the instruments used by Dr. S were not sensitive enough, and that Dr. S was wrong in concluding there was no sensory or strength loss. The time a claimant spends with a designated doctor is typically much less than the time spent during a course of treatment by a treating doctor. This disparity does not in itself confer on the opinion of the treating doctor the great weight needed to overcome the report of the designated doctor because the purposes of the examinations are different. *See* Texas Workers' Compensation Commission Appeal No. 93674, decided September 17, 1993. Similarly, the claimant's opinion about the quality of Dr. S's testing and his preference for Dr. R's testing was not medical evidence.

We will reverse a factual determination of a hearing officer only if that determination 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). The hearing officer considered the evidence and concluded that the treating doctor's opinion was simply different from Dr. S's and did not constitute the great weight of the other medical evidence contrary to Dr. S's report. We find the evidence sufficient to support this determination.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge