

## APPEAL NO. 991994

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 August 17, 1999. He (hearing officer) determined that the Texas Workers' Compensation Commission (Commission) abused its discretion in approving Dr. T as an alternate doctor, and that appellant (claimant) did not have disability beginning on March 22, 1999. Claimant appeals these determinations, apparently on sufficiency grounds. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order.

### DECISION

We affirm in part and reverse and remand in part.

Claimant contends the hearing officer erred in determining that the Commission abused its discretion in approving a change of treating doctors. Section 408.022(b) provides, in part, that if an employee is dissatisfied with the initial choice of a doctor from the Commission's list, the employee may notify the Commission and request authority to select an alternate doctor. Section 408.022(c) provides that the Commission shall prescribe the criteria to be used in granting the employee authority to select an alternate doctor and that the criteria may include: (1) whether treatment by the current treating doctor is medically inappropriate, (2) the professional reputation of the doctor; (3) whether the employee is receiving appropriate medical care to reach maximum medical improvement; and (4) whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired. A request for a change of doctor will not be approved if it is made to secure a new impairment rating or medical report. Section 408.022(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(e) (Rule 126.9(e)) provides that reasons for approving a change in treating doctor include but are not limited to the reasons listed in Section 408.022. A reason to change treating doctors may also be that the selected doctor chooses not to be responsible for coordinating the injured employee's health care. Rule 126.9(e). The list of criteria in Section 408.022(c) regarding proper reasons to request a change of treating doctor is not exhaustive.

The Appeals Panel applies an abuse of discretion standard in reviewing cases regarding requests to change treating doctors. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996. In determining whether the hearing officer has abused his discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeal No. 951943; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In reviewing the Commission's actions in approving a request to change treating doctors, the hearing officer also looks to see whether the Commission has abused its discretion.

Claimant testified that she was working for (employer) when she slipped and fell on \_\_\_\_\_, injuring her knee. Medical records indicate that claimant was helping a patient in the shower when she slipped and fell. Claimant said she first treated at the hospital, and

then she saw Dr. G for follow-up care. Claimant said that around January 1999 she had changed treating doctors to Dr. B, who was recommended by carrier.

A March 15, 1999, Employee's Request to Change Treating Doctors (TWCC-53) states that claimant wanted to change treating doctors from Dr. B to Dr. T and stated under "reason," "[c]onfidence lost in [doctor]. Still in severe pain & swelling, leg giving out in knee section." The request was granted and signed by a Commission official action officer on March 29, 1999. A review of the medical records in the file indicates that an Initial Medical Report (TWCC-61) was filed by Dr. G on September 28, 1998. The other documents in the record do not indicate that they were received by the Commission.

From the decision and order, it appears that the hearing officer considered information that was not available to the Commission's official action officer when the request to change treating doctors was approved by the Commission. We reverse Finding of Fact No. 2 and Conclusion of Law No. 3. We remand for the hearing officer to: (1) consider information available to the Commission employee on March 29, 1999, when she approved the request to change treating doctors and (2) to make a finding or findings of fact and a conclusion of law to resolve the disputed issue of whether the Commission abused its discretion.

Claimant next contends the hearing officer erred in determining that she did not have disability beginning on March 22, 1999. Claimant asserts that she is still in need of medical treatment and that the medical evidence from Dr. T supports her disability claim. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that Dr. B performed arthroscopic surgery, that he found only arthritis, and that she was waiting for her knee to get well so she could return to work. Claimant said she continued to have redness and swelling, and limped, and that Dr. B could not explain what was wrong with her. In a February 24, 1999, report, Dr. B stated that claimant did not have edema, that she had a normal gait, that there was no effusion, that she remained released to light duty, and that he intended to release her to full duty in two weeks' time. In a March 1, 1999, report, Dr. M, who offices with Dr. B, stated that claimant claimed that she was unable to work but that he believes there is a "gross discrepancy" between her complaints and her "very limited physical findings."

The hearing officer stated that there was no objective evidence of continuing injury after March 1, 1999, that Dr. B had released claimant to full duty on March 22, 1999, and that "claimant's testimony that she has never been able to return to work after her surgery

is not credible." He noted that Dr. T's initial medical report was in evidence, but that it did not provide any additional testing. We have reviewed the hearing officer's disability determination and we conclude that it is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm that part of the hearing officer's decision that determines that claimant did not have disability after March 22, 1999. We reverse that part of the hearing officer's decision and order that determines that the Commission abused its discretion in approving a change of treating doctor and remand for the hearing officer to reconsider this issue consistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

---

Judy Stephens  
Appeals Judge

CONCUR:

---

Elaine M. Chaney  
Appeals Judge

CONCUR IN PART AND DISSENT IN PART:

I concur in the affirmance of the hearing officer's decision on the disability issue. I respectfully dissent in the decision to reverse the hearing officer's decision on the issue regarding change of treating doctors. Section 408.022(d) provides that a change of doctors may not be made to secure a new impairment rating or medical report. The hearing officer found that claimant's request to change treating doctors to Dr. T was made for the purpose of securing a new medical report. It is clear that by February 24, 1999, Dr. B was intending to release claimant to full-duty work in several weeks and that he explained that to claimant.

Claimant then changed treating doctors to Dr. T and was kept off work. There is sufficient evidence to support the hearing officer's decision on the issue of change of treating doctors and I do not believe the hearing officer abused his discretion in deciding against claimant on that issue.

---

Robert W. Potts  
Appeals Judge