APPEAL NO. 992058

This appeal is brought 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 4, 1999. The record was held open so that the respondent (claimant) could be reexamined by Dr. C, the Texas Workers' Compensation Commission (Commission)-selected designated doctor; another report could be obtained from Dr. C; and the appellant (self-insured) and the claimant could be given the opportunity to comment on that report from Dr. C. The hearing officer determined that on April 25, 1996, Dr. C certified that the claimant reached maximum medical improvement (MMI) on January 18, 1996, with a zero percent impairment rating (IR); that on July 13, 1999, Dr. C certified that the claimant reached MMI on December 2, 1997, with an 11% IR; that the report of Dr. C dated July 13, 1999, is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to that report; and that the claimant reached MMI on December 2, 1997, with an 11% IR. The hearing officer also determined that from January 18, 1996, until at least December 2, 1997, the claimant's compensable injury of _____, prevented her from earning wages equivalent to her preinjury wage and that she had disability from January 18, 1996, until at least December 2, 1997. The self-insured appealed; urged that Dr. C did not amend his report for a proper reason or in a reasonable time and that his amended report is not entitled to presumptive weight; contended that the determination that the claimant had disability from January 18, 1996, until at least December 2, 1997, is so against the great weight and preponderance of the evidence as to be clearly wrong; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to income benefits. A response from the claimant has not been received.

DECISION

We affirm in part and reverse and remand in part.

The claimant testified that she worked as a physical therapy aide; that on _____, she hurt her neck and low back when she and others were placing a patient in a bed; that she went home; that she returned to the emergency room at the hospital where she worked; that she was treated by Dr. CS; that Dr. CS referred her to Dr. L; that she was referred to Dr. O; and that she was examined by Dr. C and he assigned a zero percent IR. She said that she saw Dr. G; that Dr. G had tests performed and said she had a herniated disc in her neck; that Dr. G has recommended surgery on her neck; that the Commission has approved the surgery; and that she is still deciding whether she will have the surgery. The claimant said that she has not worked since the lifting incident and that she was not able to work because of her injuries. The claimant's ten-year-old daughter testified that since her mother was hurt at work she has a difficult time caring for herself.

In a Report of Medical Evaluation (TWCC-69) dated April 25, 1996, Dr. C certified that the claimant reached MMI on January 18, 1996, with a zero percent IR. In a narrative

attached to the TWCC-69 Dr. C said the claimant was seen by Dr. CS, Dr. L, Dr. S, Dr. M, and Dr. Z; that EMG of both legs done by Dr. M were normal; that a lumbar myelogram was normal; that an MRI of the lumbar spine showed a mild disc bulge at L5-S1; that an MRI of the thoracic spine was normal; that an MRI of the cervical spine showed a general bulge at C5-6 which was apparently not into the neural foramen; that Dr. L thought she had a lumbosacral strain; that Dr. CS admitted her to the hospital for an acute lumbar strain; that Dr. Z saw the claimant on January 18, 1996, and saw no indication of radiculopathy or need for surgery; that he, Dr. C, examined the claimant; that his impression was that the claimant "has had a resolving cervical and lumbar strain"; that he did not think she had a symptomatic disc in either the cervical or lumbar region; that she could return to light duty as recommended by Dr. CS; and that she reached MMI on January 18, 1996, with a zero percent IR.

In a report dated December 4, 1997, Dr. G said that the claimant's condition has deteriorated over the years, that she needs additional testing, that she is a candidate for invasive pain management, and that his impression is cervical herniated nucleus pulposus (HNP) and lumbar HNP. On June 22, 1998, Dr. G reported that an MRI of the lumbar spine performed on June 15, 1998, revealed diffuse dislocation of the disc at L5-S1, a 3-4mm herniation and an anterior bulge at L5-S1. In a report dated July 9, 1998, Dr. G said that cervical myelogram with discogram confirmed herniated discs at C4-5, C5-6, and C6-7 and relative central spinal stenosis; that the claimant is a candidate for anterior cervical discectomy and fusion at C4-5, C5-6, and C6-7; and that she is a potential candidate for a global fusion at L5-S1. On November 5, 1998, Dr. G reported that the claimant was approved to undergo an anterior cervical discectomy and fusion of her cervical spine. In a report dated January 21, 1999, Dr. G said that the claimant was approved to undergo both cervical and lumbar spine surgery. On February 24, 1999, Dr. G reported that he had requested the claimant be seen by a rheumatologist because of a diagnosis of fibromyalgia. In a TWCC-69 dated May 19, 1999, Dr. G assigned 19% impairment for the cervical spine and 12% impairment for the lumbar spine and a 29% IR.

On May 25, 1999, the hearing officer sent Dr. C a letter and unspecified documents and asked him if the information in those documents might alter his opinion concerning MMI and IR. In a letter dated June 11, 1999, Dr. C said that he could not amend the percentage of impairment because he had not physically tested the claimant since he saw her on April 25, 1996. Apparently, there was additional communication with or correspondence to Dr. C. In a TWCC-69 dated July 13, 1999, Dr. C certified that the claimant reached MMI on December 2, 1997, with an 11% IR, consisting of six percent for a specific disorder of the cervical spine and five percent for loss of cervical range of motion.

In a discussion in her Decision and Order, the hearing officer wrote:

> Insofar as Claimant's [MMI] date and [IR] are concerned, the Hearing Officer notes that since the Commission appointed [Dr. C] to act as the designated doctor in this case, his opinion is entitled to presumptive weight, and must be adopted by the Commission unless it has been overcome by the great weight

> of contrary medical evidence. However, since [Dr. C] evaluated Claimant on two occasions, and rendered two corresponding reports on dates approximately three years apart, some discussion of which of his reports is entitled to presumptive weight is warranted in this case. In this regard, the Hearing Officer notes that an injured worker's [IR] need not constitute a snapshot of the injured worker's condition as of [MMI] date, since an [IR] may be subject to revision, provided that the injured worker properly preserved the matter for presentation to the appropriate administrative body or court of competent jurisdiction [Footnote 1]. Since, in this case, Claimant appears to have properly preserved her complaint regarding her [MMI] date and [IR] Certification, it appears appropriate to grant presumptive weight to [Dr. C's] 1999 report, as opposed to his 1996 report, since the later certification allows for the apparent deterioration of Claimant's physical condition between 1996 and 1999.
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> *[Footnote 1] See, Lumbermens Mutual casualty Company v Manasco*, 971 S.W.2d 60 (Tex. 1998), and Section 410.307 of the [1989] Act.

Section 410.307 of the Act appears in Subchapter G, Judicial Review of Issues Regarding Compensability or Income or Death Benefits. Section 410.307 is entitled Substantial Change of Condition and addresses what a court may or may not do. In Manasco, the hearing officer determined that the claimant had reached MMI with a seven percent IR as assigned by the Commission-selected designated doctor. The claimant did not appeal the hearing officer's decision. Three months after the decision of the hearing officer became final, the claimant's treating doctor recommended surgery. At a later hearing, the hearing officer determined that the prior determination of the hearing officer concerning IR had become final and could not be reopened. The Appeals Panel affirmed the decision of the hearing officer and the claimant sought judicial review of the decision of the Appeals Panel. The Supreme Court wrote:

> Based on the wording and placement of section 410.307 in the statutory framework, it is clear that section 410.307 is a rule of evidence that applies only in the judicial review of a properly appealed [IR] decision. Section 410.307 is in the subchapter governing judicial review and is placed immediately after the provision governing the general rules of evidence for judicial review. Section 410.307 is an exception to the general rules of evidence in section 410.306, which states that "evidence shall be adduced as in other civil trials." Tex. Lab. Code § 410.306(a). Section 410.306 provides that the evidence is limited to that presented to the Commission, "*except as provided in Section 410.307*." *Id. §* 410.306(c) (emphasis added). Under section 410.307, the evidence on judicial review is not limited to that presented to the Commission if the court, after a hearing, finds a substantial change of condition. *Id*. § 410.307(a).

> The review provided by section 410.307 is available only to those parties who have already appealed the contested case hearing officer's decision to an appeals panel and wish to appeal the panel's decision to a court.
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> If the Legislature had wanted to provide an open-ended means to challenge an [IR], it could have done so; instead, the Legislature provided a narrow exception to allow a claimant to present evidence of substantial change of condition that is discovered for the first time during the appeal process. Courts should not interpret a statute to provide broader rights than the Legislature intended.

In its appeal, the self-insured cites several Appeals Panel decisions concerning a designated doctor amending a report for a proper reason and within a reasonable time. The hearing officer did not make any findings of fact or conclusions of law concerning either an amendment for a proper reason or an amendment within a reasonable time. We do not consider Appeals Panel decisions concerning a designated doctor amending a report for a proper reason and within a reasonable time to be inconsistent with the holding or dicta in Manasco, *supra*. We reverse the determinations that Dr. C's report dated July 13, 1999, is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to that report; and that the claimant reached MMI on December 2, 1997, with an 11% IR. We remand for the hearing officer to make determinations concerning whether Dr. C amended his report for a proper reason and within a reasonable time, which report of Dr. C is entitled to presumptive weight, whether the great weight of the other medical evidence is contrary to that report, and the date the claimant reached MMI and her IR.

Concerning the determination concerning disability, the hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer's determination concerning disability is not so against the great weight and preponderance of the evidence

as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Disability alone does not determine entitlement to temporary income benefits. Section 408.101.

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.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge