APPEAL NO. 000290

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 December 20, 1999. The issues at the CCH were whether the appellant (claimant) reached maximum medical improvement (MMI); what is the claimant's impairment rating (IR); and whether the claimant had disability after December 17, 1998. The hearing officer determined that the claimant reached MMI on December 17, 1998, with a five percent IR, as assessed by the designated doctor; and that the claimant did not sustain disability after December 17, 1998. The claimant appeals, urging that she has not reached MMI or has reached MMI on September 11, 1999, based on the amended report of the designated doctor, Dr. F; that her IR is four percent based on the report of her treating doctor, Dr. W; and that she had disability after December 17, 1998. The respondent (carrier) replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Reversed and rendered.

The claimant has attached to her appeal documents, medical records and forms not offered or admitted into evidence at the CCH. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the documents that the claimant has attached to her appeal, but not in evidence, will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992.

The claimant sustained a compensable injury on _____, when she fractured her right ankle as a result of a slip-and-fall incident at work. On January 9, 1998, Dr. W performed surgery which consisted of an open reduction and internal fixation of the fracture. On November 5, 1998, the carrier had the claimant examined by Dr. R, who certified that the claimant reached MMI on November 5, 1998, with a seven percent IR. Dr. R's report states "I think that the planned removal of the screws is in order but I think this represents basically symptomatic treatment and probably will not materially effect range of motion [ROM], which is her entire cause of impairment at this time." The claimant disputed the report of Dr. R and the Texas Workers' Compensation Commission (Commission) appointed Dr. F. Dr. F examined the claimant on December 17, 1998, and certified that the claimant reached MMI on December 17, 1998, with a five percent IR.

Dr. W's records of December 2, 1998, state that the claimant continued to have swelling and tenderness around the medical screws and hardware and had not improved since October 14, 1998. Dr. W opined that the pain and swelling would decrease upon the removal of the screws and hardware and that the claimant was not at MMI. The medical records of Dr. W in January 1999, indicate that the claimant's pain and swelling had improved, that he was not ready to remove the metal, that the claimant would not reach MMI until she had the metal removed, and that the claimant may not require metal removal

if she continued to improve. On February 16, 1999, the Commission sent Dr. F a letter of clarification and enclosed Dr. W's January 13, 1998, report. Dr. F responded that the information provided did not change his mind that the claimant reached MMI, that the claimant was 13 months post-surgery, and that the claimant had plateaued with her recovery.

In April 1999, the claimant returned to Dr. W with complaints of pain and swelling. Dr. W noted that the claimant had swelling over the medial malleolus, was tender over the screws, and he decided to remove the screws. On July 13, 1999, the claimant had surgery to remove the hardware from her ankle. On July 23, 1999, Dr. W stated that the claimant had a dramatic decrease in pain following the removal of the metal. On August 19, 1999, the Commission sent Dr. F a letter of clarification and additional medical records concerning the surgery on July 13, 1999. Dr. F subsequently reexamined the claimant on September 11, 1999, and certified that the claimant reached MMI on September 11, 1999, with a five percent IR. Dr. F opined that the claimant had made significant progress since he last examined her, and stated:

> Patient had metal removal on 7-13-99. This has significantly decreased her right foot and ankle pain. She is currently feeling much better. Examination: her [ROM] has improved.

On November 3, 1999, Dr. W certified that the claimant reached MMI on November 3, 1999, with a four percent IR.

Section 408.122(c) and Section 408.125(e) provide in part that the report of the designated doctor has presumptive weight, and the Commission shall base its determination of MMI and IR on the report unless the great weight of the other medical evidence is to the contrary. We have held that a designated doctor may, with proper reason, and in a reasonable amount of time, amend the 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. We have also recognized that a designated doctor may amend his report after considering additional information provided that the additional information is not immaterial or irrelevant. Texas Workers' Compensation Commission Appeal No. 941600, decided January 12, 1995. The Appeals Panel has stated that it is more reasonable to consider and accept amendments to an IR before statutory MMI has occurred. *See* Texas Workers' Compensation Commission Appeal No. 970653, decided May 28, 1997; Texas Workers' Compensation Commission Appeal No. 981587, decided August 28, 1998 (Unpublished). In this case, the claimant's date of injury was _____. Without knowing the specific date that the claimant began to lose time, the earliest possible date of statutory MMI would be roughly two years after _____. *See* Section 401.011(30).

Dr. F's amendment of the claimant's date of MMI occurred prior to the date of statutory MMI, and two months after the claimant's additional surgery. The claimant argues that she has not reached MMI or has reached MMI on September 11, 1999, per Dr. F's

amended report. The carrier argues that Dr. F's amended date of MMI should not be adopted by the Commission because there was very little change in the claimant's ROM measurements, indicating that the claimant was at MMI when he initially assigned a five percent IR. Without explanation, the hearing officer gave presumptive weight to the designated doctor's original report and found that the great weight of the other medical evidence is not contrary to the designated doctor's original report certifying that the claimant reached MMI on December 17, 1998.

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 overwhelming 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.

The Appeals Panel addressed a similar situation in Texas Workers' Compensation Commission Appeal No. 962197, decided December 16, 1996. In Appeal No. 962197, the claimant was examined by a designated doctor who certified that the claimant reached MMI on May 13, 1996, with a 14% IR, and indicated in a narrative report that he arrived at the MMI date following "an inability to determine MMI through the evaluation of records." At the request of the carrier, the Commission sought clarification from the designated doctor about his date of MMI. The designated doctor subsequently changed his date of MMI to March 14, 1996, confirmed his 14% IR, and explained that his decision to change the date of MMI was based on no significant change or improvement after March 14, 1996. The hearing officer determined that the designated doctor's original report indicating a May 13, 1996, MMI date was entitled to presumptive weight and determined that the claimant reached MMI on May 13, 1996. The Appeals Panel reversed the hearing officer's decision and rendered a new decision that the claimant reached MMI on March 14, 1996, in accordance with the designated doctor's amended report. In so doing, the Appeals Panel held that the request for clarification was properly requested, and that the designated doctor's amended report and the March 14, 1996, date of MMI were the starting points for the presumptive weight analysis.

In this case, clarification from Dr. F was properly requested by the Commission based upon a subsequent surgery. Dr. F responded to the letter of clarification, reexamined the claimant, and amended the date of MMI based upon his medical opinion that the claimant had "significantly improved," her pain had decreased, and she had an increase in ROM. The hearing officer should have given presumptive weight and applied the great weight analysis to the amended report of Dr. F. The reports of Dr. R, Dr. W, and Dr. F's original report, do not rise to the great weight of the evidence contrary to the September 11, 1999, date of MMI and five percent IR. We reverse the hearing officer's determination that the claimant reached MMI on December 17, 1998, and render a new decision that the claimant reached MMI on September 11, 1999, in accordance with the designated doctor's amended report.

The claimant appeals the hearing officer's determination that she did not sustain disability after December 17, 1998. 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). Disability and MMI are separate issues, and disability may exist after a claimant reaches MMI. Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991, and Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. The claimant testified that she was unable to work as a result of her ankle injury after December 17, 1998, through the date of the CCH, and this is supported by the medical records of Dr. W. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

A claimant is entitled to temporary income benefits (TIBS) if he or she has disability and has not reached MMI. Section 408.101(a). Finding of Fact No. 18 states, "Due to the claimant['s] injury the Claimant was unable to obtain or retain employment at wages equivalent to her pre-injury wage level beginning on December 18, 1998 and continuing through September 11, 1999." The hearing officer in this case confused the concepts of MMI and disability and erred in ending disability on the date Dr. F originally certified MMI. We reform Finding of Fact No. 18 to state "Due to the claimant's injury, the claimant was unable to obtain or retain employment at wages equivalent to her preinjury wage level from December 18, 1998, through December 20, 1999, the date of the CCH." We reverse the hearing officer's determination that the claimant did not sustain disability after December 17, 1998, and render a new decision that the claimant had disability from December 18, 1998, through December 20, 1999, the date of the CCH. The claimant is not entitled to TIBS after September 11, 1999.

The determination that the claimant reached MMI on December 17, 1998, is reversed and a new decision rendered that the claimant reached MMI on September 11, 1999, in accordance with the designated doctor's amended report. We reform Finding of Fact No. 18. The determination that the claimant did not sustain disability after December 17, 1998, is reversed and a new decision rendered that the claimant had disability from December 18, 1998, through December 20, 1999, the date of the CCH.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I strongly disagree with the proposition that a designated doctor's amended date of maximum medical improvement (MMI) must be given presumptive weight. I acknowledge that in many cases the fact finder will give presumptive weight to the most recent report of the designated doctor as opposed to an earlier report. However, I do not read either Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §408.122 or 408.125, which provide the statutory basis for presumptive weight to be given to a designated doctor, as giving the Appeals Panel authority to reverse a hearing officer's determination that the designated doctor's first date of MMI or first impairment rating is entitled to presumptive weight, unless that factual determination is against the great weight and preponderance of the evidence. I do not agree that "the designated doctor's amended report . . . [was] the starting point for the presumptive weight analysis," and I see no authority for that assertion in Texas Workers' Compensation Commission Appeal No. 962197, decided December 16, 1996.

Joe Sebesta
Appeals Judge