APPEAL NO. 000379

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 18, 2000, a hearing was held. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is 12% as determined by the designated doctor, Dr. W, on September 26, 1997. Claimant asserts that the designated doctor's report of May 27, 1999, assigning an IR of 31%, should have been given presumptive weight, citing Texas Workers' Compensation Commission Appeal No. 960960, decided July 3, 1996, and referring to delays in obtaining studies and references to surgery at the time of the initial designated doctor's opinion. The appeals file does not contain a reply from respondent (carrier).

DECISION

We affirm.

Claimant worked for (employer) on _____. The evidence indicates that claimant injured his back moving a refrigerator. The parties stipulated that carrier accepted liability for the injury, that maximum medical improvement (MMI) was reached by operation of law on July 11, 1996, and that the designated doctor is Dr. W. There was no testimony.

The designated doctor was not appointed until after claimant's treating doctor, Dr. A, found him to be at MMI on July 11, 1996, with a 35% IR. Dr. W then evaluated claimant on August 21, 1996, and also said MMI was reached on July 11, 1996, but assigned a 10% IR. Dr. W noted that claimant had spinal surgery in June 1995 and based his IR on that fact. (Note that Dr. W, the designated doctor, first saw claimant after statutory MMI had been reached, according to a stipulation of the parties; his evaluation was 14 months after surgery had been performed.)

Just before Dr. W saw claimant in August 1996, Dr. B evaluated claimant on July 16, 1996. On June 3, 1996, Dr. A had said in a note that surgery may be necessary but that he would wait for an MRI report. Dr. B, in July 1996, referred to an MRI scan that showed "postoperative changes at L5-S1" and a "herniated right sided L1-2 disc." Dr. B said that "stabilization of the L5-S1 joint is probably indicated" if instability is noted on x-rays. He also said that a laminectomy at L1-2 would be appropriate. Dr. W, in addition to agreeing that MMI was reached and assigning 10% IR when he then saw claimant in August 1996, also referred to the possibility of surgery by saying that claimant has continued to have symptoms and "apparently now is being considered for further surgery to include fusion and internal fixation"; Dr. W had earlier mentioned the L5-S1 level. Dr. W said in his report that it was for IR and that "a date of MMI of July 11, 1996, at the request of the commission [Texas Workers' Compensation Commission] is included and agreed with.")

The record contains a series of reports from Dr. A. Most, if not all, contain dates of visits that significantly predate the date of the report. Dr. A provided a report on October

15, 1996, that referred to a date of visit of August 5, 1996 (before claimant saw Dr. W), which says, "awaiting surgery approval." Thereafter, reports showing visit dates of August 12, August 22, and September 10, 1996, refer to pain management and a referral to orthopedics. A note referring to December 6, 1996, says that claimant has not been seen since September 10, 1996, and "is lost to care." Then, on April 15, 1997, Dr. A reports that on February 24, 1997, claimant was again seen and states, "awaiting surgery." Similarly, a visit of March 18, 1997, reflects "awaiting surgery approval." When claimant was seen on April 18, 1997, Dr. A said, "awaiting approval for surgery on lower back." In all of these references to "awaiting surgery" from August 1996 through April 1997, there is no reference to studies that need to be done and no reference to any failure by the carrier to approve any studies. The record does not reveal any form requesting surgery since the 1995 spinal surgery.

Then on May 6, 1997, Dr. A wrote a letter to the Commission responding to a Commission request "for validation" of Dr. A's IR of July 1996. In the second page of his response, Dr. A refers to a "chronic course of non-resolution," to "scar tissue," and "periods of exacerbation." Dr. A then says that claimant "may be a candidate of myeloscopy, a newly developed procedure . . . [done] on an out-patient basis." On May 13, 1997, Dr. A mentions a consult with Dr. Br for an EMG. On June 10, 1997, Dr. A addressed the IR of Dr. W from August 1996. Dr. A then saw claimant again in June, July, and once in August without mentioning surgery or any delay in obtaining any tests. On August 22, 1997, Dr. A said again, "awaiting surgery," with no other information relating to that comment. On September 15, 1997, "awaiting surgery" was again mentioned.

Claimant was seen again by Dr. W on September 24, 1997, "at the request of the Commission to retest . . . range of motion [ROM]." A 12% IR was given, which included two percent for lateral ROM deficits. Two weeks later on October 9, 1997, claimant again saw Dr. A who said nothing of surgery or testing. However, on October 31, 1997, the words, "awaiting surgery approval" appear in Dr. A's note. On November 18, 1997, "awaiting surgery" again appears. On December 9, 1997, Dr. A noted worse pain and decreased ROM. He said he was waiting for the consult from Dr. Be. Then, on December 23, 1997, Dr. A writes, "schedule MRI of lumbar spine with gadolinium." This reference was again made on January 12, 1998. The next record of Dr. A is dated March 5, 1998, and shows that the MRI was done and "showed L5-S1 with right S1 impingement and left L5; and L1-2 right HNP [herniated nucleus pulposus]." Dr. A also said that Dr. Be recommended surgery. Dr. A said claimant needs a fusion. A May 1998 note says nothing about surgery, but a June 23, 1998, note says that Dr. L has been consulted. (Dr. L's consult is dated June 22, 1998, and is addressed to the Commission's "spinal surgery unit"; he said he was asked to provide a "surgical opinion." Dr. L said he reviewed an MRI from February 1998 and recommended "re-exploration at the L5-S1 level with stabilization . . . L1-2 . . . laminectomy." He did not refer to anyone else's recommendation for surgery of a particular kind or even to anyone else's recommendation for surgery.) Dr. A then, on June 30, 1998, noted a referral to Dr. Be.

The records show that on July 13, 1998, Dr. Be performed a laminectomy and fusion on claimant. Two days later, Dr. A wrote disputing the designated doctor's report. Dr. A

referred to claimant's 1995 surgery and then said, "his symptoms began to recur and a subsequent MRI performed on February 28, 1998, revealed . . . failed L5-S1 surgery"; Dr. A then referred to the recent surgery.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He specifically found that surgery was not under "active consideration" at the time of either Dr. W's August 1996 or September 1997 evaluations. Although the records show repeated references to "awaiting surgery" for over 15 months, the fact finder could conclude that the surgeon, Dr. Be, was not consulted until December 1997, the study upon which surgery was then based was not requested until December 23, 1997, and that study was then conducted on February 28, 1998. He could, therefore, conclude that there was no active consideration of surgery until early 1998 or possibly December 1997 at the earliest. With no repeated reference to "myeloscopy" that "claimant may be a candidate for" and no indication that Dr. Br did or did not provide the EMG, the hearing officer did not err in making no finding of fact that the record showed carrier delayed in approving studies which caused the delay in seeking surgery.

While claimant cites Appeal No. 960960, *supra*, that case reversed and remanded a hearing officer's decision that gave presumptive weight to a designated doctor's amended report. The opinion referred to amendments to a designated doctor's opinion being used when there was "an active dispute resolution process at the time the first IR from the designated doctor is given" or an "active recommendation of surgery" or to a substantial change of condition. It said that the paucity of evidence did not show what the basis was for the designated doctor's amended report and no reports showed that the "second opinion process" was being conducted. It then remanded for evidence of the "reasons for the fourth surgery." (We note that in referring to whether or not surgery was in process at the time of the "first IR," Appeal No. 960960, *supra*, dealt with a fact situation in which the designated doctor's first IR was provided after statutory MMI had been reached–we do not imply that the surgery process must be at the time of a designated doctor's initial evaluation when that occurs prior to statutory MMI.)

The evidence in the case under review shows that an MRI was available after the first surgery which showed similar conclusions to that performed in 1998. In July 1996, Dr. B recommended basically the same procedures as were performed in July 1998–laminectomy and stabilization. The hearing officer did not have to find that a substantial change of condition occurred. In addition, the general comments concerning surgery without any evidence of a process having been initiated do not require reversal of the hearing officer's finding of fact that surgery was not under "active consideration" at either time Dr. W evaluated claimant. As a result, the hearing officer was not compelled to give presumptive weight to Dr. W's last evaluation dated May 27, 1999, assigning a 31% IR; this IR was provided 34 months after statutory MMI.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The basis of the hearing officer's decision appears to me to be his finding that surgery was not under active consideration on August 21, 1996, or on September 24, 1997. This finding appears to me to be against the great weight and preponderance of the evidence. The majority goes to some length to establish that every single medical report during the time frame in question did not reference surgery. However, a number of the reports did, including the designated doctor's own report in August 1996. I think the key question in resolving the present case is whether the designated doctor amended his report (and here I mean the second amendment) within a reasonable amount of time. The hearing officer did not make a finding regarding this question. The claimant specifically raises this failure on appeal, and I would remand this case to the hearing officer to make a factual finding on this specific question. *See* Texas Workers' Compensation Commission Appeal No. 960960, decided July 3, 1996.

Gary L. Kilgore
Appeals Judge