

APPEAL NO. 000391

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 4, 2000, a hearing was held. The hearing officer determined that appellant's (claimant) impairment rating (IR) of nine percent issued by Dr. S became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), in effect at the time. Claimant asserts that the Texas Workers' Compensation Commission (Commission) should "reopen a claim, after the lapse of 90 days, based upon a change of circumstance . . . ," adding that he has a right to reopen since there is a right to reopen given a respondent (carrier) "by statute" based on "a change of circumstances or newly discovered evidence." Carrier replied that the evidence supports the decision.

DECISION

We affirm.

Claimant worked for (employer). He slipped and fell at work on _____, injuring his left knee. He has had two operations on the knee. On December 10, 1998, his treating doctor, Dr. S, certified that maximum medical improvement (MMI) had been reached on December 1, 1998, with a nine percent IR. Claimant agreed that he received more than one written notice of that initial IR, including one copy on December 29, 1998, as shown by a signed return receipt. Claimant also agreed that his first dispute of the IR was contained in a letter dated April 20, 1999, from his lawyer to the Commission. These facts sufficiently support the finding of fact that claimant did not timely dispute the initial IR.

Claimant also testified that he was able to return to work after both surgeries, but added that in the period from December 1998 to March 1999 he was doing restricted work. He added that since certification of MMI in December, his condition has changed-his pain is now worse than it was then. Claimant also added that he thought his knee would get better but it did not; he said, however, that the doctor did not tell him it would get better.

In closing argument claimant said that Texas courts have not said, in regard to Rule 130.5(e), that a case could not be reopened for a second hearing based on a change of condition. The appeal then asks for reopening of the "claim."

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. The facts presented as to a "change of circumstance or condition" do not constitute the great weight and preponderance of the evidence; on the contrary, testimony as to the condition being "worse" does not equate to a change of condition that would require a finding of fact addressing change of condition. In addition, the medical evidence from Dr. S at the time of the initial IR indicates that a total knee replacement may be eventually needed.

In addition to the hearing officer's findings of fact being sufficiently supported by the evidence and there being no basis to reverse for a failure to find that there had been a change of condition, claimant's claim has not been denied or closed. Claimant is still entitled to necessary medical care for the compensable injury whether MMI has been reached or not-there is no time limit on this benefit. Section 408.021. Only the income benefit part of claimant's claim has been foreclosed by this decision. In addition, the reference to carrier's "right to reopen," as asserted on appeal, was not accompanied by a citation; that statement may refer to a carrier's right to reopen a dispute of compensability beyond the time limit set when there is "evidence that could not reasonably have been discovered earlier." See Section 409.021(d). The Appeals Panel does not have the power to consider a statutory provision concerning reopening of a compensability issue as requiring that a regulatory provision be implied concerning reopening in regard to an IR question.

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:

Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

Judy L. Stephens
Appeals Judge