

APPEAL NO. 000461

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 January 26, 2000. The issue at the CCH was whether the appellant (carrier) is liable for respondent's (claimant) spinal surgery. The hearing officer determined that there are two opinions in favor of spinal surgery, that those opinions are entitled to presumptive weight, that there is not a great weight of medical evidence contrary to the opinions in favor of spinal surgery, and that the carrier is liable for spinal surgery. The carrier appealed, urged that the determinations that the great weight of the other medical evidence is not contrary to the two reports recommending surgery and that the carrier is liable for surgery are so against the great weight and preponderance of the evidence as to be manifestly unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that it is not liable for the costs of spinal surgery. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The claimant, who was 25 years old at the time of the CCH, injured his low back when he and another person were carrying large pieces of Sheetrock and the other person dropped the Sheetrock. Dr. A diagnosed a lumbar strain; prescribed medication; and referred the claimant to Dr. W, an orthopedic surgeon, when he did not improve. Dr. W had an MRI performed and diagnosed L5 spondylolisthesis, grade 1, and L5 herniated nucleus pulposus (HNP) with right S1 radiculopathy. Dr. L examined and evaluated the claimant at the request of the carrier. In a letter dated February 13, 1999, Dr. L stated that the claimant still seemed to be symptomatic of a herniated disc at L5 on the right side with an unstable situation at L5-S1 resulting in grade 1 spondylolisthesis, that he felt that Dr. W was right to suggest further conservative care since the claimant showed various instances of symptom magnification, and that nevertheless he felt the claimant's pain was real. In a letter dated October 20, 1999, Dr. L stated that if the claimant did not undergo surgery, he is considered to be at maximum medical improvement (MMI); that he felt compelled to mention that the claimant was definitely symptomatic of a definite physical abnormality involving the documented ruptured disc at L5 on the right side along with a grade 1 degenerative spondylolisthesis; that he felt the claimant should return to Dr. W, a back specialist, to determine whether or not he is a candidate for major back surgery; and that this would involve consultation with his psychiatrist. In a report dated November 23, 1999, Dr. D, the designated doctor, said that MRI studies indicated a herniated HNP at L5-S1 and grade 1 spondylolisthesis; that he had extensive physical therapy conservative treatments under Dr. W; that Dr. W did not recommend surgery; that Dr. G is now the claimant's treating doctor; that Dr. G planned surgery; and that the claimant had not reached MMI. In April 1999, the claimant was seen by Dr. C, a psychiatrist. Dr. C diagnosed chronic pain

and major depression, stated that the claimant did not have a history of depression prior to the injury, and opined that the depression was secondary to having a chronic injury and being out of work.

On October 18, 1999, Dr. G recommended spinal surgery. Dr. H was selected by the carrier as a second opinion doctor. In a report dated November 5, 1999, he stated that a majority of imaging studies referred to in reports were not presented for his personal review; that his impression was a mild right L5-S1 disc protrusion causing a minimal degree of encroachment at L5-S1 on the right and grade 1 spondylolisthesis at L5-S1 with a questionable pars defect; that he did not believe the claimant was a candidate for operative intervention; that a decompressive procedure would almost certainly increase his degree of instability and his back pain would be expected to get worse; that if a decompression was found to be necessary, a fusion would be required; and that the claimant has significant underlying psychological problems, and he doubted very seriously if the surgery would achieve a significant benefit. Dr. M, selected by the claimant as a second opinion doctor, in a report dated December 22, 1999, stated that he thought the claimant's psychological problems resulted from the pain and inability to work because of the injury; that the claimant realized he would not be able to return to labor after surgery and planned a postoperative vocational retraining program to become a chef; that there is clear evidence of radiculopathy, sciatic tension, and structural problems that have failed to respond to conservative treatment; and that he believed the claimant was a good candidate to proceed with spinal decompression and fusion as described by Dr. G.

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). The hearing officer resolves conflicts in expert evidence and assesses the weight to be given to expert evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). It is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the reports of the two doctors who agree concerning the need for spinal surgery. The hearing officer determined that the great weight of the other medical evidence is not contrary to the reports of the doctor who recommended surgery and the doctor who concurred with that recommendation. That determination of the hearing officer 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 Company, 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge