

APPEAL NO. 000619

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 February 16, 2000. In response to the only issue before her, the hearing officer determined that the great weight of medical evidence is not contrary to the recommendations for spinal surgery by Dr. ES and Dr. F and approved the respondent-s (claimant) request for spinal surgery. The appellant (carrier) appeals, asserting that the hearing officer's decision is against the great weight of the medical evidence because there has been no change in claimant's condition since a prior request for spinal surgery had been denied, and that Dr. F's present concurrence is based on claimant's subjective complaints, whereas the objective medical evidence "failed to document a worsening or change in condition" (at the CCH, carrier even argued that claimant's condition had improved because the herniations or protrusions were smaller based on different test results). Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file does not contain a response from claimant.

DECISION

Affirmed.

Claimant sustained a compensable low back injury on _____, when he fell some distance off some boxes. A CT scan of the lumbar spine performed on November 17, 1995, showed "a right lateralizing 5-6 mm disc herniation" at L4-5 and a "right paracentral broad-based 4 mm disc herniation" at L5-S1, which appeared "to indent the L5 as well as S1 nerve root dural sleeves." In 1996, claimant's then-treating surgeon, Dr. L, recommended spinal surgery, with Dr. S being carrier's second opinion spinal surgery doctor, and Dr. F claimant's choice for a second opinion doctor. Neither second opinion doctor concurred in the recommended surgery.

At some point, apparently in October 1998, Dr. ES became claimant's treating doctor. In letters dated March 10, 1999, Dr. ES wrote the second opinion doctors, Dr. S and Dr. F, about a newer, more recent August 1998 MRI "showing evidence of continued disk degeneration and disk protrusion with nerve root compression at L4-L5 and L5-S1." Dr. ES also points out that it has been more than three and one-half years since the injury and at least two other doctors have recommended surgery. Dr. ES requested that Dr. S and Dr. F file addendums. Dr. S responded by letter dated April 12, 1999, that he wished to reexamine the claimant, and apparently did so. In a letter dated April 19, 1999, with a heading "addendum," Dr. S indicated that the MRI showed degenerative changes, that Dr. S did not see "overt findings suggestive of nerve root compression," that there was no "objective neurological deficit" and that he did not recommend surgery. In a report dated September 28, 1999, entitled "AddendumBSecond Opinion Spinal Surgery," Dr. F recited claimant's history and complaints, gave an impression of degenerative disc disease and concluded:

He has no further improvement over the last three years. As a matter of fact, he feels that his pain is much worse. With that in mind, I feel that probably surgery

would be in order with decompression of his disks and lumbar fusion at the last two lumbar disk levels with instrumentation.

Dr. F also marked "YES, I agree that the recommended procedure is needed" on a Texas Workers' Compensation Commission form.

The hearing officer summarized carrier's argument at the CCH as follows:

Carrier contended that [Dr. F's] addendum report was not a true concurrence. According to Carrier, [Dr. F] opined the need for spinal surgery based on Claimant's subjective pain complaints. As a matter of fact, Claimant's MRI report dated August 20, 1998 compared to Claimant's CT Scan of the lumbar [spine], dated November 17, 1995 showed an improvement of Claimant's condition (the disc herniation at L4/L5 and L5/S1 were now smaller in size).

Nonetheless, the hearing officer found:

FINDINGS OF FACT

2. [Dr. ES], Claimant's treating doctor/assistant surgeon and [Dr. F], Claimant's choice for a second opinion doctor, recommended that Claimant have spinal surgery in the form of a lumbar laminectomy and fusion. [Dr. S], Carrier's choice for a second opinion doctor, recommended that Claimant not have spinal surgery.
3. The great weight of the other medical evidence is not contrary to the recommendation for spinal surgery by [Dr. ES] and [Dr. F].

Carrier essentially repeated the same arguments regarding Dr. F's concurrence, made at the CCH, on appeal.

This case is governed by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 133.206 (Rule 133.206) and, specifically, Rule 133.206(k)(4) and Rule 133.206(l). Rule 133.206(k)(4) provides that of the three recommendations and opinions (the surgeon's and the two second opinion doctors'), presumptive weight will be given to the two which had the same result, that they will be upheld unless the great weight of medical evidence is to the contrary, and that the only opinions admissible at the hearing are the recommendations of the surgeon and the opinions of the two second opinion doctors.

Rule 133.206(l) provides that if an injured employee has a change of condition (as defined in Rule 133.206(a)(16)) at any time after a nonconcurrence, the treating doctor or surgeon may submit a Recommendation for Spinal Surgery (TWCC-63) to the division and to both second opinion doctors with documentation indicating the change of condition; that the second opinion doctors will review the documentation to evaluate the presence of the criteria listed in Rule 133.206(a)(16) prior to the submission of an addendum report; that if a second

opinion doctor does not feel that the documentation meets the criteria, he or she shall submit a report indicating there is no change of condition; and that if a second opinion doctor feels the criteria are met, the doctor will issue an addendum report.

Rule 133.206(a)(16) defines change of condition as "a documented worsening of condition, new or updated diagnostic test results and/or the passage of time providing further evidence of the condition, or follow up of treatment recommendations outlined by a second opinion doctor."

The hearing officer considered carrier's points and determined the great weight of other medical evidence was not contrary to the opinions of Dr. ES and Dr. F. While carrier argues that Dr. F "based his concurrence solely on the Claimant's subjective complaints," we note that Dr. F fairly clearly referenced the fact that there had been "no further improvement [in claimant's condition] over the last three years" as meeting the definition of change of condition in Rule 133.206(a)(16) of a documented worsening condition with "the passage of time providing further evidence of the condition. . . ." Regarding carrier's opinion that the new MRI actually showed an improvement in claimant's condition because the disc herniations appeared to be smaller in size, we believe that to be a medical factor to be addressed by the doctors concerned, rather than a legal determination to be considered by the hearing officer or the Appeals Panel. (Only opinions of the doctors are admissible. Rule 206.133(k)(4).)

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge