APPEAL NO. 000728

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 1, 2000. The hearing officer rejected the report of the designated doctor, Dr. W, which certified that the appellant (claimant) reached maximum medical improvement (MMI) on September 5, 1996, for his left wrist injury with an impairment rating (IR) of zero percent and determined that he reached MMI on November 13, 1996, with an IR of eight percent, as certified to by his surgeon, Dr. C. Claimant appeals, contending that his MMI date should be the date of statutory MMI and that his IR should be the 13% assigned on December 15, 1999, by his most current treating doctor, Dr. B. The respondent (self-insured) urges in response that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury to his left wrist; that the designated doctor appointed by the Texas Workers= Compensation Commission (Commission) was Dr. W; that Dr. W found that claimant reached MMI on September 5, 1996, with an IR of zero percent; and that the date of statutory MMI was May 27, 1997.

Claimant testified that he suffered a left wrist fracture at work on _____; that his initial treating doctor, Dr. JW, cast the wrist, later prescribed physical therapy and other conservative treatments, and eventually performed carpal tunnel release surgery. Dr. JW=s Report of Medical Evaluation (TWCC-69) dated June 10, 1996, certified that claimant reached MMI on May 14, 1996, with an IR of one percent which, according to Dr. JW=s narrative report, represented minimal tenderness and mild loss of flexion range of motion (ROM). Claimant said he disputed Dr. JW=s MMI date and IR in August 1996; that he also changed treating doctors to Dr. O, a chiropractor, in August 1996; that Dr. O referred him to Dr. C in September 1996; and that in October 1996 he underwent further diagnostic testing on his left wrist.

Following claimant=s dispute of Dr. JW=s MMI date and IR, Dr. W evaluated claimant and on his TWCC-69 dated September 10, 1996, certified that claimant reached MMI on September 5, 1996, with an IR of zero percent.

Dr. C certified on a TWCC-69 dated November 14, 1996, that claimant reached MMI on November 13, 1996, with an IR of eight percent. In his narrative report, Dr. C stated that he thinks claimant will eventually require some surgical intervention but that he, Dr. C, would not recommend either an arthrodesis or an intercarpal arthrodesis at this point; that be believes claimant is still continuing to have symptomatology as far as his carpal tunnel goes, probably permanent in nature; and that he believes claimant "has reached a permanent and stationary state." Dr. C then explicitly states the portions of the Guides to the Evaluation of Permanent

Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) he used to arrive at the eight percent whole person IR which included loss of function, loss of sensation, and loss of ROM.

According to Dr. C=s operative report of April 3, 1997, which stated the preoperative and post-operative diagnosis as post-traumatic arthritis of the left wrist, Dr. C performed an arthrodesis of the left wrist. Arthrodesis is defined in DORLAND=S ILLUSTRATED MEDICAL DICTIONARY, 26th Edition, pg.123, as "the surgical fixation of a joint by a procedure designed to accomplish fusion of the joint surfaces by promoting the proliferation of bone cells; called also *artificial ankylosis*." (28th ed. 1994)

Claimant=s letter of June 16, 1997, to the Commission forwarded Dr. C=s records and requested that "clarification" be obtained from the designated doctor. The Commission wrote Dr. W on June 20, 1997; forwarded Dr. C=s records; and asked Dr. W whether or not his opinions on the date of MMI and claimant=s IR remained the same or changed. Dr. W=s letter of July 10, 1997, stated that he still believes claimant reached MMI on September 5, 1996, with a zero percent IR because he had almost full ROM and no loss of sensation on that exam, as confirmed by a post-operative EMG performed in November 1996. He also said that he disagrees with Dr. C=s evaluation of the extent of claimant=s neurological problems.

Dr. O=s TWCC-69 dated December 4, 1997, certified that claimant reached MMI on that date with an IR of 17%.

The evidence reflects that an impairment evaluation performed on September 15, 1999, for Dr. O stated the IR as 13%; that on November 30, 1999, the Commission approved claimant=s request to change treating doctor=s from Dr. O to Dr. B, apparently because Dr. O had requested to be released from further care of claimant; and that Dr. B=s TWCC-69 dated December 15, 1999, certified that claimant reached MMI on October 4, 1997, with an IR of 13%.

Claimant has not challenged findings that the designated doctor=s IR is against the great weight of the medical evidence because the designated doctor failed to perform any left wrist ROM measurements, as required by the AMA Guides; that the designated doctor declined to modify his report following contact by the Commission; and that Dr. O=s MMI date of December 4, 1997, cannot be adopted because it is beyond the date of statutory MMI and Dr. O=s 17% IR is based on ROM calculations which appear inconsistent with testimony and other medical reports which indicate that claimant has no motion on extension and flexion. In addition to disputing the dispositive legal conclusions that he reached MMI on November 13, 1996, and that his correct IR is eight percent, claimant challenges the following findings:

FINDINGS OF FACT

5. [Dr. B's] certification of [MMI] on 10-4-97 is beyond the statutory date of [MMI] and, as such, cannot be adopted by the [Commission]. His [IR] is not persuasive as it was rendered three years from the last [IR] and does not represent an accurate representation of the Claimant's [IR] in 1995 through1997.

6. [Dr. C] certified that the Claimant had a 8% [IR] with a date of [MMI] of 11-13-96 which persuasively established that as the correct certifications based on [Dr. C's] correct usage of the AMA Guides in arriving at his [IR] and knowledge of the Claimant's condition as one of his treating doctors during the periods in question. In arriving at this certification, [Dr. C] stated surgery was not under active consideration at that time. The great weight of the medical evidence supported the certification by [Dr. C].

7. Claimant reached [MMI] on 11-13-96 based on the certification in the TWCC-69 and medical report of [Dr. C] dated 11-14-96.

8. The correct [IR] is 8% based on the certification in the TWCC-69 and medical report of [Dr. C] dated 11-14-96.

Claimant urges on appeal that he reached MMI on the statutory MMI date, May 27, 1997; that his IR should be the13% IR assessed by Dr. B; and that the "primary point of contention in this case lies in the fact that Claimant underwent an arthrodesis of the left wrist on 4-4-97" which resulted in ankylosis making it, as noted by Dr. B, "physiologically impossible" for claimant to have normal left wrist ROM.

In her discussion of the evidence, the hearing officer comments that, notwithstanding that Dr. C performed the wrist surgery on April 4, 1997, he nonetheless did not change the MMI date and IR he earlier assigned because when he made those determinations, he did not feel there was going to be any change in the basic condition of the wrist; that when he assigned the MMI date and IR, Dr. C was then aware of the possibility of future surgery to relieve subjective complaints of pain; and that such surgery was not under active consideration at the time Dr. C certified the MMI date and IR. The hearing officer further states that she finds Dr. C=s certification "persuasive" in determining the MMI date and IR.

Section 408.122(c) provides that where a dispute exists as to whether the employee has reached MMI, the report of the designated doctor has presumptive weight and the Commission shall base its determination on such report unless the great weight of the other medical evidence is to the contrary. Section 408.125(e) provides, with regard to a dispute of the IR, that the report of the designated doctor shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, in which case the Commission shall adopt the IR of one of the other doctors.

The Appeals Panel has observed that "MMI does not mean there will not be a need for some further or future medical treatment and that the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified." Texas Workers= Compensation Commission Appeal No. 93489, decided July 29, 1993. Further, the Appeals Panel has stated that "pain is not, in and of itself, an indication that MMI has not been reached and that a person assessed with a permanent impairment may continue to experience some pain as a result of an injury. [Citation omitted.]" *Id.* Although addressing designated doctors= reports, we have reversed and remanded to permit a designated doctor to review and comment on an outstanding surgery recommendation where the claimant has evidenced an intent to have the surgery (Texas Workers= Compensation Commission Appeal No. 93293, decided June 1, 1993) and we have not held that a designated doctor cannot find

a claimant to have reached MMI where future surgery was a possibility (Texas Workers' Compensation Commission Appeal No. 91125, decided February 18, 1992).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge