APPEAL NO. 000832

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 27, 2000. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on July 29, 1998, with a three percent impairment rating (IR). The claimant appeals, urging that the hearing officer's determinations are against the great weight and preponderance of the evidence; that the claimant's IR is 39%; and that the hearing officer committed reversible error in refusing to grant the claimant's request for a continuance and refusing to admit the report of Dr. O into evidence. The respondent (carrier) replies that the hearing officer's decision is correct and supported by the evidence, and that the hearing officer did not abuse his discretion in denying the claimant's request for a continuance and in excluding Dr. O's report from evidence.

DECISION

Reversed and remanded for the appointment of a second designated doctor.

The hearing officer determined that the claimant did not timely exchange Dr. O's report and that no good cause existed for failure to timely exchange the report. The claimant asserted that he obtained Dr. O's report as soon as he had sufficient funds to pay for the report, and that he exchanged it immediately after it was obtained. To obtain reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there is an abuse of discretion, the Appeals Panel looks to see if the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. The hearing officer apparently felt that the claimant's explanation for the reason why he did not obtain the report of Dr. O sooner did not demonstrate due diligence. We find no abuse of discretion in the hearing officer's exclusion of Dr. O's report.

As for claimant's assertion of error in the hearing officer's denial of his motion for a continuance, no such motion was made or reurged at the hearing nor was any prehearing written motion offered into evidence or otherwise made a part of the record. While the claimant has attached to his request for review a motion for continuance dated March 17, 2000, we do not regard this document as a part of the hearing record and determine that claimant did not preserve error concerning his motion.

The claimant sustained a compensable injury on _____, when he was involved in a truck rollover. The claimant sustained injuries to his liver, ribs and back. On June 17, 1998, the claimant's treating doctor, Dr. RS, certified that the claimant reached MMI on February 10, 1998, with a zero percent IR. Dr. RS's certification was disputed and the Texas Worker's Compensation Commission (Commission) appointed Dr. T as the designated doctor. Dr. T examined the claimant on July 29, 1998, and certified that the claimant reached MMI on July 29, 1998, with a three percent IR based on thoracic range of motion (ROM). Dr. T invalidated lumbar ROM based on the straight leg raise test. On August 7, 1998, the Commission approved the claimant's request to change treating doctors to Dr. B. The claimant testified that he did not seek medical treatment from March 1998 until he began to receive treatment from Dr. B.

The claimant had a lumbar MRI performed on November 2, 1998. Dr. B's records indicate that the MRI showed a disc injury at L1-2 with a broad-based posterior disc bulge and deformity of the thecal sac. Dr. B also noted that the claimant's physical examination revealed reduced ROM of the lumbar spine and spastic paraparesis. On December 2, 1998, the Commission sent a letter of clarification to Dr. T with medical records of Dr. B and diagnostic tests. Dr. T replied that he was willing to reexamine the claimant and this was accomplished on January 20, 1999. Dr. T issued a report dated January 21, 1999, which stated that the claimant was observed with normal gait outside of the examination room and demonstrated difficulty even ambulating during the examination. Dr. T reviewed the lumbar myelogram with the post-myelogram CT dated January 13, 1999, and stated that there were abnormalities of the body of L1 with disc space narrowing and changes of the L1-2 disc, with no evidence of a herniation. Because Dr. T was unable to confirm the findings of spastic paraparesis as found by Dr. B, Dr. T referred the claimant to a neurologist, Dr. C. During the examination by Dr. C, the claimant complained of numbness in his left calf and heel. Dr. C concluded that the claimant had a normal neurologic examination and no spasticity or other symptoms to suggest myelopathy. On February 2, 1999, Dr. T, after reviewing Dr. C's findings, reaffirmed his opinion that the claimant reached MMI on July 28, 1998, with a three percent IR.

Dr. B referred the claimant to Dr. SS, who diagnosed a degenerated and collapsed disc at L1-2 based on a lumbar MRI, and recommended spinal surgery. On June 4, 1999, Dr. B states that a pre-operative MRI scan revealed a degenerated and collapsed disc at L1-2. The carrier's second opinion doctor, Dr. K, determined that the claimant's diagnostic testing revealed a "markedly degenerated disc at the L1-L2 level." Dr. K concurred in the need for spinal surgery and on June 14, 1999, the claimant had a L1-2 laminectomy and fusion with pedicle screw fixation. On August 16, 1999, the Commission wrote a letter of clarification to Dr. T enclosing additional medical records. Dr. T reexamined the claimant on September 3, 1999, and issued a report on September 7, 1999. Dr. T reiterated his opinion that the claimant reached MMI on July 29, 1998, stating that the claimant reported that the surgery had improved his ability to sleep; that the claimant was in worse functional status than prior to the surgery; and that "surgical care could be thought of as palliative only" and should not be considered based on the definition of MMI.

On December 22, 1999, Dr. B issued an unsigned and partially illegible Report of Medical Evaluation (TWCC-69) certifying that the claimant reached MMI on December 23, 1999, with a 39% IR. Attached to the TWCC-69 is a narrative report, most of which is illegible, assessing a 39% IR based on five percent for a closed head injury, four percent for a cervical strain, 10% for lumbar disc surgery with fusion and residual, and 26% for loss of lumbar ROM.

The claimant argues that he did not reach MMI on July 29, 1998, because he needed lumbar fusion surgery which was not performed until June 14, 1999, before the date of statutory MMI; that the designated doctor failed to award impairment based on Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) based on the fusion surgery; that the designated doctor incorrectly invalidated all lumbar ROM and, based on his data, should have awarded a six percent lumbar spine impairment for a total nine percent IR; that the Commission should adopt the 39% IR given by Dr. B, or revise it to exclude four percent for cervical strain; or, in the alternative, appoint another designated doctor.

Section 408.122(c) and Section 408.125(e) provide in part that the report of the designated doctor has presumptive weight, and the Commission shall base its determination of MMI and IR on the report unless the great weight of the other medical evidence is to the contrary. Section 401.011(30) defines MMI as the "earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated" or the "expiration of 104 weeks from the date on which income benefits begin to accrue." We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. The hearing officer determined that the claimant reached MMI on July 29, 1998, with a three percent IR and that the findings of Dr. T were not overcome by the great weight of other medical evidence. From those determinations, it can be inferred that the hearing officer determined that the report of Dr. T is entitled to presumptive weight.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The Appeals Panel has held that if the validity of a report of a designated doctor that was selected by the Commission is challenged, the Commission must determine whether

the report of the designated doctor was rendered in compliance with the provisions of the AMA Guides, is valid, and is entitled to presumptive weight. Texas Workers' Compensation Commission Appeal No. 93735, decided October 4, 1993. The Appeals Panel has also held that a second designated doctor may be appointed when the first designated doctor cannot or refuses to properly apply the provisions of the AMA Guides, particularly after being asked for clarification or additional information concerning his report. Texas Workers' Compensation Commission Appeal No. 94966, decided September 6, 1994.

It is undisputed that the claimant sustained a lumbar injury on _____, which resulted in spinal surgery being performed prior to statutory MMI. The designated doctor discounted the claimant's lumbar surgery because it was "palliative" and refused to change his opinion on the date of MMI and IR. The hearing officer found that the designated doctor properly applied the AMA Guides in arriving at his conclusions. Whether a claimant has any impairment under Table 49 is a matter of medical judgment and the proper application of the AMA Guides. Under the circumstances of this case, spinal surgery was found to be reasonable and necessary, was approved by the Commission and performed prior to statutory MMI, yet the designated doctor refused to assess any lumbar impairment based on the spinal surgery. Within several months of the designated doctor's first examination, and after further diagnostic testing, the claimant was diagnosed with a disc injury at L1-2. We conclude that the hearing officer erred in affording presumptive weight to the designated doctor's report and in determining that the claimant reached MMI on July 29, 1998, with a three percent IR.

The Commission has sought clarification from the designated doctor several times and he has reexamined the claimant. Because the designated doctor did not properly apply the AMA Guides when he refused to assess any lumbar impairment based on spinal surgery, additional clarification is not warranted. The claimant asserts that Dr. B's 39% IR should be adopted; however, because it is partially illegible and contains impairment for a cervical strain which does not appear to be compensable based on the claimant's own argument, we are unwilling to adopt Dr. B's certification of MMI and IR. Given that the designated doctor has failed to comply with the AMA Guides, we remand for the appointment of a second designated doctor.

We reverse the hearing officer's decision and order and remand this case for proceedings consistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Alan C. Ernst
Appeals Judge