APPEAL NO. 000840

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 10, 2000, with the record closing on March 24, 2000. After the CCH, but before the record closed, the hearing officer appointed a second designated doctor. The hearing officer determined that the great weight of the other medical evidence is not contrary to the second designated doctor's report of March 1, 2000, in which he found respondent (claimant) to be at maximum medical improvement (MMI) as of February 25, 2000, with an eight percent impairment rating (IR). The appellant (carrier) appealed only the adoption of the second designated doctor's second MMI date, arguing that the hearing officer erred in not forwarding its letter of clarification to the second designated doctor or allowing a deposition on written questions on the issue of the MMI date. In the alternative, the carrier argues that there is no evidence to support a finding that claimant reached MMI on February 25, 2000, and that the great weight of contrary medical evidence supports an earlier MMI date. The appeal file does not contain a response from the claimant.

DECISION

We affirm the hearing officer's decision.

The procedural facts of the case have been set out by the hearing officer in considerable detail and are adopted for this decision. The claimant sustained a back injury from a lifting incident, which has been conservatively treated. He testified that a doctor who said he may need surgery, Dr. V, said that it would not be advisable until he lost weight. As the hearing officer's decision recited, the treating doctor, Dr. G, rendered a certification of MMI on December 10, 1998, with a 20% IR. Dr. S was appointed as designated doctor and certified MMI on January 26, 1999, with a 24% IR. The carrier's required medical examination doctor had proposed a zero percent IR on November 30, 1998.

Thereafter began a round of requests for clarification from the Texas Workers' Compensation Commission (Commission), generated largely due to a total of three paper reviews of medical records and Dr. S's certification that were undertaken at the request of the carrier by Dr. C. One dispute involved the range of motion deficits assessed by Dr. S. After two of Dr. C's peer reviews and two requests for clarification or consideration of these reviews from the Commission, Dr. S reissued an IR of 16% on September 27, 1999.

The hearing officer considered all the evidence before her and concluded that Dr. S had not properly applied the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association but that the other reports based upon actual examination of the claimant did not constitute a great weight of contrary medical evidence and had flaws of their own. Consequently, appointment of a second designated doctor was ordered, and this was not appealed. The second designated doctor, Dr. K, issued his report after reexamining the

claimant on February 25, 2000. The report assessed an eight percent IR and certified that MMI was reached on the date of his examination. The hearing officer forwarded this report to the claimant and the attorney for the carrier. She gave the parties two weeks to respond, or by March 22, 2000. The carrier's adjuster responded on March 11th and asked for another benefit review conference, but the attorney responded another 10 days later, or right before the expiration of the deadline, and at that time requested clarification of the MMI date (while approving the lowered IR) and alternatively that a deposition on written questions be forwarded to Dr. K.

The claimant testified at the CCH that he had not returned to what he used to do and could no longer do much of anything. Little was developed about the course of his medical treatment that did not have to do with opinions about MMI and IR, but it is clear from reports in evidence that claimant continued to receive physical therapy and work hardening. Dr. K's report stated that claimant received chiropractic treatment for about a year after his date of injury.

At the outset, it must be pointed out that the parties could have resolved the issues of IR and MMI, both of which were disputed in this case. Time and again, for well over a year, the reports of the first designated doctor were disputed and clarified and reviewed and disputed again. The designated doctor was, of course, appointed because the report of the treating doctor, certifying MMI on December 10, 1998, with a 20% IR, was considered unacceptable by the carrier. It can be surmised that there is the potential for yet a new round of review and clarification on remand. Furthermore, the hearing officer could have concluded that the date of MMI, expressed as it was, did not have to be "clarified" and that the objective of the clarification was simply to encourage the doctor whose opinion is given presumptive weight under Section 408.122(c) to change that opinion. We cannot fault the hearing officer for denying this, given the past procedural history of the case and attendant delay.

We find no support for the carrier's assertion that a designated doctor asked to opine on MMI must also affirmatively acknowledge this and explain his conclusions underlying the date certified. Dr. K stated in his letter that he understood that his opinion on MMI was requested. While a designated doctor may choose a date of MMI suggested by earlier medical records, Texas Workers' Compensation Commission Appeal No. 962044, decided November 18, 1996, he is not required to do so. Texas Workers' Compensation Commission Appeal No. 931190, decided February 8, 1994. That a designated doctor may prefer to render an opinion of MMI based upon his own examination is one of the aspects of throwing an IR and MMI first issued into dispute. This is one of the "risks" of litigation.

We affirm the decision and order of the hearing officer as sufficiently supported by the evidence and as properly applying the law and rules of the Commission.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge