APPEAL NO. 000869

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 March 6, 2000. The hearing officer determined that the appellant's (claimant) compensable injury did not extend to include the claimant's low back; that the certification of a date of maximum medical improvement (MMI) and an impairment rating (IR) by the designated doctor was contrary to the great weight of the other medical evidence; and that the claimant's date of MMI is April 7, 1999, and his correct IR is 12% as certified by the claimant's treating doctor. The claimant appeals these determinations, contending that they are against the great weight and preponderance of the evidence and that the issues of MMI and IR should be remanded for referral again to the designated doctor. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The finding that the carrier timely disputed the compensability of the claimed back injury has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant testified that on _____, while working, he stepped into a hole with his left foot, fell backwards and hyper extended his right leg. The carrier accepted a right knee injury. The claimant first received treatment on the date of the injury at a clinic where he was referred by the employer. The record of this visit does not reflect any complaints of back pain, although the claimant testified that he reported back pain. After four visits, the claimant's knee was reported as "better."

The claimant then selected Dr. P, as his treating doctor. At his first visit with Dr. P on June 29, 1998, the claimant submitted a pain diagram reflecting low back pain. However, Dr. P's narrative report of this visit refers only to the right knee and gives no impression of a low back condition. The first explicit reference to the back appears in a "Reevaluation Note" of September 18, 1998, wherein Dr. P includes among the chief complaints "[l]ow back pain which has continued to progressively worsen due to compensatory ambulation in movements related to the right knee injury." This entry appeared after the claimant was examined by Dr. S, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, who included a rating for the lumbar spine in the claimant's whole body IR. *See below.* The reference to low back pain randomly appears in some, but not all, later reports of Dr. P. A physical therapy "reevaluation" by Ms. P, physical therapist, on October 28, 1998, contains no reference to the lower back. A functional capacity evaluation by Dr. P on November 10, 1998, includes a diagram of low back pain, but the diagnosis includes only the knee. On November 16, 1998, Dr. P includes low back pain among the chief complaints, but does not include it in his impression of the claimant's condition. In a report of January 6, 1999, Dr. P at one point attributes the low back pain to "a set of compensatory mechanisms which are causing abnormal stress to the low back related to the right knee injury and the abnormal gait and

ambulating pattern secondary to the right knee injury." Later in the same report, he finds the low back injury "directly related to the job related injury of _____. It is very plausible that the event was directly related to the twisting, torquing, downward whipping motion." Generally, Dr. P's reports beginning on February 8, 1999, consistently refer to low back pain. A diagnosis of lumbar facet syndrome does not appear until March 24, 1999.

On August 10, 1998, the claimant underwent arthroscopic surgery to repair a meniscus tear and chondromalacia.

On August 28, 1998, Dr. S, the designated doctor, examined the claimant to determine both the date of MMI and the correct IR. On September 3, 1998, he completed a Report of Medical Evaluation (TWCC-69) in which he certified MMI on August 28, 1998, and assigned a 20% IR. Included in the IR were ratings of four percent for loss of lumbar range of motion (ROM) and 17% for right lower extremity loss of ROM. No diagnosis-based impairments were assigned for either the knee or the lumbar spine. On November 19, 1998, the Commission wrote Dr. S pointing out the surgery and asking him if the claimant achieved MMI in the time between the surgery and his examination. (The elapsed time was 18 days, even though the letter states it was 21 days.) The Commission also asked Dr. S to "assess an impairment without the lumbar for the _____ injury." Dr. S responded on January 7, 1999, that he felt the "appropriate and relevant areas were tested and the findings accurate." He further stated that in his opinion "further material recovery from or lasting improvement to [claimant's] injury could no longer reasonably be anticipated." He did not believe repeat tests were warranted and declined to amend his TWCC-69 "at this time."

On August 18, 1999, Dr. K examined the claimant at the request of the carrier and completed a TWCC-69 in which he found MMI as of this date and assigned a seven percent IR solely for the right knee (though unclear, presumably for loss of ROM and for a diagnosis). He did not assign an IR for the lumbar spine because he did not consider it part of the compensable injury. His rationale for this conclusion was that the description of the back pain in Dr. P's records suggested it was more of a severe muscle spasm, not an acute strain, and that the condition diagnosed by Dr. P on September 18, 1998, would not relate to an injury on _____. Dr. K also testified at the CCH that recovery from torn meniscus surgery would take at least six weeks plus six weeks of physical therapy and for this reason he did not believe the claimant was at MMI on the date certified by Dr. S, the designated doctor.

The only other TWCC-69 in evidence was completed by Dr. P, the treating doctor, on December 20, 1999, based on an examination of this date. In this TWCC-69, Dr. P found MMI on April 7, 1999, and assigned a 19% IR. The IR consisted of eight percent for the lumbar spine (ROM only) and 12% for the right knee.

Critical to the resolution of the MMI and IR issues was the determination of the extent of the compensable injury. Whether the claimant injured his lumbar spine when he fell on _____ or whether a back injury naturally resulted from an altered gait due to

the knee injury were questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The claimant had the burden of proving the extent of his compensable injury. In this case, the hearing officer considered it significant that the initial treatment records do not refer to a back injury; that Dr. P does not mention a back injury in his narrative reports, despite the pain drawing on the first visit, until September 18, 1999, which was after Dr. S's examination; and that Dr. P seemed to provide alternative theories of causation. In addition there was evidence from Dr. K that, based on the prior records and his evaluation of the nature of the lumbar condition, it was not related to the _____, accident. From this the hearing officer concluded that the claimant failed to prove that his compensable injury included the lumbar spine. In his appeal of this determination, the claimant argues that his testimony that he injured his back on _____, was "unrefuted"; that the hearing officer "erred in not providing appropriate weight to the treating doctor's medical opinion that the back injury was causally related to the _____," incident; and that it was error to find Dr. P's opinion less credible that other medical evidence. We cannot agree that the claimant's testimony was unrefuted in terms of causation. Clearly, the opinion of Dr. K was contrary to the claimant's opinion and to the opinion of Dr. P.[1] Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. As fact-finder, she could accept or reject, in whole or in part, the evidence of either party in reaching a determination of what facts have been established. 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 find the evidence sufficient to support the extent of injury determination of the hearing officer.

MMI is defined for purposes of this case as the date on which "based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated[.]" Section 401.011(30)(A). Impairment is defined as "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). An IR is the "percentage of permanent impairment of the whole body resulting from a compensable injury." Section 401.011(24). The 1989 Act established the position of designated doctor to resolve MMI and IR disputes. The opinion of a designated doctor appointed by the Commission, as was Dr. S, to determine MMI and IR is entitled to presumptive weight on these issues and the Commission is to base its determination of MMI and IR on this report unless the great weight of the other medical evidence is to the contrary. Sections 408.122(c) and 408.125(e). Whether the great weight is to the contrary is itself a question of fact for the hearing officer to decide and is subject to the same standard of review as are all factual determinations. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. We have also held that when a

[1]Dr. S, the designated doctor, appeared to simply accept as a given that the compensable injury included the lumbar spine.

hearing officer determines that the great weight of the other medical evidence is contrary to this report he must identify what medical evidence constitutes that great weight and articulate a rationale for this conclusion. Texas Workers' Compensation Commission Appeal No. 92522, decided November 9, 1992; Texas Workers' Compensation Commission Appeal No. 000242, decided March 23, 2000.

In the case we now consider, the hearing officer determined that Dr. S's certification of a date of MMI of August 28, 1998, was against the great weight of the other medical evidence because it came too soon after the claimant's right knee surgery as expressly stated by Dr. K. Such a conclusion is also clearly implied in Dr. P's certification of a later date of MMI. In Finding of Fact No. 11, the hearing officer explicitly found the great weight of the other medical evidence in Dr. P's opinion that the claimant continued to improve after August 31, 1998. In Finding of Fact No. 12, the hearing officer also explicitly found the great weight in Dr. K's opinion that the recovery from the surgery would be about eight weeks and only then should the claimant be considered to be at MMI. Because an IR must be assigned with reference to the date of MMI, Texas Workers' Compensation Commission Appeal No. 950615, decided June 5, 1995, the finding that Dr. S's date of MMI was against the great weight of the other medical evidence compels the conclusion that the assigned IR based on this date of MMI is also against the great weight of the other medical evidence.[2] *See* Texas Workers' Compensation Commission Appeal No. 931064, decided December 30, 1993.

In his appeal of these determinations, the claimant contends essentially that the hearing officer "failed to identify the medical evidence that was found to amount to great weight of medical evidence to the contrary of the Designated Doctor" and that the other medical evidence was only a difference in opinion that did not rise to the level of the great weight of the other medical evidence. We cannot agree that the hearing officer failed to identify the other medical evidence that she considered to constitute the "great weight." This is described above and specific findings of fact are referenced. In a basic sense, all contrary or differing medical conclusions can be described as differing opinions. But simply calling them opinions does not mean that they can never rise to the level of the great weight. The opinions of Dr. K and Dr. P contained articulated reasons for their conclusions. Dr. S was given the opportunity to directly address the assertions of a premature certification of MMI, but said only that he chose to stand by his certification and declined the opportunity to re-examine the claimant. By this action, he created what could be called a vacuum in the evidence supporting his position that was filled by the opinions of Dr. S and Dr. P. Under our standard of review, we find the evidence sufficient to support the determination that the great weight of the other medical evidence was contrary to Dr. S's report.

[2]We also observe that the hearing officer was unwilling to adopt Dr. S's IR because it included the lumbar spine, which she determined was not part of the compensable injury. If the date of MMI had no impact on the IR, then the hearing officer arguably could have simply subtracted out the lumbar portion of Dr. S's IR. This approach is not consistent with the 1989 Act because the impairment is determined after MMI is obtained. Section 401.011(24).

Section 408.125(e) provides that if the great weight of the other medical evidence is contrary to the report of the designated doctor, the Commission "shall adopt the [IR] of one of the other doctors."[3] We have in the past remanded for further clarification from a designated doctor, rather than immediately adopting the report of another doctor. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 931038, decided December 27, 1993; Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1993. In this case, the hearing officer elected to adopt Dr. P's report with the exception of that portion of the IR attributable to the lumbar spine. *See* Texas Workers' Compensation Commission Appeal No. 951135, decided August 28, 1995. In his appeal, the claimant does not directly take issue with the hearing officer's subtraction of the lumbar IR (except to the extent that he contends the lumbar spine was part of his compensable injury). Rather, he contends that it was error for not going back again to Dr. S with a request for clarification and/or re-examination or even the appointment of a second designated doctor. As noted above, Dr. S had already been presented with the opportunity to re-examine the claimant and address the short period of time between the surgery and the certification of MMI and said this was not necessary. While we do not categorically rule out the options of going back to Dr. S or to a second designated doctor, we cannot conclude that under the circumstances of this case, the hearing officer was compelled as a matter of law to take either alternative course.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge

[3] A comparable provision does not appear in Section 408.122(c)