APPEAL NO. 000951

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 April 10, 2000. The hearing officer determined that the respondent's (claimant) request for spinal surgery should be approved. The appellant (carrier) requests our review, asserting that claimant's second opinion doctor's concurrence with spinal surgery is not a "true" concurrence because it is questionable whether that doctor actually knew the limited extent of claimant's conservative treatment. Claimant filed a response urging the sufficiency of the evidence to support the hearing officer's determination. The parties also filed responses.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury to the lumbar spine and cervical spine; that claimant's treating doctor is Dr. S; that claimant chose as his second opinion doctor Dr. G; and that the carrier chose as its second opinion doctor Dr. R.

Claimant testified that he has sharp pain in his back which radiates down his right leg and also has tingling and numbness in his right toes. He said that after three days of physical therapy (PT), the therapist suspected claimant could have a spinal fracture or protrusion because of his pain and recommended that his spinal injury be further investigated. Claimant indicated that Dr. H, apparently a prior treating doctor, then stopped PT. According to the PT records in evidence, claimant started PT on June 1, 1999, and on June 3rd his PT was stopped until further notice from Dr. H. A June 26, 1999, note states that claimant "is not appropriate for PT currently." Claimant further stated that although he has not had any more PT, he did have some injections and did not have a problem with them. He also stated that he told Dr. G he only had three days of PT and gave Dr. G one of the PT reports. He acknowledged declining a discogram, explaining that he did not want any more needles in his back, and also stated that the doctor indicated the test was not absolutely necessary.

In his neurosurgical evaluation dated December 16, 1999, Dr. S states that claimant had a fall on the job on _____; that he developed low back pain with radiation into both legs, as well as numbness and weakness; that he also had neck pain with radiation into both arms but that the low back symptoms predominate; and that conservative measures have included bed rest, various medications, PT, and local injections and have not led to lasting relief. Dr. S further reported that diagnostic tests show that claimant has bulging discs at L4-5 and L5-S1, that claimant is "at his wits end" and desires surgical treatment, and that they have discussed lumbar spine decompression and fusion surgery from L4 to S1.

The Recommendation for Spinal Surgery (TWCC-63) was signed by Dr. S on January 11, 2000. Dr. G signed a Texas Workers' Compensation Commission form on February 2, 2000, and made a check mark by the following option: "YES, I concur that surgery is indicated for this patient." Dr. G stated in his detailed narrative report of February 29, 2000, that claimant has had PT, epidural steroid injections, and trigger point injections, all "without relief"; and that "the only thing left to do really would be surgical." Dr. G concluded his report as follows: "In summary, I feel like [claimant] has undergone considerable conservative therapy without relief and if he is functionally unwilling and unable to continue, surgery would be the next step and I concur with the recommendations. My personal bias would be for him to obtain discograms, but I do not think this is mandatory prior to proceding with surgery."

Dr. R's February 24, 2000, report states that he does not think a decompression is indicated at this point in time, given the paucity of compressive problems in claimant's lumbar spine; that he does not feel a two-level fusion would help get claimant back to gainful employment with only signs of disk degeneration; and that he would recommend only conservative measures.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k)(4) (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 and they will be upheld unless the great weight of medical evidence is to the contrary. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

In closing argument, the carrier contended that Dr. G's concurrence was not a "true" concurrence because Dr. G may not have been aware of how little conservative treatment claimant had before being recommended for the proposed spinal surgery. The carrier suggested that the hearing officer query Dr. G concerning the extent of his knowledge of the insubstantial amount of conservative treatment claimant had before he decided to concur with the proposed surgery.

Rule 133.206(a)(13) defines "concurrence" as a second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. The rule goes on to state how "need" is assessed and also states types of spinal surgery.

The hearing officer found that Dr. G made an informed decision when he concurred with Dr. S's surgery recommendation; that Dr. S and Dr. G recommended that claimant have spinal surgery and Dr. R recommended that claimant not have spinal surgery; and that the great weight of the other medical evidence is not contrary to the recommendation for spinal surgery by Dr. S and Dr. G.

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, an appellate reviewing tribunal, 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.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge