

APPEAL NO. 001019

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 November 4, 1999. With the agreement of the parties, the hearing officer was to have held the record open until November 15, 1999, to obtain additional pay records from which to compute a date of "statutory MMI [maximum medical improvement]" (see Section 401.011(30)(B)). The record before us does not indicate what, if anything, happened on November 15, 1999. In evidence as Hearing Officer's Exhibit No. 4 is correspondence dated November 16, 1999, from the respondent (carrier) which purports to establish the days appellant (claimant) missed work and that statutory MMI would have been August 18, 1998. The hearing officer, in listing the exhibit, states that it was received by the hearing officer "on 3-13-00 although dated 11-16-99." In any event, in response to the issues before her, the hearing officer determined that the claimant reached MMI on February 13, 1998, with a four percent impairment rating (IR) as assessed by the designated doctor. Claimant appealed, contending that she had cervical surgery after the designated doctor's evaluation and that surgery has improved her condition. Claimant also contends that the designated doctor did not timely issue his report (an allegation not raised at the CCH) and that had he timely issued his report, claimant speculates "the spinal surgery would have taken place sooner." Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds, citing an Appeals Panel decision regarding spinal surgery after statutory MMI and urges affirmance "[s]ubject to the Appeals Panel's determination of the carrier's Motion Nunc Pro Tunc to correct the typographical error reflected in the decision portion of the hearing officer's written opinion," urges affirmance. No Motion Nunc Pro Tunc is in the appeals file.

DECISION

Affirmed.

Claimant was employed as a reservation agent for (employer). Medical records indicate that in _____ claimant began "having severe neck pain and stiffness with headaches and numbness mostly in the left arm." Carrier has apparently accepted a compensable cervical injury with a date of injury of _____. Claimant continued working with intermittent days of lost time. Claimant was treated by the "company doctor"; was referred to Dr. W, a rehabilitation specialist; an MRI was performed in 1997; and, after an independent medical examination (not in evidence), Dr. B was appointed as the designated doctor. The parties stipulated that Dr. B was the "Commission [Texas Workers' Compensation Commission] selected designated doctor."

Claimant was seen by Dr. B on April 2, 1998, and, in a report dated June 8, 1998, Dr. B recited claimant's medical history and treatment and commented on the March 1997 MRI. Dr. B recites, and the MRI report states, that there "is a small focal disc protrusion centrally at C5-6, slightly indenting the thecal sac near midline." Dr. B goes on to discuss the protrusion, certifies MMI on February 13, 1998, and assesses a four percent IR based

on Table 49, Section II, subsection B, of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. No impairment was given for loss of range of motion or neurological disorder. Dr. B goes on to comment:

If she had a herniated nucleus pulposus then her award would have been significantly different. The lack of anatomical lesion on the MRI scan in March of 1997 showed this. A year has gone by since she had a MRI scan. If her symptoms persist, she can have a follow-up x-ray of the C-spine, EMG of the upper extremities, MRI of the neck again.

* * * *

Over a period of almost 22 months, her symptoms are waxing and waning. The last MRI scan was done in March 1997. It would be prudent to repeat this. Prior to this it would be prudent to repeat an x-ray of the C-spine. The patient has reached [MMI] according to medical guidelines. Part of her problem could be related to her medication use as mentioned earlier or her stress and depression. We need to confirm her anatomical findings and go from there and make sure we are not missing any diagnosis.

There was apparently some delay in getting the report from Dr. B. The hearing officer found statutory MMI to be on August 18, 1998.

Claimant apparently had a repeat cervical MRI performed on September 14, 1998, and was subsequently referred to Dr. C who, in a report dated September 24, 1998, referenced the 1998 MRI which had an impression "C5-6 central disc protrusion approaching but not contacting the spinal cord." Dr. C goes on to state that "[t]here is some deformity of the anterior aspect of the cord which is consistent with [the MRI says 'suggests'] intermittent impingement." Dr. C recommended "an anterior cervical discectomy and fusion C5-6." Dr. C performed the surgery on November 3, 1998. Claimant testified that her condition had not changed between the time she saw Dr. B on April 2, 1998, and August 1998, when she was at statutory MMI.

The hearing officer found that Dr. B's report was entitled to presumptive weight and was not against the great weight of the other medical evidence. Claimant states she disagrees with the hearing officer's finding because she has returned to work, her "physical condition is excellent now," and she could perform activities which she could not do before her surgery. We will note that was information which was not presented at the CCH, where claimant testified her condition had not changed between April and August 1998.

Claimant also complains that Dr. B did not timely prepare his report and this is "a violation of the [Commission] rules." That may or may not be so, but it does not change or invalidate Dr. B's report. If claimant feels strongly about this point, she may notify the Medical Review Division which monitors the designated doctor program. Assertions that

the 1998 MRI showed a different or worsened condition than the 1997 MRI was a distinction for the hearing officer to resolve. The hearing officer made no specific finding on this point, although it was argued at the CCH. The hearing officer could have believed that the two MRIs were substantially similar, both showing a C5-6 protrusion not impinging on the thecal sac or spinal cord.

Claimant cites Texas Workers' Compensation Commission Appeal No. 93856, decided November 4, 1993, as requiring a remand or reversal in this case. In Appeal No. 93856 there was Commission-approved surgery after the designated doctor's report but which was being considered at the time of statutory MMI. In this case, surgery was not being considered when claimant reached statutory MMI and the designated doctor had only suggested a repeat MRI might be prudent. The Appeals Panel has attempted to establish some parameters and guidelines for determining when a designated doctor's evaluation may be reconsidered. In cases such as this one, where surgery is performed after the date of statutory MMI, we have considered whether surgery was contemplated at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 980985, decided June 26, 1998; Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995; and Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994. In this case, the claimant's cervical surgery was not even considered until September 24, 1998, one month after statutory MMI. Thus, the surgery in this case was not contemplated at the time the claimant reached statutory MMI. We find the hearing officer's decision to be sufficiently supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Dorian E. Ramirez
Appeals Judge

Judy L. Stephens
Appeals Judge