APPEAL NO. 001124

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 28, 2000. The hearing officer determined that the date of maximum medical improvement (MMI) is March 15, 1999, and the impairment rating (IR) is two percent, as determined by the designated doctor. The appellant (claimant) appeals and argues that the designated doctor considered no other records than that of the respondent's (self-insured) doctor and has ignored the aspect of improvement due to the claimant's further shoulder surgery. The claimant argues that proper diagnosis of her condition was delayed and, thus, she had not reached MMI at the time certified by the designated doctor. The self-insured responds that there is no great weight of evidence against the presumptive weight to be given to the designated doctor's report and that the designated doctor has reviewed the surgical records and his opinion was unchanged.

DECISION

The decision is affirmed.

The claimant was employed by the self-insured, a school district, when she injured her left shoulder on October 20, 1998. The claimant is right-hand dominant. She was first treated by Dr. D and by her family physician, Dr. M. She said that both doctors examined her shoulder. Dr. M arranged for an MRI of her thoracic and cervical areas which were unremarkable. She said that Dr. D and Dr. M essentially treated her with pain medication and muscle relaxants only.

The claimant was referred to Dr. Y, by her attorney. Dr. Y referred her to Dr. B on June 1, 1999. The claimant had surgery on July 23, 1999, after an arthrogram a month earlier showed mild impingement. Dr. B suggested that a new examination and evaluation of MMI and IR should be done. The claimant said that her condition had greatly improved after surgery. Her pain level was lower and her range of motion (ROM) was greater than before the surgery. She had returned to work for the self-insured.

The claimant had been examined by Dr. P for the self-insured on March 15, 1999. Dr. P certified that the claimant reached MMI on that date with a zero percent IR. He noted that the claimant complained of continuing pain in her left scapula. Dr. P found nearly full ROM in the shoulder, no crepitance, and no loss of strength. He noted that an x-ray of the shoulder showed no calcification.

The claimant was thereafter examined by Dr. H, the designated doctor. Although the appeal argues that Dr. H performed no examination, there was no testimony elicited about what occurred during Dr. H's examination. His report recited the substance of records and treatment, in addition to Dr. P's report. His impression was cervical and left shoulder myofascial pain syndrome. He examined the claimant's neck and shoulder and suggested that the claimant should be more consistent with following an

exercise/stretching program. By comparing her ROM to her unaffected shoulder, Dr. H noted some impaired ROM and he gave a two percent IR for this. He agreed with the accuracy of Dr. P's date of MMI. Dr. H opined that there was no need for surgical intervention.

After being furnished with records from Dr. Y and Dr. B, as well as a functional capacity evaluation (FCE) not in evidence, Dr. H wrote to the Texas Workers' Compensation Commission (Commission) on January 3, 2000, and said that his examination of records demonstrated that the claimant had not undergone significant improvement following her surgery. He noted that the FCE ROM figures were similar to his, although Dr. B's were different. He felt that no additional IR would result. He considered the impact of her surgery on MMI and noted that surgery would not necessarily change this date and where there was no significant change following that surgery, her March 15, 1999, MMI date was viable. Dr. H noted in his letter that some component of his decision-making process at the time was based upon the claimant's poor efforts with cervical ROM. However, the claimant showed improved effort with shoulder ROM testing.

The ROM figures that Dr. H recorded for the right and left shoulders were very similar to each other, with slight reduction on the left side. Following the claimant's surgery, Dr. Y recorded ROM figures that appear to exceed the claimant's right shoulder ROM as observed by Dr. H. However, he recorded her left shoulder abduction in several visits as 170E compared to Dr. H's 140E finding.

The self-insured's peer review doctor, Dr. YT, commented that his analysis of the medical records supported Dr. H's opinion on MMI and IR. However, Dr. YT noted that the surgery was performed after findings of a mild impingement and after medical necessity was determined by the self-insured.

The report of a Commission-appointed designated doctor is given presumptive weight. Sections 408.122(c) and 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

"Maximum medical improvement" is defined, as pertinent to this case, 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. . . ." Section 401.011(30)(A). We have stated many times that the presence of pain is not, in and of itself, an indication that an employee has not reached MMI; a person who is assessed to have lasting impairment may indeed continue to experience pain as a result of an injury. *See* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993. The claimant's right to medical treatment does not end with reaching MMI. Conversely, the continuation of medical treatment, including surgery,

does not mean that MMI was not reached. *See* Texas Workers' Compensation Commission Appeal No. 951805, decided December 12, 1995 (Unpublished). We have also stated that a doctor may consider whether surgery has resulted in significant improvement in deciding whether the MMI date should be amended. Texas Workers' Compensation Commission Appeal No. 982885, decided January 22, 1999 (Unpublished).

The hearing officer's determination that there is not a great weight of medical evidence to refute Dr. H's assessment of MMI or IR is supported by the evidence. We accordingly affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge