APPEAL NO. 001249

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 13, 2000. With respect to the single issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. B did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In its appeal, the appellant (carrier) argues that the hearing officer erred in determining that the first certification did not become final under Rule 130.5(e) because his determination that the treating doctor was acting on behalf of the respondent (claimant) in disputing Dr. B's certification is against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

Because only the issue of whether the first certification of MMI and IR became final under Rule 130.5(e) is before us on appeal, our factual recitation will be limited to those facts most relevant to that issue. The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. B assigned the first certification of MMI and IR; and that the claimant received written notice of Dr. B's certification on or about February 1, 1999.

Dr. B examined the claimant on January 26, 1999, at the request of the carrier. In a Report of Medical Evaluation (TWCC-69) of the same date, Dr. B certified that the claimant reached MMI on January 26, 1999, with an IR of one percent. The claimant testified that on February 9, 1999, she had an appointment with her treating doctor, Dr. M; that she and Dr. M discussed Dr. B's certification of MMI and IR at that appointment; that she and Dr. M did not agree with the certification; that she asked Dr. M to dispute the certification for her; and that he agreed to do so. On February 11, 1999, Dr. M completed the bottom portion of the TWCC-69, indicating his disagreement with the certification of MMI and the one percent IR. An "Activity Note" dated March 9, 1999, prepared by an adjuster for the carrier, states that the "treating dr. did not agree with the 1% IR. . . ." The claimant introduced a letter dated December 7, 1999, from Dr. M to the claimant's attorney. In that letter, Dr. M states, in relevant part, "[p]lease be advised I [Dr. M] was acting as patient's agent at the time I disputed/disagreed with findings of the [IR] performed by [Dr. B]."

The hearing officer determined that the first certification of MMI and IR did not become final because it was disputed by Dr. M within the 90-day dispute period. As the March 9, 1999, note from the carrier demonstrates, the carrier had notice of Dr. M's dispute of Dr. B's certification well within 90 days of the date the claimant received written notice of Dr. B's certification. Thus, the question becomes one of whether Dr. M was acting on

behalf of or with the involvement of the claimant in disputing Dr. B's certification. The claimant testified that she discussed Dr. B's certification with Dr. M at the February 9, 1999, appointment; that she and Dr. M disagreed with the certification; and that Dr. M agreed to dispute the rating for her. In addition, Dr. M states in his December 7, 1999, letter that he was acting as the claimant's agent in disputing the rating. On appeal, the carrier contends that "if [Dr. M] was in fact acting on the claimant's behalf and with the involvement of the claimant in disputing the assessment, he would have indicated such in a report soon after receipt of [Dr. B's] assessment." We find no merit in the assertion that the fact that Dr. M memorialized the claimant's involvement in the decision to dispute the first certification of MMI and IR after the 90-day period expired defeats the effectiveness of that dispute, as a matter of law. Rather, the question of whether Dr. M was acting on behalf of the claimant in disputing Dr. B's certification presented a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 992227, decided November 22, 1999; Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer has the responsibility to determine what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The claimant's testimony and the evidence from Dr. M sufficiently support the hearing officer's determination that the first certification did not become final under Rule 130.5(e) because it was timely disputed by Dr. M, who was acting on behalf of and with the involvement of the claimant in disputing. Our review of the record does not demonstrate that the hearing officer's determination that the first certification did not become final because it was timely disputed is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain, *supra.*

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur only because of recent Appeals Panel decisions. *See* Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998, for an opposing view.

Tommy W. Lueders
Appeals Judge