APPEAL NO. 001432

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 in _____, Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant=s (claimant) request for spinal surgery is not approved. The claimant appealed, arguing that one of the second opinion doctors did agree to surgery and that the doctors in the spinal surgery process did not review all of his records. The appeal file does not contain a response from the respondent (carrier).

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

It was undisputed that the claimant sustained a compensable injury on August 3, 1997. The claimant was treating with Dr. R, who referred him to Dr. G, a neurosurgeon. Dr. G recommended a three-level cervical discectomy and fusion. The second-opinion spinal surgery process was initiated and the carrier selected Dr. Ru as its second-opinion doctor. Dr. Ru initially expressed concern about the surgery and stated that he would consult with Dr. G. Dr. Ru later issued an addendum to his report stating, "So far now I am not going to concur pending further investigation." The claimant chose Dr. Ra as his second-opinion doctor and Dr. Ra also stated that he did not concur with surgery. Dr. G stated as follows in a report dated March 10, 2000:

> I had the pleasure of seeing [the claimant] back in the office today. He has had a second opinion with [Dr. Ru]. [Dr. Ru] begrudgingly concurred, but shared his concerns with me and I had a frank discussion with [the claimant]. Basically, at the end of the day, I am very reticent to recommend surgery for him. He has three-level discogenic problems, and [Dr. Ru] points out that he would [sic] a discogram at C3-4 before we could be sure that surgery would be helpful. I have told [the claimant] that in my opinion, I just think the risks of surgery do not justify the potential limited benefits.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 133.206(k)(4) (Rule 133.206(k)(4)) provides as follows if a spinal surgery determination is appealed to a CCH:

> 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.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying the statute, the rule, and the proper standard of appellate review, we cannot say that the hearing officer erred in giving presumptive weight to the doctor=s opinion that stated that the claimant should not have surgery. We, therefore, conclude that the hearing officer=s determination that the presumptive weight of the medical evidence not to the contrary is not against the great weight and preponderance of the evidence. It is a factual matter to which we must defer unless it is against the overwhelming weight of the evidence. At the end of the spinal surgery process, it appears that none of the three doctors involved in the spinal process is recommending surgery. Even though, as the claimant points out in his appeal, Dr. G stated that Dr. Ru had initially agreed, this is not, in fact, reflected in the records from Dr. Ru. It appears that Dr. G himself had changed his mind concerning the advisability of surgery at this time.

Finally, we do not find any evidence in the record that the doctors involved in the spinal surgery process did not review the relevant records as the claimant contends on appeal.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge