APPEAL NO. 001462

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 March 1, 2000. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 000589, decided May 8, 2000, reversed the part of the decision of the hearing officer that the respondent (claimant) reached maximum medical improvement (MMI) by operation of law on June 26, 1998, and that his impairment rating (IR) is 23% as certified by Dr. A, the Texas Workers' Compensation Commission-selected designated doctor, in an amended report and remanded for the hearing officer to consider Appeals Panel decisions related to a designated doctor amending a report and make necessary determinations to determine the date the claimant reached MMI and his IR. The hearing officer did not hold another CCH and rendered another decision dated June 9, 2000. He determined that the surgery performed on March 3, 1999, was under active consideration at the date of statutory MMI; that the designated doctor amended his report for a proper reason to include impairment associated with the surgery; that Dr. A's amended report dated December 13, 1999, is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to that amended report; and that the claimant reached MMI on June 26, 1998, with a 23% IR. The appellant (carrier) requested review, contended that the surgery was not under active consideration at the date of statutory MMI, urged that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant reached MMI on May 29, 1997, with a 10% IR as certified by Dr. A in his first report. A response from the claimant has not been received.

DECISION

We affirm.

The evidence related to the date the claimant reached MMI and his IR is summarized in both decisions of the hearing officer and in Appeal No. 000589, *supra.* Briefly, it is undisputed that the claimant reached MMI by operation of law on June 26, 1998. In a "To Whom It May Concern" letter dated December 23, 1997, Dr. H stated that he was "pursuing approval for a lumbar discogram with CT in order to accurately and precisely plan any surgical intervention, which is likely in this patient's case." In a letter to Dr. RR dated February 16, 1998, Dr. H stated that the claimant was referred to him for another opinion; mentioned the claimant's previous lumbar fusion and a discogram performed in December 1997; and stated that he did not believe the claimant's current situation was amenable to further surgery directed toward stabilization, but believes that the claimant should undergo the insertion of a spinal cord stimulator. Follow-up office visit notes from Dr. H dated May 12, 1998, and June 16, 1998, do not mention surgery. In a follow-up progress note dated September 15, 1998, after the claimant reached MMI by operation of law, Dr. RR recommended a fusion.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). He considered the medical evidence and determined that surgery was under active consideration on the date the claimant reached statutory MMI. That determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). The carrier did not present argument that the great weight of the other medical evidence is contrary to the amended report of Dr. A.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge