APPEAL NO. 001697

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 June 22, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on May 19, 1998, with an 11% impairment rating (IR) as assessed by Dr. T, the Texas Workers' Compensation Commission (Commission)-selected designated doctor whose first (1998) report was not contrary to the great weight of the other medical evidence. (The hearing officer's decision also recites that the claimant is not entitled to supplemental income benefits (SIBs) although SIBs was not an issue before the hearing officer.)

The claimant appealed, asserting that he had disputed Dr. T's 1998 report; and that for the 14 months or so after that report, he continued to have shoulder problems, receive physical therapy (PT), and take pain medication. The claimant requests that we reverse the hearing officer's decision and render a new decision that he has a 16% IR as assessed by Dr. T in a subsequent second report. The respondent (carrier) responds, setting out the sequence of events, and urges affirmance, citing authority therefore.

DECISION

Affirmed.

The claimant was employed as a pipefitter and the parties stipulated that the claimant sustained a compensable (right shoulder) injury on _____, when his safety rigging caught on a scaffold. The claimant's initial treating doctor was Dr. A. The claimant had surgery to repair a torn rotator cuff, "partial acromionectomy and excision of coracoacrominal ligament" on April 11, 1997. In a Report of Medical Evaluation (TWCC-69) and narrative, both dated February 19, 1998, Dr. A certified the claimant at MMI on that date with a 4% IR based on loss of range of motion (ROM). The claimant disputed that rating.

The parties stipulated that Dr. T was the Commission-selected doctor. In a TWCC-69 dated May 19, 1998, and accompanying narrative, Dr. T certified the claimant at MMI on May 19, 1998, with an 11% IR based on 12% impairment for upper extremity crepitation and 8% impairment for loss of ROM which converted to an 11% whole person IR. The claimant testified that he was not satisfied with this rating either (the claimant made it clear in his testimony that his ultimate goal was to qualify for SIBs) and returned to Dr. A for assistance in disputing the designated doctor's report. Dr. A, in a subsequent report, comments:

> [The claimant] returned to my office on 10/19/98. I reviewed my [IR] and [Dr. T's] report and rating. I explained to [the claimant] that I was standing by my original decision of 4%.

The parties appear to accept that October 10, 1998, is the date the claimant reached MMI by operation of law (statutory MMI) in accordance with Section 401.011(30)(B). (This date is probably incorrect by eight days.)

At some point, the claimant began seeing Dr. TB, who referred the claimant to Dr. EB. The change of treating doctor from Dr. A to Dr. TB was approved on February 17, 1999. An MRI of the right shoulder performed on May 6, 1999, showed evidence of "at least a partial tear as well as some calcific tendinitis in 1997 and 1996." Dr. EB performed arthroscopic surgery on July 19, 1999, but found no rotator cuff tear and only degenerative joint disease. A Commission benefit review officer wrote Dr. T asking about his IR by letter dated October 25, 1999, and Dr. T replied by letter dated December 3, 1999, indicating how he arrived at his 11% IR.

Although the claimant testified that he was receiving PT and other treatment throughout, there are no medical records to support that assertion. The claimant was sent back to Dr. T, who in a report dated January 27, 2000, said that statutory MMI was "10/10/98" and assessed a 16% IR based on 10% upper extremity impairment for loss of ROM and 18% impairment for joint crepitation combined for a 16% whole person IR.

It appears undisputed that both Dr. A and Dr. T certified the claimant at MMI in 1998, prior to the statutory date of MMI in October 1998, and that no additional surgery had been recommended, contemplated, or mentioned at that time.

The issue here is whether the designated doctor's amended report was made within a reasonable time and for a proper purpose and whether surgery was under active consideration at statutory MMI, which was clearly not the case. The hearing officer found that Dr. T "amended his findings for improper reasons and within an unreasonable amount of time under the circumstances since at the time of the initial report additional surgery to the right shoulder was not contemplated or discussed in the medical evidence." (Finding of Fact No. 5.) We agree and have held that while an amendment by a designated doctor can be appropriate, an amendment to an MMI/IR certification must be for a proper reason and done within a reasonable period of time. Texas Workers' Compensation Commission Appeal No. 972233, decided December 12, 1997; Texas Workers' Compensation Commission Appeal No. 972423, decided January 2, 1998. Surgery, in and of itself, particularly following statutory MMI, is not necessarily a proper justification for amending a certification. Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995. Essentially, whether a proper reason is shown for an amendment is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996. In this case, Dr. T did not amend his report until 19 months after his first report, 15 months after statutory MMI, and then only because of the additional arthroscopic surgery which did not find another rotator cuff tear.

Generally, we have held that surgery after statutory MMI and an IR by a designated doctor does not require a new IR unless surgery was being actively considered at the time of statutory MMI. Further, in Texas Workers' Compensation Commission Appeal No.

992014, decided November 1, 1999, a case involving an initial designated doctor's opinion approximately one and one-half years after the injury with two surgeries then occurring (one before statutory MMI and one appearing to be after statutory MMI), the Appeals Panel stated therein, "[t]he facts of this case appear to demonstrate an attempt solely to obtain a higher rating using surgery as the impetus." (Emphasis added.) In this case, the impetus also appeared to be to obtain a 15% or greater IR in order to meet one of the requirements for SIBs.

Upon review of the record submitted, we find no reversible error. 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:

Alan C. Ernst
Appeals Judge

CONCUR IN RESULT:

Gary L. Kilgore
Appeals Judge