APPEAL NO. 001830

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 July 11, 2000. The hearing officer determined that the appellant (claimant herein) reached maximum medical improvement (MMI) on September 1, 1998, with an 11% whole body impairment rating (IR). The claimant appeals, arguing that the hearing officer exceeded the issues before him by finding that the first IR by Dr. A had become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant also argues that the hearing officer's findings that Dr. A's rating was not timely disputed is contrary to the evidence. Finally, the claimant contends that the hearing officer's finding that there was insufficient evidence to support the appointment of a second designated doctor and his conclusion that the respondent (carrier herein) is not estopped from disputing the appointment of a second designated doctor are also incorrect. The carrier responded that the decision of the hearing officer is supported by the evidence and should be affirmed.

DECISION

Affirmed, as reformed.

The hearing officer sets out the facts of the case in some detail in his decision and we adopt his rendition of the facts. We will, therefore, only touch on the facts directly germane to the appeal. This includes the fact that it was undisputed that the claimant sustained a compensable back injury on _____. Dr. A, the claimant's treating doctor, certified on a Report of Medical Evaluation (TWCC-69) that the claimant attained MMI on September 1, 1999, with an 11% IR. Dr. B, as the designated doctor, certified on a TWCC-69 dated December 7, 1998, that the claimant reached MMI on that date with an 11% IR. The claimant testified that he did not know what triggered the appointment of Dr. B as the designated doctor. Clarification was sought from Dr. B by the Texas Workers' Compensation Commission (Commission) by letter of August 12, 1999. There is no record of Dr. B responding to this request. The claimant testified at a later benefit review conference that he was told that Dr. B was not on the Commission's list of designated doctors. As a consequence, Dr. S, was later appointed as the designated doctor. Dr. S certified on a TWCC-69 dated April 4, 2000, that the claimant attained MMI November 17, 1998, with a 17% IR.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

6. The certification on September 2, 1998 by [Dr. A] that claimant reached [MMI] on September 1, 1998 with an 11% whole body [IR] was the first [IR] assigned Claimant, was never disputed, and has become final.

7. If it should be determined on appeal that the September 2, 1998 certification by [Dr. A] was timely disputed or has not become final, the hearing officer would make the following findings of fact:

A. The [Commission] appointed [Dr. B] as the designated doctor.

B. As evidenced by the August 12, 1999 letter of clarification, the [Commission] considered [Dr. B] to be a designated doctor as late as August 12, 1999.

C. On December 7, 1998, [Dr. B], purportedly, acting as a designated doctor, certified that Claimant reached [MMI] on December 7, 1998 with an 11% whole body [IR].

D. The evidence is insufficient to find that [Dr. B] failed or refused to perform his duties as a designated doctor.

E. The evidence is insufficient to find that appointment of designated doctors other than [Dr. B] was proper or appropriate.

F. [Dr. B's] certification of [MMI] and whole body impairment have not been overcome by the great weight of contrary medical evidence.

G. There has not been detrimental reliance by Claimant or wrongful action or wrongful retention of a benefit by Carrier of such a nature as would estop Carrier from disputing the appointment of [Dr. S] as a second designated doctor.

H. The December 7, 1998 certification of [Dr. B] that Claimant reached [MMI] on December 7, 1998 with an 11% whole body [IR] has presumptive weight.

I. The evidence is insufficient to find that [Dr. B] was not a designated doctor at any relevant time.

J. The evidence is insufficient to find that not including the name of [Dr. B] on a list of designated doctors was appropriate and correct.

CONCLUSIONS OF LAW

3. Claimant reached [MMI] on September 1, 1998 with an 11% whole body [IR].

4. Carrier is not estopped from disputing the appointment of [Dr. S] as a second designated doctor.

5. The December 7, 1998 certification from [Dr. B] that Claimant reached [MMI] on December 7, 1998 with an 11% whole body [IR] would have presumptive weight; however, the certification by [Dr. A] that Claimant reached [MMI] on September 1, 1998 with an 11% whole body [IR] was not timely disputed and has become final.

We first address the claimant's argument that the hearing officer exceeded the issues before him in determining that Dr. A's certification became final under Rule 130.5(e). The claimant argues that this issue was not before the hearing officer. It is certainly not a matter that was certified as an issue from the BRC. We do not find from reviewing the record that this issue was litigated by the parties. We do find that this was not an issue subsumed in the issue of what was the claimant's IR. Under these circumstances, we find that the hearing officer exceeded his jurisdiction by making Finding of Fact No. 6 and we reverse and strike this finding.

The claimant argues that Finding of Fact No. 7 was contrary to the evidence. We do not find this to be the case. We have previously stated that the appointment of a second designated doctor should be a rare occurrence. We do not find that the great weight and preponderance of the evidence was contrary to the hearing officer's Finding of Fact No. 7. We, therefore, find no error in the hearing officer's giving presumptive weight to the report of Dr. B certifying that the claimant attained MMI on December 7, 1998, with an 11% IR and we reform the decision of the hearing officer to reflect that the claimant attained MMI on December 7, 1998, with an 11% IR.

As reformed, the decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kenneth A. Huchton
Appeals Judge