APPEAL NO. 001845

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 13, 2000. With respect to the issues before him, the hearing officer determined that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving the appellant/cross-respondent's (claimant) request to change treating doctors; that the claimant has not reached maximum medical improvement (MMI); that the claimant's continuing back problems are not the result of his _____, compensable injury; and that the claimant has not had disability as a result of his _____, compensable injury. In his appeal, the claimant essentially argues that the hearing officer's determinations that he did not have disability and that his continuing back problems are not the result of his _____, compensable injury are against the great weight of the evidence. In its response to the claimant's appeal, the respondent/cross-appellant (carrier) urges affirmance. In its cross-appeal, the carrier argues that the great weight of the other medical evidence is contrary to the designated doctor's opinion that the claimant has not yet reached MMI; thus, the carrier contends that the hearing officer erred in giving presumptive weight to the designated doctor's report and that he should have adopted one of the MMI dates certified by another doctor. The appeals file does not contain a response to the carrier's appeal from the claimant. The carrier did not appeal the hearing officer's determination that the Commission did not abuse its discretion in approving the change of treating doctors to Dr. B and that determination has become final. Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained a compensable back strain injury on _____, in the course and scope of his employment as a long-haul truck driver for (employer). The claimant testified that on that date, the 18-wheeler in which he was a passenger was struck from the rear by a car on an interstate. He stated that he injured his neck and low back in the _____, accident. The claimant went to the emergency room following his accident and was diagnosed with whiplash. On November 23, 1999, the claimant was released to full duty. The claimant acknowledged that he worked from November 23, 1999, to March 24, 2000, performing his regular duties as a truck driver and that he did not seek medical treatment for his back in that period; however, the claimant maintained that he continued to have low back pain from November 23, 1999, to March 24, 2000. On cross-examination, the claimant admitted that he sought medical treatment from Dr. G, his family doctor, on November 29, 1999; December 3, 1999; and February 16, 2000, for various complaints but that those records do not reflect ongoing complaints of back pain. Dr. G's record of the claimant's March 28, 2000, visit notes that the claimant has had back pain for two weeks. The claimant explained that the two week reference was to the date that the back pain became so severe that it began to interfere with his driving the truck.

On April 5, 2000, the claimant saw Dr. E. Dr. E noted that his examination did not reveal any muscle spasm or tenderness; that there was not restriction in the claimant's range of motion (ROM); and that there was no perceptible decrease in strength. On April 6, 2000, Dr. E certified that the claimant reached MMI on April 5, 2000, with a zero percent impairment rating (IR). In his accompanying narrative report, Dr. E stated "please be advised that [claimant] did not keep his appointment with me on the 6th of April. In view of his non-compliance, I think it is reasonable to declare MMI on April 5, 2000 with a 0% [IR]."

The claimant disputed Dr. E's certification and Dr. K was selected by the Commission to serve as the designated doctor. In a Report of Medical Evaluation (TWCC-69) dated May 15, 2000, Dr. K certified that the claimant had not reached MMI. In his narrative report, Dr. K stated that "[a]n examination was conducted on [claimant] but an [IR] cannot be assigned at this time as in the opinion of this examiner the patient has not reached MMI."

On June 13, 2000, Dr. D examined the claimant at the request of the carrier. On a TWCC-69 of that date Dr. D certified that the claimant reached MMI on June 13, 2000, with an IR of zero percent. In his accompanying narrative, Dr. D noted that the claimant's examination and his diagnostic testing were essentially normal and stated that "[h]e probably reached MMI as early as 04/05/00. But, giving him the benefit of the doubt, certainly by today's date of 06/13/00, he has reached MMI . . . ."

Dr. B testified at the hearing that the claimant's lumbar MRI was misread and that it in fact reveals evidence of disc dessication and degenerative disc disease. Dr. B further stated that the claimant's _____, injury made the preexisting bulging disc and degenerative disc disease symptomatic; that both conditions were aggravated by the _____, accident; and that the claimant's current low back problems were a result of his compensable injury.

The carrier had Dr. S, a board certified neuroradiologist, testify at the hearing. Dr. S stated that in his opinion the claimant's lumbar MRI was normal and that there is no evidence of herniation, bulging, disc dessication, or neural impingement. Dr. S concluded that there was no evidence from a radiological standpoint of a lumbar spine injury and that nothing on the MRI would explain the claimant's complaints of low back pain.

As noted above, the hearing officer determined that the claimant's continuing back problems are not the result of his _____, compensable injury and that the claimant has not had disability as a result of his _____, compensable injury. Each of those issues presented the hearing officer with questions of fact. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines 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 hearing officer determined that the claimant failed to prove by a preponderance of the credible evidence that he had disability or that his continuing back problems are the result of his compensable back strain injury of _____. The hearing officer noted that the claimant worked full duty and did not seek medical treatment for his back for the period from November 23, 1999, to March 24, 2000, and that video surveillance of the claimant in April and May 2000 showed that the claimant was able to perform various activities without restrictions. Each of those factors was properly considered by the hearing officer in making his credibility determinations. Nothing in our review of the evidence reveals that either the hearing officer's determination that the claimant did not have disability as a result of his compensable injury or that the claimant's continuing low back problems are not a result of the _____, compensable injury are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse those determinations on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Next, we consider the carrier's cross-appeal of the hearing officer's determination that the claimant has not reached MMI in accordance with the designated doctor's, Dr. K's, report. We are puzzled by the hearing officer's determination in that regard. Dr. K's opinion that the claimant is not at MMI is clearly premised upon his determination that the claimant's low back problems have not resolved. However, the hearing officer found, and we affirmed his determination, that the claimant's continuing low back problems are not a result of the _____, compensable back strain injury. Since the claimant's ongoing low back complaints have been determined not to be a result of the compensable injury, it follows that the claimant has reached MMI for the _____, compensable injury and that the great weight of the other medical evidence is contrary to Dr. K's opinion that the claimant has not reached MMI. Accordingly, Dr. K's certification that the claimant has not reached MMI is not entitled to presumptive weight and, pursuant to Section 408.125(e), the Commission should have adopted the certification of one of the other doctors. As noted above Dr. E certified MMI at least in part because of noncompliance. We have recognized that a certification of MMI based on alleged noncompliance with treatment does not equate to a certification of MMI based on reasonable medical probability that further material recovery or lasting improvement can no longer be reasonably anticipated. Texas Workers' Compensation Commission Appeal No. 982212, decided November 2, 1998; Texas Workers' Compensation Commission Appeal No. 980912, decided June 18, 1998. As such, Dr. E's certification cannot be adopted. However, Dr. D certified that the claimant reached MMI on June 13, 2000, and no problems are apparent from his report. Accordingly, we reverse the hearing officer's determination that the claimant has not yet reached MMI in accordance with Dr. K's report to which he erroneously gave presumptive weight, and render a new decision that the claimant reached MMI on June 13, 2000, in accordance with the certification of Dr. D. The issue of the claimant's IR was not before the hearing officer and is likewise not before us on appeal. Accordingly, we cannot and will not resolve that issue in this decision.

The hearing officer's determinations that the claimant's continuing back problems are not a result of his _____, compensable injury and that he has not had disability as a result of that injury are affirmed. The hearing officer's determination that the claimant has not reached MMI is reversed and a new decision rendered that the claimant reached MMI on June 13, 2000.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge