APPEAL NO. 001889

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 18, 2000. With respect to the single issue before him, the hearing officer determined that the appellant's (claimant) request for spinal surgery should not be approved. In her appeal, the claimant asserts error in that determination and requests that we reverse the hearing officer's decision and render a new decision approving the requested spinal surgery. In the alternative, the claimant asks that she be given the opportunity to select an alternate spinal surgery second opinion doctor. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable low back injury on _____. Dr. P has recommended an anterior lumbar interbody fusion with internal fixation at L4-5. The carrier selected Dr. H as its spinal surgery second opinion doctor. On March 30, 2000, Dr. H examined the claimant. On the same date, Dr. H completed a form provided by the Texas Workers' Compensation Commission (Commission) to provide the results of her examination, stating that she did not concur in the proposed surgery because more or a different type of non-surgical care should be tried. In her accompanying narrative report, Dr. H recommended that the claimant undergo interdiscal heat therapy, acknowledging that it is experimental but that it is also "much less invasive than a fusion. . . ." Dr. H also expressed concern about the proposed fusion because the claimant smokes and is "moderately overweight." Dr. H concluded:

> I told her that I would not concur with the suggested procedure to have a fusion at her age, will certainly make it more likely for her to undergo adjacent segment degeneration during her lifetime requiring another operative procedure and I have limited my interbody fusions to patients with 50 percent or more disc space collapse.

The claimant testified at the hearing that she is not interested in having the therapy recommended by Dr. H because it is experimental and there is inadequate information about the "pros and cons" of the procedure.

The claimant selected Dr. N as her second opinion doctor. The claimant's appointment with Dr. N was on May 25, 2000. In a report dated May 26, 2000, Dr. N concluded that "the proposed anterior lumbar interbody fusion with BAK cages at the L4-L5 interspace is not indicated at this time." The claimant testified that Dr. N was rude to her and made unusual remarks during her visit with him. The claimant also introduced a letter dated May 26, 2000, detailing Dr. N's behavior during the examination.

Dr. P testified by telephone at the hearing. Dr. P stated that there is "fairly compelling evidence" that the claimant's L4-5 disc is the major pain generator. Dr. P stated that he believes there is an 80% chance that the claimant will have significant reduction in her back pain, if she has successful surgery and completes post-surgery rehabilitation. Dr. P stated that he believes that the claimant has had the "full gamut" of conservative treatment and that her pain persists. In response to Dr. H's report, Dr. P noted that the claimant does not want to have the experimental treatment Dr. H recommends and that Dr. H's statement about limiting surgery to patients with 50% or more disc space collapse appears to be based upon her personal preference and is not supported in the literature. In regard to Dr. N, Dr. P noted the bizarre nature of the examination described by the claimant. In addition, Dr. P stated that Dr. N's examination was "short-sighted." Dr. P concluded that Dr. N was "off base"in both his evaluation and his assessment.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §133.206(k)(4) (Rule 133.206(k)(4)) provides that of the three recommendations and opinions, those of the surgeon and the two second opinion doctors, presumptive weight will be given to the two which have the same result and that their result will be upheld unless the great weight of the other medical evidence is to the contrary. The parties stipulated that Dr. H and Dr. N had not concurred in the proposed surgery. The hearing officer determined that the great weight of the other medical evidence was not contrary to the result reached by Dr. H and Dr. N. Thus, he further determined that the proposed spinal surgery should not be approved.

In her appeal, the claimant essentially argues that the evidence from Dr. P, Dr. O, D.C., her treating doctor, and Dr. R, her pain management doctor, are the great weight of the evidence contrary to the opinions of Dr. H and Dr. N. The hearing officer determined that the great weight of the other medical evidence was not contrary to the opinions of Drs. H and N; thus, he further determined that the spinal surgery should not be approved. Our review of the record does not demonstrate that the hearing officer's decision in that regard is 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 the decision 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).

Finally, we briefly consider the claimant's alternative request that she be given another second opinion doctor based upon her assertions as to the odd behavior Dr. N demonstrated during the spinal surgery second opinion examination. While the claimant's allegations are troubling, as the hearing officer noted there is no authority in either the 1989 Act or the Commission's rules for the appointment of another second opinion doctor. Thus, the Appeals Panel is without the authority to grant the relief requested by the claimant.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge