

APPEAL NO. 002005

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 July 27, 2000. With respect to the single issue before her, the hearing officer determined that the appellant's (claimant) request for spinal surgery should be denied because the two second opinion doctors did not concur in the need for surgery and because the claimant's request for a spinal surgery CCH was untimely. In his appeal, the claimant contends that the hearing officer erred in determining that there were two nonconcurrences in the need for surgery. The appeal does not address the issue of whether the request for the spinal surgery CCH was untimely. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that Dr. S performed a laminectomy and fusion at L3-4 in 1997 and a laminectomy and fusion at L4-5 in 1998, both as a result of his compensable injury. Dr. S submitted a Recommendation for Spinal Surgery (TWCC-63) seeking approval of surgery to extend the claimant's fusion to L5-S1 and to remove the hardware from L3-4 and L4-5.

The carrier selected Dr. W to serve as its second opinion doctor. On November 1, 1999, Dr. W examined the claimant. Dr. W did not concur that the surgery proposed by Dr. S was indicated. In a narrative report dated November 8, 1999, Dr. W opined that the claimant did not need the first or second surgeries and that a third surgery likewise was not indicated. Dr. W noted that the claimant's discogram was "not impressive" and that the claimant's pain "is not related to L5-S1." Finally, Dr. W stated that the claimant "is going to have pain for the rest of his life and I don't feel surgery is the answer to resolve any of this pain."

The claimant selected Dr. H as his second opinion doctor. In a report of November 29, 1999, Dr. H stated that he needed a current EMG and a neurological evaluation before he could render an opinion on the need for the proposed surgery. That testing was performed and the results were forwarded to Dr. H. Dr. H reexamined the claimant on March 10, 2000. In a March 15, 2000, narrative report, Dr. H noted that Dr. S had recommended a lumbar laminectomy, removal of instrumentation from L3 to L5, and an extended fusion to S1. Dr. H concluded:

I do believe that the patient has nerve root irritation. He is difficult to evaluate and is hostile and belligerent. It is difficult for me to predict or imagine that the patient would be likely to benefit from the surgical procedure with so many subjective complaints. In any event, if he were to have an

operation, I would recommend nothing more than [sic] a decompression and fusion.

In an April 14, 2000, letter the Texas Workers' Compensation Commission's (Commission) Medical Review Division sent a letter to the claimant advising him that the carrier is not liable for the cost of spinal surgery because neither of the second opinion doctors agreed with the recommendation for spinal surgery. On June 30, 2000, the claimant called the Commission and requested a spinal surgery CCH.

In Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) the term "concurrency" is defined as follows:

A second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. Need is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed (i.e. cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) that are likely to improve as a result of the surgical intervention. Types of spinal surgery include but are not limited to: stabilizing procedures (e.g. fusions); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators.

Rule 133.206(k)(3) states that an appeal to a spinal surgery CCH "must be filed within 10 days after receipt of notice from the commission regarding carrier liability for spinal surgery." 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 hearing officer determined that the claimant's appeal to a spinal surgery CCH was not timely requested; that neither Dr. W nor Dr. H concurred in the proposed surgery; and that the great weight of the other medical evidence was not contrary to the result reached by Dr. W and Dr. H. Thus, she further determined that the proposed spinal surgery should not be approved. As noted above, the claimant does not address the issue of the timeliness of his request for a spinal surgery CCH in his appeal. However, the hearing officer's determination in that regard is supported by sufficient evidence. The Commission's notice of the results of the spinal surgery second opinion process is dated April 14, 2000. Pursuant to Rule 102.5(d), the claimant is deemed to have received that notice five days later on April 19, 2000. In accordance with Rule 133.206(k)(3), the claimant had 10 days from April 19, 2000, to appeal. Because April 29, 2000, was a Saturday, pursuant to Rule 102.3(a)(3), the deadline for filing an appeal was extended until Monday, May 1, 2000. However, the claimant did not request an appeal to a spinal surgery CCH until June 30, 2000, well beyond the deadline for doing so.

The hearing officer also determined that the spinal surgery should not be approved because neither of the second opinion doctors concurred in the proposed surgery. In his appeal, the claimant contends that Dr. H's opinion was a concurrence. In order to qualify as a concurrence under Rule 133.206(a)(13), the second opinion doctor must agree on the proposed type of spinal surgery and the region (cervical, thoracic, lumbar, or sacral) of the spine involved. However, the second opinion doctor does not have to agree on the approach (anterior, posterior, instrumentation, cages, etc.) or on the number of levels within the region in which the recommended surgery will be performed. Thus, the critical question becomes one of determining if Dr. H's March 15, 2000, report states that decompression and fusion surgery is needed. In considering that question, it is instructive to consider the language of Dr. H's report within the framework of the definition of the term "concurrence" in Rule 133.206(a)(13). It is important to note that Rule 133.206(a)(13) provides that need "is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed (i.e. cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) that are likely to improve as a result of the surgical intervention." (Emphasis added.) In his report, Dr. H states "[i]t is difficult for me to predict or imagine that the patient would be likely to benefit from the surgical procedure with so many subjective complaints. In any event, if he were to have an operation, I would recommend nothing more than [sic] a decompression and fusion." From this language, it follows that Dr. H's opinion cannot qualify as a concurrence in that he does not believe that the claimant's condition will improve as a result of the surgery. To the contrary, he predicts a poor surgical response. For the foregoing reasons, we believe that the hearing officer properly determined that Dr. H's opinion is not a concurrence as that term is defined in Rule 133.206(a)(13).

As noted above, pursuant to Rule 133.206(k)(4), presumptive weight is given to the two opinions that reach the same result, unless the great weight of the other medical evidence is to the contrary. The hearing officer determined that the great weight of the other medical evidence was not contrary to the opinions from Dr. W and Dr. H that the proposed type of surgery was not indicated; thus, she further determined that the 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).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge