

APPEAL NO. 002400

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 September 15, 2000. With regard to the only issue before her, the hearing officer determined that the appellant's (claimant) impairment rating (IR) was 13% as assessed by the designated doctor, whose report was not contrary to the great weight of other medical evidence.

The claimant appeals, requesting that she be reexamined by the designated doctor because of spinal surgery subsequent to his assessment. The claimant, in her appeal, reiterates that she had never refused surgery prior to reaching maximum medical improvement (MMI). The claimant requests that we reverse the hearing officer's decision and render a new decision to have her reexamined by the designated doctor. The respondent (carrier) responds, citing a number of Appeals Panel decisions and urging affirmance.

DECISION

Affirmed for the reasons stated.

The claimant was employed putting face covers on public telephones. The claimant testified how she bent over to pick up some of the face covers and injured her back on _____. The parties stipulated that the claimant sustained a compensable (low back) injury on that date and that the claimant had reached MMI on February 18, 1998. The parties also stipulated that Dr. G was the Texas Workers' Compensation Commission (Commission)-selected designated doctor.

The claimant's treating doctor was Dr. J, who treated the claimant conservatively. At some point, apparently August 13, 1997, Dr. J referred the claimant to Dr. M, a neurosurgeon. In a report of that date, Dr. M commented that he thought the claimant "may require a surgical intervention," but that the claimant "is not interested to have a surgical procedure" and therefore he was referring the claimant back to Dr. J so she could "continue conservative care under the supervision of [Dr. J]." Subsequently, the claimant was examined by Dr. TM, who in a Report of Medical Evaluation (TWCC-69) and narrative dated February 26, 1998, certified the claimant at MMI on February 17, 1998, with a 5% IR (Dr. M does not indicate how he reached that figure), and released the claimant to return to full-time work effective February 26, 1998. This apparently led to the appointment of Dr. G as the designated doctor.

Dr. G, in a TWCC-69 and narrative, both dated August 10, 1998, certified MMI on February 17, 1998, with a 13% IR, based on a 7% impairment from Table 49, Section (II)(C) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association and 6%

impairment for loss of range of motion. No motor or sensory deficit was noted. Dr. G, in his narrative, noted Dr. M's recommendation for surgery, which the claimant refused, and noted that the claimant had been "non-compliant with PRIDE and returned to the care of [Dr. J]. She again was [offered] interventional care and declined." Dr. G concluded:

She is discussed the nature of this problem and asked if she understands the surgery which was previously proposed. She seems to and is unwilling to entertain anything without a 'guarantee'. I explained via translator that there are no guarantee's, but that it was likely she would continue to get worse rather than better unaided. She is not likely to change her opinion regarding surgery. It is curious, but in reading the medical record, this finding is consistent. Because she has been adequately diagnosed, recommended (and declined) surgical intervention, and passed through rehabilitation as much as is reasonable, she is at MMI.

The claimant's refusal for surgery is also documented in Dr. J's records and reports. The claimant, at the CCH, initially denied that she had ever declined or refused surgery; however, the reports of Dr. J, Dr. M, and Dr. G indicate otherwise. There is no stipulation or finding regarding when the claimant reached MMI by operation of law (statutory MMI, Section 401.011(30)(B)); however, the hearing officer, in her Statement of the Evidence, comments:

In the present case, surgery was neither being contemplated at the time the Claimant reached MMI as a matter of law (December 9, 1998) and according to the evidence and the testimony, nor was there a substantial change in the Claimant's medical condition after the Claimant reached MMI.

In a report dated January 20, 1999, Dr. M noted that the claimant was "suffering from mechanical low back pain" and Dr. J, in a note of December 15, 1998, commented that the claimant "was very adamant about no surgery." Dr. J continued to try different therapies and pain medication until June 1999. In a report dated June 30, 1999, Dr. M notes that the claimant had given up on conservative treatment "and would like to have a surgical solution." Dr. M recommended spinal surgery on September 13, 1999, concurred in on September 24, 1999, and performed on December 13, 1999. In a letter dated March 8, 2000, a Commission benefit review officer advised Dr. G, the designated doctor, of the claimant's surgery, submitted surgical reports, and asked whether Dr. G had prospective knowledge of the claimant's surgery and whether that changed the claimant's IR. Dr. G replied by letter dated March 13, 2000, stating:

The answer is no. I had no prior knowledge or premonition that [the claimant] would elect to have two level 360 surgery, specially since she had declined it on separate prior occasion at one level. Secondly I have no reason nor knowledge of why she would have surgery at two levels, since all the records of her injury were at one level prior to that time.

The hearing officer commented that she did not find the claimant "to be a persuasive witness" particularly in her testimony that she had "never" refused or declined surgery. The hearing officer commented:

At any rate, the Claimant testified that [Dr. M] recommended that she have back surgery on August 13, 1997 (See Carrier's Exhibit C). The Claimant testified that she did not have the surgery until December 1999. The evidence supports the fact that the Claimant refused to have the surgery, and now, three (3) years subsequent to her refusal, she wishes to have the designated doctor amend his two (2) year old report (See Carrier's Exhibit C, Claimant's Exhibit 3, p.2). I find that there are no compelling circumstances warranting the designated doctor to amend his report dated August 10, 1998 wherein he assesses a thirteen percent (13%) [IR] (See Claimant's Exhibit 2). Therefore, the Claimant's [IR] should stand at thirteen percent (13%).

Both the hearing officer and the carrier rely heavily on Texas Workers' Compensation Commission Appeal No. 971385, decided August 25, 1997, which held that the focus, or key factor, in a case of surgery after the designated doctor's IR, "is on whether surgery was contemplated at the time of the designated doctor's first report" and established a "three prong test." The Appeals Panel has declined to follow Appeal No. 971385. See Texas Workers' Compensation Commission Appeal No. 000389, decided April 3, 2000; Texas Workers' Compensation Commission Appeal No. 992672, decided January 18, 2000; and Texas Workers' Compensation Commission Appeal No. 991081, decided July 8, 1999. Particularly, Appeal No. 992672, *supra*, gives our reasoning and why we have moved away from the position of Appeal No. 971385, *supra*. Instead, we have held, in the cases cited and others, that the key factor in such cases is whether surgery was contemplated ("under active consideration") at the time of statutory MMI. See *also* Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999. Where surgery and the amendment of a designated doctor's report take place before statutory MMI, the hearing officer should consider whether the designated doctor amended his report for a proper reason and within a reasonable amount of time. Texas Workers' Compensation Commission Appeal No. 992288, decided December 1, 1999, and Appeal No. 992672, *supra*.

However, in this case, statutory MMI was on or about December 9, 1998, and at that point, several of the doctors' reports (Dr. J's report of December 15, 1998, and Dr. M's report of January 20, 1999) noted that the claimant was still very adamant about no surgery. Clearly, although surgery had been recommended as early as August 1997, the claimant had equally clearly refused surgery as an option until around June 1999, some six or seven months after she reached statutory MMI. While perhaps the hearing officer applied the wrong standard, in this case, the evidence supports the hearing officer's decision.

We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352

(Tex. App.-El Paso 1989, writ denied). Consequently, we affirm the hearing officer's decision and order that the claimant has a 13% IR.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Judy L. Stephens
Appeals Judge