APPEAL NO. 002510

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 29, 2000. The issues at the CCH were the date that the respondent (claimant) reached maximum medical improvement (MMI) and his impairment rating (IR).

The hearing officer determined that the claimant reached MMI on June 27, 1999, with a 17% IR in accordance with the amended report of the designated doctor, which he found was not against the great weight of the contrary medical evidence.

The appellant (carrier) has appealed, arguing that the amended report was not done for a proper purpose and that the claimant had already reached MMI. The carrier argues that the Texas Workers' Compensation Commission (Commission) is without jurisdiction to consider a substantial change in condition. The claimant responds that a reexamination by the designated doctor was properly done. The claimant further points out that all of the actions complained of here took place before statutory MMI had been reached.

DECISION

We affirm.

The claimant sustained a back injury in the course and scope of employment on _____, while pulling a cart with a very heavy tank of water on it. He had two back surgeries, the first on January 13, 1998, and a second surgery on April 20, 1999. The claimant testified briefly and said that he continued to have problems after his first surgery. However, the claimant said the second surgery was more successful.

From medical records in evidence, it is shown that the claimant's first surgeon, Dr. M, certified him at MMI on July 20, 1998, with a 12% IR. This was apparently disputed, because Dr. C was appointed as designated doctor. Dr. C examined the claimant on October 1, 1998. In his Report of Medical Evaluation (TWCC-69), Dr. C noted that Dr. M's postop office notes showed that the claimant was not progressing in postoperative therapy and continued to have pain, but that Dr. M certified MMI because he felt nothing else medically could be done for the claimant.

Dr. C stated that although the claimant had evidence of multiple-level degenerative disc disease and could benefit from a discogram, he was certifying the claimant at MMI due to inconsistencies in the claimant's examination, his age (around 60 years old), and his prospect for returning to his previous job after repeat surgery. Dr. C stated that the claimant might be a candidate for a two-level lumbar fusion, but he was at MMI "in a practical sense" because further surgery would, in Dr. C's opinion, make little difference in the claimant's impairment or recovery.

Dr. C assigned 10% for a specific disorder but gave 0% for both neurological deficit and range of motion (ROM) deficit. Dr. C adopted Dr. M's MMI date.

The claimant said that he was referred to Dr. S because Dr. M was retiring. Dr. S began treating the claimant in November 1998 and ordered an MRI. This study reported a probable recurrent herniation at the L4-5 site of the previous surgery and some mild degenerative changes at L5-S1.

On January 1, 1999, Dr. S wrote that the claimant should either learn to live with his continuing pain or undergo a second surgical procedure. He noted that the claimant was not able to work with his pain yet wanted to return to work as soon as possible. The second surgery was performed on April 20, 1999, and follow-up reports indicated that the claimant was doing well, with no significant reports of pain.

The attorney for the claimant wrote to the Commission after the second surgery arguing that there was a substantial change in condition and the designated doctor should be recontacted. Dr. C was recontacted by the Commission about the second surgery, and he responded that he would have to do a second examination because the second surgery would affect the date of MMI and the IR. His second TWCC-69, filed after this examination, assigned an MMI date of June 27, 1999, with a 17% IR. Of this, 13% was for a specific condition, one percent was for loss of sensation, and three percent for ROM loss.

We note that the carrier, in its appeal, does not suggest that the second report of Dr. C was against the great weight of the contrary medical evidence, nor was another medical report tendered to refute the accuracy of the 17% IR. Rather, the carrier argues that no surgery was contemplated at the time of the first report, that the claimant had already reached MMI, and that the second report of the designated doctor was improper.

We would first point to language in Dr. C's first report which explains why he found the claimant to be at MMI. In contrast to what the carrier argues as to whether surgery was contemplated, Dr. C acknowledges that further testing could be done to identify the source of the claimant's continued pain which might well point toward surgery. However, he assessed a "practical" MMI status, based upon the claimant's age and likelihood of returning to his previous employment. Neither factor appears in the definition of MMI set forth in Section 401.011(30).

We note that while Dr. C was skeptical, at the time, that the claimant would derive any benefit from a subsequent surgery, the record indicates that the claimant in fact did experience a "further material recovery"after, and as a result of, the surgery. We do not view this case as reopening the matter of IR based upon "substantial change of condition," so much as reviewing the course of the injury as it developed over the subsequent 104-week period. (We note that by passing Section 408.104, the legislature has recognized that the effects of back injuries may need an even longer period of time than 104 weeks to achieve medical MMI.)

Leaving aside the side argument about "proper purpose" amendments, the hearing officer was required to analyze the first report of Dr. C according to whether the great weight of medical evidence was contrary to it. Sections 408.122(c) and 408.125(e). The hearing officer found as fact that the great weight of medical evidence was against the certification of MMI and IR in that carrier report. This is supported by the record in this case. He could then look to the designated doctor's second report, perform the same analysis, and accord presumptive weight. The second report is not only not overcome by the great weight of contrary medical evidence, it is consistent with that medical evidence. Sending the claimant back to the designated doctor to assess the results of surgery that the designated doctor speculated was an option (and which was performed before the date of "statutory" MMI) was proper in this case.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge