

APPEAL NO. 002646

Following a contested case hearing held on October 12, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by finding that the great weight of the medical evidence is not contrary to the recommendations of Dr. C and Dr. T for spinal surgery and by concluding that the respondent's (claimant) request for spinal surgery is approved. The appellant (carrier) asserts on appeal that the hearing officer's determination is not in accord with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) because Dr. C, the claimant's surgeon, amended the Recommendation for Spinal Surgery (TWCC-63) to conform to the surgical procedure recommended by Dr. T, the claimant's second opinion doctor, and because the claimant does not have the requisite spinal pathology since objective tests do not support the opinions of Dr. C and Dr. T that the claimant has lumbar spine herniated discs. The record does not contain a response from the claimant.

DECISION

Affirmed.

Rule 133.206 provides for the spinal surgery second opinion process. Rule 133.206(k)(4) provides that of the three recommendations and opinions (the surgeon's and the two second opinion doctors'), presumptive weight will be given to the two which had the same result and they will be upheld unless the great weight of the medical evidence is to the contrary. Rule 133.204(a)(13) defines "concurrence" as a second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed and that "need" is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed that are likely to improve as a result of the surgical intervention.

Dr. C's Recommendation for Spinal Surgery (TWCC-63), signed on May 11 (all following dates are in 2000 unless otherwise stated), states the diagnosis as lumbar radiculopathy at L4-5 and the recommended procedure as lumbar decompression L4-5, right. Dr. K, the carrier's second opinion doctor, wrote on June 21 that he cannot concur at this time because further testing is needed before he can render an opinion. Dr. K wrote on June 29 that the claimant is in severe pain and is severely incapacitated; that the myelogram-CT of November 9, 1999, showed the left-sided L4-5 disk herniation; that an April 20 MRI shows an asymmetrical bulge at L3-4 on the right, almost to the point of a far lateral disc herniation and that the L4-5 disc has some scarring in the canal; that his impression is degenerative disc disease at L3-4 and L4-5 with postop status L4-5 discectomy; and that while he agrees with the necessity for surgical intervention, he feels further documentation is necessary and recommends a myelogram-CT, to be followed by a discogram-CT if the former is not conclusive. Dr. C wrote on July 14 that he believes that the claimant has a right-sided compression at L3-4; that he also has disc space narrowing and foraminal narrowing at L4-5; and that his plan has been to perform right-sided decompression at L3-4 and possibly at L4-5. Dr. K wrote to Dr. C on August 1 stating that Dr. C's plan for surgery is "probably good" but that he would like to see it properly

documented by work-up; and that the confusion actually stemmed from Dr. C's TWCC-63 stating that he, Dr. C, wanted to do a lumbar decompression at L4-5. Dr. C's record of August 11, 2000, states that while the claimant is markedly improved on the left following the December 12, 1999, left L4-5 partial hemilaminectomy, his right leg pain has continued to progress; that an MRI reveals a right L3-4 herniated nucleus pulposus; and that he has recommended a right L3-4 partial hemilaminectomy and, in addition, exploration of the right L4-5 level. Dr. T wrote on August 11 that he concurs that surgery is indicated for the claimant. Dr. T further wrote on that date that the lumbar spine MRI reveals a right L3-4 herniated nucleus pulposus and that he has recommended that the claimant have a right L3-4 partial hemilaminectomy and also exploration of the right L4-5 level. Dr. C's TWCC-63 signed on September 14 states the diagnosis as lumbar radiculopathy, 3-4, L4-5, and the procedure as lumbar decompression on L3-4 with exploration at L4-5.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We are satisfied that the challenged finding that the great weight of the medical evidence is not contrary to the recommendations for spinal surgery of Dr. C and of Dr. T is sufficiently supported by the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The medical records sufficiently establish the existence of lumbar spine pathology that may be improved by the proposed surgery. Further, the carrier points us to no provision in Rule 133.206 which prohibits the surgeon from preparing an amended TWCC-63, whether or not such conforms to the surgical recommendation of a second opinion doctor.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge