

APPEAL NO. 010931
FILED JUNE 6, 2001

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 April 3, 2001. The hearing officer determined that the respondent/cross-appellant (claimant) was entitled to change her treating doctor and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving the claimant's request to change treating doctors. The appellant/cross-respondent (carrier) appealed that determination, arguing that: (1) certain findings of fact and conclusions of law were incorrect; (2) the Commission action on the request for change of treating doctor was an abuse of discretion; and (3) the hearing officer applied the burden of proof incorrectly. The claimant disagrees with portions of Finding of Fact Nos. 4 and 6, and requests reversal of those portions, but otherwise agrees with the hearing officer's determinations. The carrier submitted a response to the claimant's submission.

DECISION

Affirmed, as reformed.

We note first that the hearing officer made an obvious typographical error in Conclusion of Law No. 4 and in the Decision paragraph. The hearing officer mentions the name "Dr. P four times when it is obvious that he meant to refer to Dr. A. The Decision paragraph and Conclusion of Law No. 4 are corrected to read Dr. A, vice Dr. P.

The claimant testified at the hearing that she requested to change treating doctors from Dr. T to Dr. A because she did not believe that she was receiving proper care from him and because Dr. T had never done any diagnostic tests on her. She had only seen Dr. T on two occasions soon after her injury, and had requested and obtained referral to a chiropractor. The claimant saw the chiropractor, Dr. R, three times a week for two months. The claimant and Dr. R had discussed diagnostic tests early during the course of treatment, but Dr. R did not believe the tests were necessary. Dr. R had returned the claimant to full duty on November 1, 2000. The claimant had in fact returned to her job as a flight attendant. She testified that on her third multi-day trip after returning to work, she was unable to perform her duties and had removed herself from work when she returned to (city). The claimant testified that she sought a new doctor by calling a number on a flyer in her union materials. She obtained Dr. A's name from calling that number on November 15th or 16th. She talked to Dr. A and he indicated that he would want her to undergo diagnostic testing since that had not yet been done. The claimant underwent a required medical examination with Dr. B on November 17, 2000. Dr. B noted in his report that no diagnostic tests had been done. Dr. B found that the claimant was at maximum medical improvement on November 17, 2000, and assigned an impairment rating (IR) of 2%.

On the Employee's Request to Change Treating Doctors (TWCC-53), dated November 20, 2000, the claimant stated: "Dr. [T] is the first doctor I saw and he is not

helping my condition. I believe Dr. [A] can help my condition. Dr. [A] is my choice of a doctor." The Commission approved this request on November 21, 2000.

The carrier argued that the Commission abused its discretion in approving this change because the actual reason for the claimant's request was not her dissatisfaction with the lack of treatment from Dr. T, but rather because she had earlier been off work for two months, and wanted to be taken off work again.

Section 408.022(c) provides a list of criteria for approving a change of treating doctors. A change to secure a new IR or medical report is prohibited. Section 408.022(d). See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9). A determination to approve or disapprove a change of treating doctors is reviewed under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 970686, decided June 4, 1997. There is an abuse of discretion when a decision maker reaches a decision without reference to guiding rules and principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The carrier had the burden of proving an abuse of discretion in the approval. See Texas Workers' Compensation Commission Appeal No. 93433, decided July 7, 1993; and Texas Workers' Compensation Commission Appeal No. 941721, decided February 7, 1995 (Unpublished). There was evidence from which the hearing officer could conclude that the claimant had submitted the TWCC-53 for proper reasons. The hearing officer apparently found the claimant to be credible, and her reason for wanting a change of treating doctor to be a permitted reason for change. Consequently, the hearing officer found that the Commission did not abuse its discretion in approving the requested change.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

The challenges to specific findings of fact and conclusions of law are rejected. The overall evidence fully supports the final decision, as reformed. We note that the hearing officer correctly stated and applied the burden of proof when making his determinations in this case.

We affirm the decision, as reformed, and the order of the hearing officer.

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge