APPEAL NO. 011175
FILED JULY 12, 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 May 10, 2001. The hearing officer who resolved the disputed issue by determining that the first impairment rating (IR) and the date of maximum medical improvement (MMI) assessed by Dr. B, the appellant's (claimant herein) treating doctor, became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant files a request for review arguing that she did timely dispute Dr. B's certification of IR and date of MMI and that it therefore did not become final pursuant to Rule 130.5(e). The claimant argues that the records of the Texas Workers' Compensation Commission (Commission) are inaccurate to the degree that they reflect she did not dispute Dr. B's rating until more than 90 days after she was deemed to have received it. The respondent (self-insured herein) replies that the evidence showed that the Commission sent the claimant notice of Dr. B's certification more than 90 days before she disputed Dr. B's certification.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____, that included her cervical, thoracic, and lumbar spine as well as her left shoulder and left knee. It was undisputed that Dr. B certified maximum medical improvement (MMI) and IR on November 4, 1997, and that this was the first certification of MMI and IR. Commission records indicate that the Commission sent the claimant notice of this certification on November 19, 1997. The claimant testified that she does remember when she received this notice. The claimant also testified that she called the Commission in January 1998 to dispute Dr. B's certification. Records of the Commission indicate that the claimant first disputed Dr. B's certification on February 27, 1998.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. On November 04, 1997, [Dr. B] assessed an [IR] of 7% percent with a [MMI] date of November 04, 1997.

3. By November 24, 1997, Claimant knew she was assessed an [IR] of 7% percent with a [MMI] date of November 04, 1997.

4. Claimant did not dispute the [IR] or date of [MMI] within 90 days.

CONCLUSION OF LAW

3. The first certification of [MMI] and [IR] assigned by [Dr. B] dated November 4, 1997 become [sic] final under Rule 130.5(e).

Rule 130.5(e) provides the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.[1] We have held that this time does not begin to run until a party has received written notice of the assignment of an IR. Texas Workers' Compensation Commission Appeal No. 951229, decided September 5, 1995. In this case written notice of the IR was sent to the claimant by the Commission on November 19, 1997. The claimant did not recall when she received this notice. Rule 102.5(d) deems receipt of a notice from the Commission five days after it is mailed unless the great weight of the evidence indicates otherwise. Pursuant to this rule the claimant was deemed to have received the November 19, 1997, notice from the Commission informing her of Dr. B's certification on November 24, 1997. This was more than 90 days before February 27, 1998, the date Commission computer records first indicate that the claimant contacted the Commission concerning the certification.

While the claimant testified that she disputed Dr. B's certification in January 1998, there was conflicting evidence concerning this. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review, we find sufficient evidence that the claimant first disputed Dr. B's certification on February 27, 1998, which was clearly more than 90 days after she was deemed to have received notice of Dr. B's certification.

[1]While the current version of Rule 130.5(e) provides certain exception to finality, the version of Rule 130.5(e) in effect at the time the claimant's IR became final did not provide for any exceptions.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge