APPEAL NO. 011209
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 (CCH) was held on May 4, 2001. The hearing officer determined: (1) that the respondent (claimant) had disability from December 7, 1996, through April 25, 1998; (2) that the date of maximum medical improvement (MMI) was April 25, 1998; and (3) that the claimant's impairment rating (IR) is 25%. The appellant (carrier) has appealed these determinations. The claimant has not responded to the appeal.

DECISION

Affirmed, as reformed to conform to dates revised at the CCH.

This case has a lengthy and involved chronology. The claimant sustained a compensable injury to her lumbar spine on _____. On October 21, 1996, Dr. M, a carrier-selected required medical examination doctor, certified that the claimant reached MMI on October 3, 1996, with a 4% IR. Dr. GM was selected by the Texas Workers' Compensation Commission (Commission) as the designated doctor, and notice of the designated doctor appointment was sent to the parties on November 18, 1996. The claimant sought treatment for her compensable injury with Dr. P on November 19, 1996; he initially diagnosed a lumbrosacral sprain and recommended that an MRI be done. Dr. GM evaluated the claimant on December 6, 1996, in order to determine whether the claimant had reached MMI and to determine her IR. Dr. GM became aware that an MRI was to be performed and requested of the Commission that he be provided the results before he completed the evaluation. Dr. GM indicated he did not need to reevaluate the claimant, but only needed to review the MRI results before he completed the MMI and IR determinations. The claimant had a lumbar MRI on December 27, 1996, which demonstrated that she had a broad-based posterior disc herniation at L5-S1, involving the central and left lateral aspect, measuring 3.5-4.5 mm in AP diameter, obliterating the prethecal space and slightly indenting the thecal sac. As of February 13, 1997, Dr. GM still did not have the results of the MRI. On March 24, 1997, Dr. GM certified that the claimant reached MMI on December 6, 1996, with a 0% IR. His narrative report clearly indicated that he did not have the MRI results. The claimant was involved in a motor vehicle accident (MVA) on May 22, 1997, and there are indications in the record that there was confusion about whether the claimant needed continuing medical treatment for the compensable injury, or because of a noncompensable injury sustained in the MVA. That dispute was not resolved until March 1998, and was resolved in the claimant's favor. The claimant, meanwhile, underwent a second lumbar MRI on September 16, 1997, which demonstrated straightening of the lumbar spine consistent with paraspinal muscle spasm, and very early dessication of the L5-S1 disc with a mild posterior bulge, grade I. Dr. P was considering recommending surgery as early as February 1998, and did recommend a lumbar laminectomy and possible fusion on April 7, 1998. The claimant was evaluated as part of the spinal surgery second opinion process on May 21, 1998, by Dr. M, who

concurred with Dr. P's recommendation for surgery. On June 17, 1998, Dr. P performed a lumbar laminectomy at L5-S1, and a posterolateral fusion with instrumentation at L5-S1. Dr. P certified that the claimant reached MMI on July 16, 1999, with a 25% IR. On January 6, 2000, the claimant requested a benefit review conference (BRC) on the issue of her IR. She also disputed the opinion of the designated doctor and requested a BRC on that issue. On January 18, 2000, the Commission provided Dr. GM with a copy of the December 27, 1996, MRI. The hearing officer found that Dr. GM's letter dated October 18, 1999, was erroneously dated, and was actually a response to the Commission's letter of January 18, 2000. Dr. GM expressed his opinion that he desired to perform a reevaluation of the claimant for purposes of rendering an IR in light of the MRI results that he had never received. The carrier objected to a reevaluation by the designated doctor, and the Commission did not schedule a reevaluation. After all the confusion and delay described above, a BRC on the issues was held on March 14, 2001, and this CCH followed.

The carrier takes the position that the designated doctor's certification of MMI and IR were properly made on December 6, 1996. The carrier sees no problem with the designated doctor proceeding to certify MMI and IR when the MRI report was not forthcoming. The carrier argues that, although the MRI of December 27, 1996, showed disc herniation, the treating doctor did not recommend spinal surgery until April 7, 1998, proving that the MRI did not determine the course of treatment. The carrier also argues that the claimant has waived her right to dispute the designated doctor's certification by waiting too long to make her dispute. The carrier asks that the designated doctor's MMI date and IR be accepted, or, in the alternative, that the claimant be sent to the designated doctor for evaluation.

The Dispute Resolution Information System (DRIS) notes were in evidence as Claimant's Exhibit No. 4. The notes are sketchy, but generally show that the claimant sought information from the Commission on a number of occasions. Some of the notes dealt with what the claimant needed to do because the carrier was attributing the claimant's injury to the MVA rather than the work-related injury. BRCs on that issue were requested as early as November 18, 1997, scheduled, then rescheduled, and ultimately (on March 27, 1998) canceled, when the carrier no longer disputed whether the medical treatment was due to the MVA or for the compensable injury. The spinal surgery second opinion process occupied the next few months, followed by the June 17, 1998, spinal surgery. Dr. P, the treating doctor, saw the claimant approximately once a month over the next year and certified that she reached MMI on July 16, 1999, with an IR of 25%. The claimant delivered a Report of Medical Evaluation (TWCC-69) prepared by Dr. P to the Commission on January 6, 2000, and requested a BRC to contest the designated doctor's report. As noted above, time was expended contacting the designated doctor, and discussing a reevaluation of the claimant by the designated doctor, with the ultimate refusal by the carrier to go along with a reevaluation.

The Appeals Panel has not found that there is any set time during which a claimant must contest a designated doctor's date of MMI and IR. *See*, for example, Texas Workers' Compensation Commission Appeal No. 991081, decided July 8, 1999, and cases cited

therein. Cases such as these are very fact-specific, and turn on the specific facts found by the hearing officer. We note, as did the hearing officer, that spinal surgery was under active consideration at the time of statutory MMI (April 25, 1998). Under the circumstances of this case, it is apparent that the claimant did not have a complete and proper evaluation by the designated doctor in December 1996. The hearing officer found that there was a great weight of medical evidence contrary to the opinion of the designated doctor that the claimant had reached MMI on December 6, 1996. Section 408.122(c). The hearing officer detailed this evidence as the existence of the MRI which demonstrated disc pathology, which was not included in the designated doctor's evaluation and review of medical records, even though the designated doctor wanted to see that report before he rendered his evaluation, as well as the letter from Dr. GM in January 2000, wherein he stated that he wanted to do a reevaluation in light of the MRI which he had never received. There was ample evidence on which the hearing officer could base these determinations. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of 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. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer went on to determine that it was appropriate to use the statutory MMI date in this case, and determined that date to be April 25, 1998. Section 401.011(30)(B). There is sufficient evidence in the record to support this determination. With the designated doctor's MMI date being determined to be incorrect, his IR was also incorrect. The hearing officer had the option of returning the case to the designated doctor for reevaluation, or accepting another valid IR from another doctor. Section 408.125(e). Since the carrier had earlier refused the Commission's opportunity to have the designated doctor reevaluate the claimant, it was entirely logical and appropriate for the hearing officer to accept Dr. P's IR of 25%, after determining that it was not invalid or improper, and that it was done in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association.

Lastly, the hearing officer's determination of disability for the period of December 7, 1996, through April 25, 1998, is consistent with the correction of the date of MMI, and fully supported by the evidence. We do note that during the CCH the hearing officer revised the first issue to include the starting date of December 7, 1996, but then failed to carry that correction over to Finding of Fact No. 33, Conclusion of Law No. 2, and her Decision paragraph. The references to "December 8, 1996," in those areas are reformed to "December 7, 1996."

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

Michael B. McShane
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge