APPEAL NO. 011601
FILED AUGUST 23, 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 4, 2001. The record closed on June 8, 2001, after the hearing officer received a response to a request for clarification from the designated doctor selected by the Texas Workers' Compensation Commission (Commission). With respect to the issues before her, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is zero percent as certified by the designated doctor in his amended report and that good cause does not exist to relieve the claimant from the effects of the Benefit Dispute Agreement (BDA) signed on October 9, 1998. In her appeal, the claimant asserts error in each of those determinations. In its response, the respondent (carrier) contends that the claimant's appeal is untimely. In the alternative, the carrier urges affirmance.

DECISION

Affirmed.

Initially, we will address the carrier's assertion that the claimant's appeal is untimely. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in the Texas Government Code in the computation of the 15-day appeal period. In this instance, the hearing officer's decision and order was distributed to the parties on June 20, 2001. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), the claimant was deemed to have received the hearing officer's decision on June 25, 2001, five days after it was mailed. Based on that date of receipt, the 15-day deadline for mailing the appeal was July 17, 2001, and the 20-day deadline for the Commission to receive the appeal was July 24, 2001. The claimant's appeal is postmarked July 9, 2001, and was received by the Commission on July 12, 2001, and it is, therefore, timely.

It is undisputed that the claimant sustained a compensable injury on _____, when she was assaulted by a coworker. As a result of that injury, the claimant has been treated for psychological problems. On October 12, 2000, the claimant was sent by the Commission to the designated doctor for a determination of the claimant's IR. The designated doctor assigned a 50% IR for mental and behavioral disorders. The narrative report accompanying the designated doctor's Report of Medical Evaluation (TWCC-69) explains that the 50% IR was premised upon the designated doctor's understanding from the claimant and her husband that she was "essentially confined to her home, quite anxious, and unable to interact with other people." On November 10, 14, and 15, 2000, the carrier conducted surveillance of the claimant and discovered that the claimant was working as a bank teller and interacting with the public. On May 7, 2001, the hearing officer forwarded a copy of the surveillance videotape to the designated doctor and asked him to review it and consider the effect on his certification of a 50% IR. On June 1, 2001, the designated doctor responded that the claimant's presentation on the videotape was in "stark contrast" to her

presentation at the designated doctor evaluation. The designated doctor concluded that "after observing the significant contradiction in behavior on the videotape . . . I have no option but to reject the original [IR] of 50%." The designated doctor determined that the appropriate IR is zero percent and further noted that "reexamining the patient would not provide any beneficial data as she has already established herself as an unreliable claimant."

The hearing officer did not err in giving the designated doctor's zero percent amended certification presumptive weight. Section 408.125(e) provides that, if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. We have long recognized that a designated doctor may amend a certification of IR if he does so for a proper purpose and within a reasonable time. Texas Workers' Compensation Commission Appeal No. 000138, decided March 8, 2000; Texas Workers' Compensation Commission Appeal No. 972233, decided December 12, 1997. After reviewing the evidence, the hearing officer determined that the designated doctor's initial report was based upon incomplete and erroneous facts. Indeed, it is undisputed that the claimant failed to inform the designated doctor that she had been working outside of the home for some time prior to her appointment and that she grossly distorted her history to the designated doctor. Based upon those inaccuracies, the hearing officer sent the designated doctor a letter of clarification. The designated doctor responded to the letter and revised his opinion of the claimant's IR. The hearing officer determined that the designated doctor amended his first certification for a proper purpose and within a reasonable time. Nothing in our review of the record indicates that those determinations are so against the great weight of the evidence so as to be clearly wrong or manifestly unjust. Likewise, the hearing officer's determination that the other medical evidence of the claimant's IR did not rise to the level of the great weight contrary to the designated doctor's amended IR is not so against the great weight of the evidence as to compel its reversal on appeal. Thus, the hearing officer did not err in giving presumptive weight to the designated doctor's amended report and in determining that the claimant's IR is zero percent.

In her appeal, the claimant argues that the Commission erred in selecting a designated doctor that was not a psychiatrist because he was not of the same discipline and licensed by the same board of examiners as the claimant's treating doctor. *See* Section 408.122(b). However, that argument was not raised at the hearing and will not be addressed for the first time on appeal.

Finally, the hearing officer did not err in determining that good cause does not exist to relieve the claimant from the effects of the BDA they signed on October 9, 1998. Section 410.030 provides that an agreement signed in accordance with Section 410.029 is binding on an insurance carrier, and a claimant represented by an attorney, through the conclusion of all matters relating to the claim, unless the Commission or a court, based on a finding of fraud, newly discovered evidence or other good and sufficient cause, relieves either party of the effect of the agreement. The hearing officer determined that the claimant failed to meet her

burden on the issue by a preponderance of the evidence. That determination is supported by sufficient evidence and it is not so against the great weight and preponderance of the evidence as to compel its reversal on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge