APPEAL NO. 950252

Following a contested case hearing held in (city), Texas, on January 9, 1995, the hearing officer, (hearing officer), resolved the two disputed issues by determining that the appellant and cross-respondent (claimant) did not have disability (defined in the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011(16) (1989 Act)) from her undisputed compensable injury of (date of injury), and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving her request to change her treating doctor to (Dr. B). The respondent and cross-appellant (carrier) has appealed the change in treating doctor issue asserting abuse of the Commission's discretion in approving claimant's request because of insufficient reason to warrant Commission approval. Claimant has appealed from the adverse determination of the disability issue.

DECISION

Affirmed in part; reversed and rendered in part.

The parties stipulated that claimant sustained a compensable injury on (date of injury). Claimant testified that on that date she fell at work injuring her back, left shoulder, and neck, that she worked for a while and then went home early, and that the next day she was treated by (Dr. N) at Mesa Medical Clinic where she was sent by her employer, a clothing manufacturer. She said Dr. N told her she had no injuries and kept her off work for two days. She returned to work for about two and one-half weeks performing light duty which involved the handling and stacking of pieces of material. Claimant further testified that she called (Ms. R), the carrier's adjuster, seeking referral to an orthopedic specialist and began treatment with (Dr. K), that after seeing him twice she changed treating doctors to Dr. B, that she has not worked since Dr. B took her off work on August 29, 1994, and that she is feeling "much better" since commencing treatment with Dr. B.

On the Employee's Request to Change Treating Doctors form (TWCC-53) which claimant signed on September 1, 1994, she stated the following as her reason for requesting a change from Dr. K to Dr. B: "I feel no improvement and would like to see another doctor of my choice in order to feel some improvement in my condition." Claimant testified that Dr. B was recommended by her attorney's secretary and that she changed to him because she did not like the way Dr. K treated her. Specifically, claimant said Dr. K told her she was born with her back problem and that if she was feeling bad it was because she was "too fat." She said she did not mention Dr. K's comment on the TWCC-53 because of embarrassment. The date stamp showing the date of the Commission's approval of claimant's request is illegible on both TWCC-53 forms in evidence. The benefit review conference (BRC) report states that date as September 21st.

The practice of offering and admitting illegible exhibits proves particularly unhelpful when appellate review is later required. In a similar vein, the record on review contained pieces of cloth offered by the carrier, ostensibly to show light duty compliance, which were

admitted. The desirable practice would be to photograph such non-documentary evidence for purposes of appellate review.

Ms. R testified that when contacted by claimant she gave her the names of several orthopedic specialists, that claimant indicated she wanted a Spanish speaking doctor, and that Ms. R then gave her the name of (Dr. O) and had the impression claimant was going to see him. The apparent purpose of this testimony was to offset any impression left by claimant's testimony that the carrier had also selected Dr. K for claimant.

On July 28th Dr. N diagnosed strained neck, shoulder, dorsal and lumbar area muscles, took claimant off work, and treated her with ice packs and Motrin; on August 1st Dr. N described claimant as improving, noted her current treatment as hot packs, Motrin and another medication, and released her for light duty work. On August 4th claimant, then 28 years of age, saw Dr. K who diagnosed mechanical low back strain, noted claimant's estimate of her weight at 240 pounds, and prescribed a conservative course of treatment including therapy. Dr. K's August 9th report of claimant's August 4th visit stated the anticipated date claimant could return to full-time work as "[t]he patient can return to work 8/8/94." That report stated no anticipated date that claimant could return to limited type of work. However, on his report of claimant's August 18th visit, Dr. K stated that "[t]he patient can continue modified duty at this time."

Dr. B, a neurologist-psychiatrist, issued an initial medical report which reflected that on August 29th he diagnosed 11 conditions, that claimant decided to come to him because of continuing pain problems, and that her anticipated date to return to either limited or full-time work was described as "continues." Dr. B's treatment plan consisted of three medications. Dr. B also signed a "to whom it may concern" letter on August 29th stating that claimant was unable to return to work for four weeks due to her medical condition. Dr. B's August 30th record of an electrical stimulation treatment stated that claimant's pain was "mild to moderate," that her progress was "slow but sure," that she was to continue her home exercise program, and that she was "to get blocks and biofeedback." In a Specific and Subsequent Medical Evaluation report of October 29th, Dr. B stated the anticipated dates claimant could return to both limited and full-time work as "continues." The carrier wrote Dr. B on November 17th noting his description of claimant's anticipated return to work date as "continues" and asking if he had released her for regular duty work and as of what date she could work and at what capacity. Dr. B's response of November 25th stated that he would have claimant come in and see him and answer carrier's questions. Dr. B signed a "to whom it may concern" letter on December 29th which stated, in identical terms, the content of his August 29th letter. Dr. B's Specific and Subsequent Medical Evaluation report of December 29th stated the anticipated dates claimant could return to both limited and full-time work as "EARLY 1995."

In the December 20th report of his independent medical examination (Dr. P) stated that three months of physical therapy in conservative modalities should be enough to restore

claimant to her previous condition and that she is able to return to her work in her previous condition.

According to the BRC report, the benefit review officer, noting that the Commission had not approved Dr. B as the treating doctor when he took claimant off work on August 29th, recommended that claimant had disability beginning on October 29th, the first date claimant saw Dr. B after he was approved as her treating doctor, and an interlocutory order to that effect was entered. The disputed disability issue asked whether claimant had disability and, if so, for what periods. Finding that "after her injury" claimant's "treating doctor" had released her to return to light duty work, that the employer accommodated the light duty restriction, and that Dr. B, like Dr. K, simply provided conservative treatment, the hearing officer stated, in both a finding of fact and a conclusion of law, that claimant did not have disability as a result of her compensable injury "up to the date of the hearing."

While it appears that the hearing officer intended to find that claimant had no disability after being released to return to work at light duty by Dr. N, he failed to make a finding of fact that she had disability for the period of time that Dr. N had her off work. We believe the great weight and preponderance of the evidence supports a finding that claimant had disability from July 28, 1994, the date Dr. N took her off work, through August 1, 1994, the date Dr. N returned her to work with restrictions. Claimant testified that Dr. N took her off work for two days (she did not identify those days); Dr. N's records showed that he took her off work on July 28th and on August 1st stated she could return to work with restrictions. Attendance records submitted by the carrier reflect claimant's leaving work early on (date of injury) after her fall as well as her release by the "clinic" for light duty work on August 2nd. Accordingly, we reverse Finding of Fact No. 12, Conclusion of Law No. 3, and so much of the Decision and Order of the hearing officer as determines that claimant had no disability up to the date of the hearing and render a new decision that claimant had disability as a result of her compensable injury of (date of injury), from July 28 through August 1, 1994.

The hearing officer stated in both a factual finding and a legal conclusion that the Commission did not abuse its discretion in approving Dr. B "as an alternate doctor." The hearing officer found that "part of the reason" claimant wanted to change doctors was because a conflict existed which jeopardized the "doctor-patient relationship." He failed to make a finding as to the rest of the reason. In his discussion the hearing officer relates such conflict to claimant's testimony about Dr. K's telling her she was "too fat" and goes on to state that claimant "was too embarrassed to write that reason down in her request to change treating doctors." The carrier asserts on appeal that claimant did not inform the Commission of such a conflict and thus the Commission had inadequate grounds upon which to approve the request and thereby abused its discretion. We agree with the carrier's contention that the hearing officer seems to find no abuse of discretion by the Commission based on information the Commission apparently did not have when approving the request. Claimant's request to the Commission stated, in essence, that she wanted to change doctors because she felt she was not improving under the care of Dr. K and made no reference to a conflict with Dr. K.

Notwithstanding the error of the hearing officer in grounding his no abuse of discretion determination on information of which the Commission's approving authority was apparently unaware and which was not stated in the TWCC-53, we do not find the error reversible since we find claimant's TWCC-53 to have stated a sufficient basis for her request to be approved. The Appeals Panel has held that a hearing officer's decision can be affirmed on any reasonable theory supported by the evidence. *See* e.g. Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993. In Texas Workers' Compensation Commission Appeal No. 941475, decided December 16, 1994, the hearing officer concluded that the Commission did not abuse its discretion in approving the employee's request to change treating doctors and grounded that conclusion on the finding that the Commission approved the injured employee's request both because of the current treating doctor's unavailability and because the employee was not improving under his care. In affirming, the Appeals Panel noted that one of the four criteria set forth in Section 408.022(c) is whether treatment by the current doctor is medically inappropriate; that, arguably, the contention that the employee is not improving under the current doctor's care is another way of stating that criterion; and that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(e) (Rule 126.9(e)) provides that the reasons for approving a change in treating doctor are not limited to those set out in Section 408.022(c). Our decision in Appeal No. 941475 further stated: "In certain situations medical treatment that is ineffective could be considered inappropriate. Even were this not the case, the failure of a doctor's treatment to effect improvement would seem a valid reason for changing to another medical provider and Rule 126(e), by providing that the list of reasons to change doctors in the statute and rule "include but are not limited to," is not an exclusive list for approving such a change. *See* Appeal No. 94857, *supra* [Texas Workers' Compensation Commission Appeal No. 94857, decided August 17, 1994.]" Applying the abuse of discretion principles in Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986), we are satisfied the Commission did not abuse its discretion in approving claimant's request notwithstanding its apparent unawareness of claimant's "conflict" with Dr. K. This is not to say that requests for change in treating doctors should be summarily approved. The opinion in Texas Workers' Compensation Commission Appeal No. 950232, decided April 4, 1995, discussed this matter in detail and observed that "reasons that would justify an earlier change may not comprise further justification for subsequent changes," and that the term "include but are not limited to" [in Rule 126.9] "cannot be used to justify simple approval of all requests made, as this would subvert the legislative mandate to establish `criteria.'"

So much of the hearing officer's decision as determined that the Commission did not abuse its discretion in approving Dr. B as claimant's treating doctor is affirmed. So much of the decision as determined that claimant did not have disability as a result of her compensable injury of (date of injury), up to the date of the hearing is reversed and a new decision is rendered that claimant had disability from July 28 through August 1, 1994.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge