APPEAL NO. 950346

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 January 31, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether appellant (claimant herein) has attained maximum medical improvement (MMI), and if so, on what date and if the designated doctor's decertification was warranted under the circumstances, is the claimant entitled to temporary income benefits (TIBS) from December 16, 1993, or from the effective date of decertification of MMI. The hearing officer found that the claimant attained MMI on December 16, 1993, with an eight percent impairment rating (IR) per the report of the designated doctor. The hearing officer also found that the designated doctor did not decertify MMI, but concluded that if he had done so then the claimant would have been entitled to TIBS back to the date on which he originally found she had MMI, provided the claimant still had disability. The claimant appeals the decision of the hearing officer, particularly the finding of the hearing officer that the designated doctor did not decertify MMI. The respondent (carrier herein) replies that the hearing officer correctly found that the designated doctor did not decertify MMI and that the findings of the hearing officer as to MMI and IR were correct.

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.

There was little live testimony presented at the CCH (the claimant's husband testified briefly). Most of the evidence consists of records presented by each party. Review of these records do not provide an entirely clear picture of events.

The parties stipulated that on (date of injury), the claimant sustained a compensable injury to her cervical area and left arm. At some point (Dr. H), D.C., became the claimant's treating doctor. Dr. H sent the claimant to (Dr. Ha), D.C., for an impairment evaluation. Dr. Ha certified on a Report of Medical Evaluation (TWCC-69) dated December 21, 1993, that the claimant attained MMI on December 16, 1993, with an 11% IR. This IR had two components--four percent for specific disorders of the cervical spine and seven percent for "unilateral C8 nerve root."

On December 16, 1993, the claimant saw (Dr. S), M.D., the carrier's medical examination order (MEO) doctor. Dr. S certified on a TWCC-69 that the claimant attained MMI on December 16, 1993, with a seven percent IR. His rating was entirely based on Table 49 of Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the AMA Guides).

The carrier requested that the Texas Workers' Compensation Commission (Commission) appoint a designated doctor to resolve the dispute over IR. The parties

stipulated that the Commission selected (Dr. W), M.D., to evaluate and examine claimant as to MMI date and IR. Dr. W stated on a TWCC-69 dated March 21, 1994, that an MMI date had been "previously determined" and that the claimant had an eight percent IR. His IR was based on two percent of loss of range of motion and six percent from Table 49 of the AMA Guides for C6-7 protrusion.

On December 29, 1993, the claimant filed an Employee's Request to Change Treating Doctors (TWCC-53), asking that she be allowed to change her medical treatment from Dr. H to (Dr. S), M.D. This request was granted by the Commission on January 6, 1994. Dr. S at some point refers the claimant to (Dr. M), a neurosurgeon, who recommended as follows in his report of July 28, 1994:

> At this point, I would suggest to proceed with cervical myelogram, postmyelogram CAT scan to further assess the degree of cord compression but also confirm the involvement of the C-6 neural foramen, and most likely a two level disketomy and fusion with iliac bone graft would be indicated to take care of her problem.

This myelogram apparently showed a disc herniation at C5-6 according to a letter from Dr. W to (Ms. K) with the Commission stating as follows (Ms. K's letter which apparently prompted Dr. W's letter, like so much in this case, was not placed into evidence):

> In regards to your September 19, 1994 letter: The report that you sent us was the radiology report of the myelogram which was done 08-03-94 showing a small posterior or posterior lateral disc herniation at C5-6. Apparently [Dr. M], who is a neurosurgeon, has recommended surgical intervention, per his request for spinal surgery, and an anterior cervical fusion has been requested.
>
> If in fact this patient does have surgical intervention and is still under the statutory MMI date, then obviously the patient would not be [MMI] at this time. As to whether this patient needs an operation or not, I'm unable to verify. However, request for additional surgery has been requested by the treating physician and if in fact this is approved and the patient does have surgery, then the patient at this point would not be [MMI].

In the meantime Dr. H changed his opinion as to MMI stating as follows in a letter of May 17, 1994:

> I have treated the patient with conservative care and had put her MMI on 12-14-93. My decision to do so at that time was influenced by her need to move to another state. The patient returned to my office on 5-17-94 for another examination. Since the time I last saw her there does seem to be improvement. I now question whether the MMI date I had previously given on 12-14-93 was accurate, since she has shown improvement since that time.

Claimant's husband testified that the carrier disputed the need for surgery leading to a resolution of the issue through the Commission's spinal surgery dispute system. There is in evidence a November 21, 1994, letter from a (Dr. We), M.D., who is referred to in the benefit review conference (BRC) report as "the second opinion on spinal surgery doctor." Dr. We states in part in this letter which is addressed to the Commission as follows:

> Her complaints and symptoms certainly seem radicular in nature. I do not feel her C2-C3 mild to minor changes explain her clinical picture. I feel that she is a very sensible surgical candidate and agree with [Dr. M's] surgical decision. I feel that both her C5 and C6 level should be decompressed and it is my understanding through the patient and her husband that they intend to use autogenous graft.

The claimant apparently scheduled surgery, but Dr. M cancelled it due to two abnormal EKGs. Dr. M states in a letter of January 18, 1995:

> [Claimant] is still the same as she was when I first saw her on July 28, 1994. Surgery was cancelled because she had two abnormal EKG's. She was advised to see a cardiologist for this abnormality. [Claimant] will have to have a complete work up by a cardiologist before surgery will be considered. She has to have clearance from the cardiologist.

The hearing officer makes a number of Findings of Fact including the following two:

FINDINGS OF FACT

> 5.Designated [Dr. W] reported that Claimant reached [MMI] on December 16, 1993, with an 8% [IR].
>
> 7.[Dr. W's] conditional September 23, 1994, letter does not constitute a "decertification" of [MMI].

Dr. W appears throughout his narrative report and TWCC-69, as well as his letter of September 23, 1994, to assume that someone else has already assigned an MMI date. It is unclear from the record before us as to whether Dr. W ever determined that the claimant reached MMI on December 16, 1993. However, since the parties stipulated on the record that he did so, this stipulation certainly supports the hearing officer's Finding of Fact No. 5.

As to Finding of Fact No. 8, the hearing officer found that Dr. W's September 23, 1994, letter did not constitute a "decertification" of MMI. We have held that a designated doctor may amend his opinion as to MMI for proper reason. *See* Texas Workers' Compensation Commission Appeal No. 93207, decided May 3, 1993. The question here is whether Dr. W's letter constituted an amendment. His language, which is quoted above,

is both ambiguous and conditional. The hearing officer found that his letter did not constitute an amendment.

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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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 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).

Under the circumstances of this case we cannot say that the decision of the hearing officer is contrary to the overwhelming weight of the evidence. This is particularly true when it was the claimant's burden to prove the designated doctor had amended his opinion and so little evidence concerning the matter was presented by the claimant.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge