APPEAL NO. 980012

Following a contested case hearing held on December 17, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the first certification of maximum medical improvement (MMI) and the impairment rating (IR) assigned by (Dr. G) on April 25, 1994, became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) and that the appellant (claimant) reached MMI on April 25, 1994, with a whole body IR of 13%. Claimant has appealed, contending that if Dr. G had correctly performed the cervical spine fusion operation on September 13, 1993, the two subsequent cervical spine fusion operations, one by Dr. G and one by (Dr. W), would not have been necessary, that such improper surgeries should result in a higher IR, and that she should be sent to a designated doctor to evaluate her impairment. The respondent (carrier) urges that the evidence is sufficient to support the challenged determinations, pointing to the absence of medical evidence of improper treatment and asserting that failed fusions and additional surgery do not mean that the prior treatment was incorrect.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury, that Dr. G was the first doctor to assess claimant with a date of MMI and to assess an IR, and that neither claimant nor the carrier disputed Dr. G's findings within 90 days of receipt. In evidence is Dr. G's Report of Medical Evaluation (TWCC-69) dated in April 1994, certifying to MMI on April 25, 1994, with an IR of 13%. It was apparently the IR assigned in this report which parties stipulated was not disputed within 90 days of its receipt by either party.

Claimant testified that she did not dispute Dr. G's 13% IR because he told her the fusion of her cervical vertebrae at C4, C5, and C6 would take about a year to heal; that after the first operation, her neck problems and headaches did not improve; that Dr. G then performed a second fusion operation on these vertebrae; that she did not improve after the second fusion operation; that she discussed the IR with Dr. G and he indicated he would rescind the 13% because she should have a higher rating; that Dr. G retired without having rescinded the IR and referred her to Dr. W; that Dr. W performed the third procedure installing hardware; that her condition has improved following the third procedure; that she has some numbness and loss of neck motion; and that Dr. W said he would refer her for an evaluation but the referral was denied by the carrier.

According to the medical records, on September 13, 1993, Dr. G's diagnosis was cervical spondylosis C4-5 and C5-6 with chronic pain and he performed a cervical discectomy and anterior fusion at C4-5 and C5-6 with fusion. Dr. G's May 3, 1995, report stated that following that procedure, claimant complained of recurrent neck pain and

headaches and that on April 11, 1995, he diagnosed a nonunion at C4-5 and performed a repeated anterior fusion at C4-5 after excising the pseudoarthrosis. On March 19, 1997, Dr. W diagnosed pseudoarthrosis C4-5 and possible pseudoarthrosis C5-6 and he performed discectomy and fusion at C4-5, C5-6, and C6-7 with a C6 cordectomy.

The hearing officer found that the medical evidence established that Dr. G's diagnosis and surgical intervention of September 13, 1993, and claimant's subsequent diagnosis and surgical intervention of April 11, 1995, by Dr. G, and of March 19, 1997, by Dr. W, were accurate and consistent with each other. The hearing officer further found that the medical evidence showed that claimant's first two surgical procedures resulted in failed fusions of the C4-5-6 areas, that the failed fusions were based on risky surgical procedures, and that the medical evidence did not show that the failed fusions were based on improper or inadequate treatment. Claimant has challenged these findings.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and as the trier of fact resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos., 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, we will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90days after the rating is assigned. In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel commented on Rule 130.5(e), noting the sound basis for the Texas Workers' Compensation Commission (Commission) to require some definitive finality in resolving claims, stated that the rule is not absolute and would not be dispositive if, for example, an MMI certification or IR were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis. In that case, the Appeals Panel found no evidence of a new, previously undiagnosed condition or prior improper or inadequate treatment of the injury. The Appeals Panel has stated that the fact that surgery is performed after the 90-day dispute period has expired does not mean that the initial findings of MMI and IR are not final under Rule 130.5(e) where the circumstances mentioned in Appeal No. 93489, *supra*, are not involved. *See* Texas Workers' Compensation Commission Appeal No. 950069, decided February 17, 1995. The hearing officer found no compelling medical evidence of improper or inadequate treatment nor do we. It seems self-evident that undergoing spinal fusion surgery carries the risk of nonfusion sequellae leading to additional surgery. Claimant presented no compelling medical evidence that Dr. G's surgical technique was improper or inadequate.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge