APPEAL NO. 93093

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On October 21 and December 29, 1992, (hearing officer) conducted a contested case hearing and found that appellant, claimant herein, reached maximum medical improvement on June 23, 1992, with a 12% impairment. Claimant requests review of the decision pointing out that the designated doctor did not have a certain exhibit when he gave his impairment rating; he states that a 16% impairment rating is appropriate. The respondent, carrier herein, replies that the evidence was sufficient to support the decision of the hearing officer.

DECISION

Finding that the decision is supported by sufficient evidence of record, we affirm.

Claimant was at work on (date of injury), for (employer)., when a steel plate or steel I-beam, weighing several thousand pounds, fell on his left foot. The injury was described as a "severe crush type injury to the forefoot" with multiple fractures. There was no question that the injury occurred in the course and scope of employment or that timely notice was communicated. On the initial date of hearing, the hearing officer was concerned that the claimant did not fully appreciate that maximum medical improvement (MMI) might be an issue and returned the case for another benefit review conference. At the December hearing, the issues to be considered were whether and when MMI had been reached and, if reached, what was the impairment rating.

After the injury, surgery was performed to clean the wound and set the fractures. Claimant, without contradiction, reported an extended period of infection and draining at the site, with his physician seriously considering amputation. In March 1992, claimant's treating physician, (Dr. M), who had done the surgery, prepared a TWCC form 69 saying that MMI was reached with 12% impairment. Thereafter, some added tests were done and Dr. M prepared another TWCC form 69, undated, which says:

> 13 amendment from TWCC 69 on 3-13-92
> Patient underwent a Lido test at Shorline (sic) Physical Therapy which indicates diminished strength in his left leg with marked weakness of plantar flexion of his left foot and ankle compared to the right foot and ankle, it is approximately 1/3 of the strength of the normal side and I believe this should actually increase the amount of impairment I gave the patient
>
> 14 (after the MMI date is stated as 3/13/92, and impairment at 16%, the following is recorded)

> See Lido test results enclosed
> I would recommend elevating his 30% impairment of the lower extremity to 40% which would correlate to 16% of the whole body

After Dr. M gave his initial rating of 12%, the claimant states that he inquired of the Texas Workers' Compensation Commission and was told he could choose a second treating doctor. He thus chose (Dr. A), a podiatrist. Dr. A indicated in a letter of May 21, 1992 that he agreed with Dr. M's report but did not say which report he agreed with. Dr. A also submitted several brief TWCC form 69's in which he said that claimant had not reached MMI, including one indicating that MMI was not reached as of June 4, 1992. Claimant did not see a doctor for a period of time but now sees (Dr. K) and thinks that Dr. K's opinion that MMI was reached in December 1992 is correct. The record indicates that both the claimant and the carrier were less than satisfied with the impairment rating of 12% given in March 1992 and sought a designated doctor. The Commission selected a designated doctor, (Dr. J), who found that claimant reached MMI on June 23, 1992, with a 12% impairment rating.

Claimant's contention on appeal that Dr. J did not have a copy of Dr. M's report showing 16% impairment was also argued at the hearing and considered by the hearing officer. While exhibit 27, a letter of Dr. J dated November 20, 1992, appears to agree that Dr. J did not have a copy of the TWCC form 69 that specified a 16% impairment, Dr. J's narrative report dated June 23, 1992 that accompanied his TWCC form 69 indicates knowledge and consideration of the underlying test that Dr. M relied on to reach the 16%. Dr. J's narrative says in part:

> Review of the Lido Isokinetic evaluation dated 4-20-92 revealed a 67 percent deficit in left plantar flexion when compared to the right. Although there was some elevation of the coefficient of variance, there was clinical correlation, as well as anatomic corroboration to this deficit
>
> .....
>
> The weakness in the left leg and foot is a result of the loss of function in the ankle and foot joints, and as such they have been considered in combination when figuring out the joint impairment.

Dr. J did not always combine various aspects of injury in order to determine amounts that contributed to his total body rating. His report also contains the following comment:

Since the sensory loss on the dorsum of the left foot is felt to be due to

> direct injury to the peripheral nerves (rather than in combination with the joint impairment), I consider a 10 percent impairment of the left lower extremity to be reasonable, as it relates to the numbness of the foot.

One of claimant's exhibits at the hearing was entitled:

Shoreline Physical Therapy (Shoreline Terrace)
719 S. Shoreline Blvd., Suite 100
Corpus Christi, Texas, 78401 (512) 882-881

LIDO TEST RESULTS

Date: 04-20-92 Time: 11:25:31

The hearing officer, in finding that Dr. J's report was "comprehensive" and "detailed", weighed Dr. J's consideration of the underlying Lido test, used by Dr. M, as more important than whether Dr. J saw Dr. M's TWCC form 69, which cited the Lido test as his basis for increasing the rating. (compare references to the Lido test in Dr. M's and Dr. J's reports assigning impairment with the description of the exhibit in evidence, described above.) There was sufficient evidence to support the hearing officer's findings that the designated doctor's opinion as to MMI and impairment rating was not overcome by the great weight of other medical evidence.

The other documents that claimant asserts Dr. J should have considered were limited to Dr. A's three TWCC form 69's, previously alluded to, which stated that MMI had not been reached, and the letter of May 21, 1992, from Dr. A, which said he agreed with a report by Dr. M. No tests or test results were asserted as unavailable to Dr. J. The designated doctor's report is entitled to presumptive weight unless the "great weight of the other medical evidence is to the contrary." *See* Article 8308-4.25(b) and 4.26(d) of the 1989 Act. The Legislature chose to provide this standard knowing that the designated doctor would not usually spend the amount of time with a claimant that claimant's treating doctor did. *See* Texas Workers' Compensation Commission Appeal No. 93031, dated February 25, 1993. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. Under Article 8308-4.25 and 4.26, the hearing officer is the fact finder who must determine whether the presumption specified by the Legislature should be applied or whether it has been overcome by the great weight of the other medical evidence. The Appeals Panel has said that this presumption is entitled to strong consideration, Texas Workers' Compensation Commission Appeal No. 92412, dated September 28, 1992. When a hearing officer finds that the presumption has been overcome, a detailed explanation of the basis for that decision will be given. *See* Texas Workers' Compensation Commission Appeal No.

92522, dated November 9, 1992.

The Appeals Panel will only reverse a decision of the hearing officer that is based on matters of factual determination when it is against the great weight and preponderance of the evidence. *See* In Re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1952) and Texas Workers' Compensation Commission Appeal No. 91066, dated December 4, 1991. The findings and conclusions of the hearing officer are based on sufficient evidence of record and the decision is sufficiently based on those findings, conclusions, and evidence. We affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge