APPEAL NO. 931038

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On October 8, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that the respondent (claimant) reached maximum medical improvement (MMI) on September 15, 1992, with an impairment rating of 25%. Appellant (carrier) asserts that the hearing officer erred in that the great weight of medical evidence was not contrary to that of the designated doctor who found MMI in January 1992, with 0% impairment. Claimant did not reply to the appeal.

DECISION

We affirm.

Claimant worked for (employer) on (date of injury), when he fell off a truck and broke his left elbow. He also aggravated a previous back condition. Surgery was performed on the elbow. His treating doctor, (Dr. S), stated that he reached MMI on September 15, 1992, with 25% impairment. The carrier disputed this rating, and (Dr. H) was appointed as the designated doctor. Claimant saw Dr. H on January 8, 1993, and Dr. H found that he had reached MMI in January of 1992 with 0% impairment. The narrative that accompanied the TWCC-69 signed by Dr. H mentioned claimant's limited left elbow extension three times, but as stated, provided no amount of impairment.

A CT scan of the claimant's cervical area was done on January 23, 1992. On June 30, 1993, Dr. H acknowledged in a letter to the Texas Workers' Compensation Commission (Commission) that he had not been provided the CT scan to review. By letter dated September 2, 1993, from the Commission, Dr. H was provided the CT scan report and asked to state his impairment rating. No reply indicating that Dr. H considered the CT scan was offered into evidence. Dr. H did write a letter to an attorney on September 30, 1993, in which he referred to his evaluation as "my neurological evaluation;" he also stated that he would "defer to the opinion of an orthopedist to ascertain the functional assessment based upon this slight degree of limited joint motion." He concludes that letter with, "[m]y conclusion remains unchanged that [claimant] has a neurologic impairment associated with his work related (date of injury) injury of zero percent."

While no evidence shows that Dr. H considered the report of the CT scan sent to him after his evaluation of claimant (in evidence as claimant's exhibit 10), Dr. H in the September 30, 1993, letter does discuss ratings for spondylolisthesis and spondylolysis and states that claimant does not fit ratings provided for these problems. Dr. H refers, however, to the Revised edition of the Guide to the Evaluation of Permanent Impairment, which is not the correct impairment guide to be used as set forth by Section 408.124 of the 1989 Act. In addition, Dr. H refers to claimant's spondylitic changes as mild, when the CT scan indicates that there is "nerve root canal encroachment" at C5-6; Dr. H does not mention "nerve root canal encroachment".

In addition to the treating doctor and the designated doctor, (Dr. J) saw the claimant on behalf of the carrier. Dr. J on May 4, 1992, stated that claimant will have permanent impairment in regard to his elbow; he predicted MMI in three to six months, but cautioned that a myelogram may be necessary to "assess cervical nerve root involvement if symptoms indicate."

Carrier refers to Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992, as indicating that the designated doctor should be given presumptive weight notwithstanding certain criticism of his report. We note that Appeal No. 92255, mentioned the criticisms of the designated doctor's examination in the context of whether they affected his determination of MMI, not impairment rating. In Texas Workers' Compensation Commission Appeal No. 93482, decided July 29, 1993, (citing Appeal No. 93035, decided February 24, 1993), tests conducted for impairment were said to not necessarily affect attainment of MMI.

The carrier asserts that the impairment rating of the designated doctor should be given presumptive weight even though acknowledging the absence of the CT scan. In Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993, the Appeals Panel affirmed a hearing officer's decision that the opinion of the designated doctor was not entitled to presumptive weight because he did not consider an EMG, while another doctor did. The hearing officer found MMI and the impairment rating based on the opinions of the doctor who did consider the EMG in question.

Dr. H, in his letter of September 30, 1993, alerted the hearing officer to the fact that he limited his evaluation. He made it clear that he was reporting no change to the evaluation he had given claimant in January 1993 (when he said MMI was reached in January 1992) and characterized that evaluation as a "neurologic impairment." This statement coupled with his earlier assertions that he gave an "impairment rating from the neurological stand point" and that he deferred to other opinions to assess range of motion, indicate that Dr. H's opinion was limited or conditional. *See* Texas Workers' Compensation Commission Appeal No. 93705, decided September 27, 1993, in which the hearing officer found that a conditional finding of MMI did not amount to claimant having reached MMI. (In Appeal No. 93705, the doctor had said, "from a neurological standpoint she has reached maximal medical improvement . . . .")

In addition, we note that the designated doctor in giving his opinion as to impairment based it upon the incorrect Guide (*supra*). *See* Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993, which noted that an impairment rating should only be based on the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (Guides).

The hearing officer had sufficient evidence upon which to base his decision that the great weight of other medical evidence was contrary to the designated doctor's opinion. He is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Once he determined that the designated doctor's opinion was against the great weight of the other medical evidence, he could base his determination as to MMI and impairment on the opinion of another physician in evidence. *See* Appeal No 93493, *supra*. The opinion of Dr. S was sufficient upon which to base his determination of both MMI and impairment rating.

Finding that the evidence is sufficient to support the decision and order of the hearing officer, we affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge