APPEAL NO. 931054

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing was held on October 19, 1993 in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) reached maximum medical improvement (MMI) and, if so, on what date, and what is the claimant's correct impairment rating (IR). The hearing officer determined that, consistent with the certification of the designated doctor selected by the Texas Workers' Compensation Commission (Commission), the claimant reached MMI on March 17, 1993, with a five percent whole body IR. The claimant appeals only that part of the decision of the hearing officer regarding the correct IR arguing that his own doctor, unlike the designated doctor, is a specialist in his type of injury and "knows what is wrong with me."[1] The respondent (carrier) urges that the great weight of the medical evidence produced at the hearing was not contrary to the report of the designated doctor.

DECISION

The decision of the hearing officer is affirmed.

There was no dispute that the claimant, a construction worker, injured himself on (date of injury), while working with concrete and polishing a floor. He first saw (Dr. ZA), but his treating doctor was (Dr. Z), who diagnosed a herniation of both the cervical and lumbar spine with decreased range of motion in each. Dr. Z did not determine a whole body IR. Although myelograms of the lumbar and cervical spine taken on September 19, 1992, were both normal, an MRI of the lumbar and cervical spine taken on May 14, 1993, disclosed evidence of disc degeneration at the L2-3 level without bulging annulus or herniated nucleus pulposus (HNP); a "small midline and left" HNP at the L4-5 level "which slightly displaces the left L5 nerve root posteriorly;" a small midline HNP at C3-4 and C4-5 without significant spinal stenosis or interval change; HNP "posterolaterally on the right extending superiorly from the C5-6 disc level;" and "central and left posterolateral disc herniation and osteophyte formation of the C6-7 level."

In a Report of Medical Evaluation (TWCC-69) of March 17, 1993, (Dr. J), a doctor requested by the carrier, gave a whole body IR of four percent for injury to the cervical spine based on his review of the above noted normal cervical and lumbar myelogram and what he terms "minimal changes on MRI." He also concluded that there were no range of motion limitations of the left shoulder or the cervical spine.

On May 7, 1993, (Dr. T) was appointed designated doctor by the Commission to

[1]In his appeal, the claimant also asserts, without assigning specific error to this contention, that the hearing officer mistakenly stated that his wife assisted him at the hearing when he was only assisted by the ombudsman who told his wife "that she could not speak at the hearing . . . ." A review of the decision and order of the hearing officer, however, clearly shows that the claimant's wife was noted as present at the hearing, but that only the ombudsman assisted him.

determine both MMI and IR. In his report of June 18, 1993, including a TWCC-69, Dr. T certified a whole body IR of five percent, arrived at by assigning one percent for loss of range of motion in the right shoulder and four percent due to a specific disorder of the cervical spine pursuant to the AMA's Guides to the Evaluation of Permanent Impairment, third edition, 2d printing, February 1989 (AMA Guides), Table 49. He found no neurological deficit and determined that the claimant had no loss of range of motion in either the cervical or lumbar spine and that range of motion testing indicating possible limitations of the cervical spine were invalid because the claimant's "values were inconsistent between my physical examination and those done by an independent evaluator. He also has been found to have inconsistent values in the past when examining the medical records."

Dissatisfied with this report and what he considered to be Dr. T's cursory "three minute examination," the claimant was referred by Dr. Z to (Dr. H) who in a TWCC-69 of October 2, 1993, assigned a 19% IR based on one percent for loss of range of motion in the claimant's right shoulder (a determination identical with Dr. T's), six percent for a specific disorder of the cervical spine (compared to Dr. T's four percent) and, most importantly, 13% for loss of range of motion of the cervical spine (compared to Dr. T's zero percent). (Dr. H declined to give a rating for the lumbar spine because "I cannot extrapilate (sic) this from the injury . . . .")

We have repeatedly observed that the designated doctor holds a unique position under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1993, and Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Section 408.125(e) accords the report of the designated doctor "presumptive weight." In Appeal No. 92412, *supra*, we pointed out that to outweigh the report of the designated doctor requires more than a mere balancing of the medical evidence or even a preponderance of medical evidence. Rather, such other medical evidence must be determined to be the "great weight" of the medical evidence contrary to the report. A claimant's lay testimony does not constitute medical evidence that can be considered in determining whether the "great weight" rebuts the "presumptive weight" of the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 93072, decided March 12, 1993, and Texas Workers' Compensation Commission Appeal No. 93518, August 5, 1993. However, an attack on the validity of the report of the designated doctor based on non-medical issues, such as failure to comply with "the underlying statutory requirements of certification," may be based on lay testimony. Texas Workers Compensation Commission Appeal No. 93046, decided March 5, 1993; *see also* Texas Workers' Compensation Commission Appeal No. 93483, decided July 26, 1993.

In his appeal, the claimant urges the adoption of Dr. H's IR of 19% and challenges both the adequacy of the physical examination he received from Dr. T and the quality of Dr. T's credentials as a plastic surgeon when compared to Dr. H's qualifications as a "specialist for my injury." Specifically, he testified that Dr. T saw him for three minutes and only tapped his knees and lifted his arms. The Appeals Panel has in the past addressed allegations by claimants that a physical examination was either not done at all by the designated doctor or done only in a cursory fashion. *See e.g.*, Texas Workers' Compensation Commission

Appeal No. 93852, decided November 4, 1993, and Texas Workers' Compensation Commission Appeal No. 93539, decided August 12, 1993. In addition, the Commission has directly addressed what is expected of a designated doctor in TWCC Advisory 93-04, dated March 9, 1993. What is required is personal involvement by the designated doctor in an actual physical examination and a review of the results of pertinent tests so that the medical conclusions are those of the designated doctor, independently arrived at, and not just a rubber-stamp endorsement of the opinions of others. The time the doctor spends in an examining room actually performing a physical examination is not necessarily controlling on the question of the adequacy of the examination. A hearing officer must also consider the report prepared by the designated doctor and may accept the recitations in the report as evidence that the designated doctor was personally involved in the examination; that the designated doctor reviewed all pertinent test results conducted by himself and others; and that the certification given on the TWCC-69 is the product of the sound professional judgment of the designated doctor. Unlike Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993, where the evidence showed that the examination "may well not have been performed by the designated doctor," in the case now under appeal, a comprehensive report was rendered by Dr. T which clearly reflected that he personally examined the claimant. We are thus unwilling to conclude as a matter of law, that Dr. T's examination of the claimant was inadequate.

The claimant also asserts that because Dr. H is a specialist for the injuries he claims and "knows what is wrong with me" whereas Dr. T is a plastic surgeon,[2] the opinion of Dr. H is of sufficiently "great weight" to overcome the statutory presumption in favor of the designated doctor. We have not found similar arguments "persuasive" in the past. Texas Workers' Compensation Commission Appeal No. 93412, decided July 8, 1993. A designated doctor need not, in every case, be a specialist, and a hearing officer may afford the opinion of a specialist whatever weight deemed appropriate. *See* Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993. The demonstrated skill of the respective physicians and the quality and comprehensiveness of their reports, as determined by the hearing officer, are controlling on the question of where the great weight of the medical evidence lies. In this case, the hearing officer concluded that the report of Dr. T was entitled to presumptive weight, and the evidence is sufficient to support his decision.

With regard to the medical evidence itself, we observe that the disparity between Dr. H's and Dr. T's rating was in the degree of severity assigned by each to the claimant's disorder of the cervical spine and the validity of range of motion testing of the cervical spine. Pursuant to Table 49 of the AMA Guides, a six percent rating is assigned for herniated discs judged to be "moderate to severe degenerative changes" and a four percent rating is assigned to "none to minimal degenerative changes." Whether the HNP sustained by the claimant in the case under appeal represented a minimal, moderate or severe change was certainly a question subject to varying opinions and is precisely the kind of dispute intended

[2]The only evidence that Dr. T is a plastic surgeon is the testimony of the claimant who read this information on Dr. T's business card. It is unrebutted and we accept it as an established fact.

to be resolved by the designated doctor under the 1989 Act. Dr. J, the only other doctor providing a rating for this injury, also found four percent. Similarly, Dr. T found cervical spine range of motion testing invalid because of what were, in his opinion, manipulative conduct by the claimant and results inconsistent with other previous tests. On the other hand, Dr. H performed his own range of motion tests and, considering them valid, assigned a 13% IR. Under these circumstances, we find sufficient evidence to support the hearing officer's decision that the claimant's correct IR is five percent and that the great weight of the other medical evidence did not overcome the "presumptive weight" to be afforded the certification of the designated doctor.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given that evidence. Section 410.165. Where, as here, there is sufficient evidence to support this determination, there is no sound basis to overturn the decision of the hearing officer. Only if we were to determine, which we do not in this case, that the decision of the hearing officer is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust would we reverse. Cain v. Bain, 709 S.W.2d,175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Gary L. Kilgore
Appeals Judge