APPEAL NO. 931085

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. §401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On November 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues to be determined at the contested case hearing were whether the claimant, (claimant), who is the appellant, reached maximum medical improvement (MMI) and, if so, the date, and the impairment rating to be assigned to the claimant. The hearing officer determined that the claimant reached maximum medical improvement on March 31, 1993, with an impairment rating of 10%, based upon the report of the designated doctor, and that the greater weight of other medical evidence did not overcome this.

The claimant has appealed, arguing that his impairment rating should be 33% as found by his treating doctor, and he attaches another medical report not submitted at the hearing. He argues that the finding of fact that both the designated doctor and treating doctor found the same MMI date was erroneous, because there was no agreement based upon the new evidence he submits. Claimant also argues that the 23% differential between the impairment ratings indicates that one of the doctors did not use proper procedures, and it is clear from his appeal that he feels that the designated doctor was the one who erred. The carrier responds that the determination of the hearing officer is correct.

DECISION

We reverse the hearing officer's decision and remand for additional evidence on the range of motion measurement in the designated doctor's report.

First, we note that we will not consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. There is no indication that such documents could not have been timely obtained in order to present at the hearing.

It was stipulated that claimant was injured on (date of injury), while employed by (employer). Claimant stated that his treating doctor was (Dr. Z), who operated on his lumbar spine at the L5-S1 level on June 15, 1992. Claimant stated that he continued to have pain and that Dr. Z wanted to do another surgery.

The record indicated that Dr. Z opined that claimant reached MMI effective March 31, 1993 with a 10% whole body impairment. Claimant said he disputed this impairment rating and, after contacting the Texas Workers' Compensation Commission (Commission), a designated doctor, (Dr. T), was appointed. The claimant stated that Dr. Z later told him that Dr. T was a plastic surgeon and should not have been the designated doctor. Accordingly, Dr. Z referred him to (Dr. H).

Claimant was examined by Dr. T on July 14, 1993; he stated that the measurements were performed by a woman but testified that Dr. T also examined him, for only five minutes.

The report of Dr. T indicated that range of motion was measured by another, and reviewed by Dr. T. Dr. T assessed a 10% impairment rating for objective injury only. Dr. T stated that range of motion tests were invalid, and found that claimant was a "symptom" magnifier, which he stated did not affect impairment but would affect future ability to return to work.

Although Dr. T contended that all range of motion measurements were invalid, the underlying chart for range of motion indicated that two measurements, for lumbar lateral flexion, resulted in valid impairment percentages of three percent for the left flexion and one percent for the right. As the 10% impairment rating assigned by Dr. T corresponds only to Table 49, for one level operated lumbar disc lesion, it appears that Dr. T did not take the additional four percent into account.

Dr. H stated that he was able to take valid range of motion measurements for the claimant, and assigned a 33% impairment rating. He stated that Dr. T likely had trouble in part because of a language barrier. Claimant, who had an interpreter at the hearing, testified that he had been through the tenth grade in Texas schools, and that he could read the medical reports in question although he did not understand all the terms. Claimant said that Dr. H's examination lasted two hours.

Both Dr. T and Dr. H were in agreement that claimant had no loss of muscular or neurological function in the lower extremities. Dr. H did not use the TWCC-69 form and supplied his conclusions in a letter narrative to Dr. Z dated August 30, 1993. However, this same letter indicated that claimant had not reached MMI. Further, it did not appear that Dr. H used the "combined values" charts in the AMA Guides to the Evaluation of Permanent Impairment (Guides) when he combined his values from Table 49 with percentages for loss of range of motion. In a report of a follow-up visit dated September 14, 1993, Dr. Z stated that he agreed with the 33% rating assigned by Dr. H.

As the date of MMI found by the hearing officer is used both by the designated doctor and by Dr. Z, we find sufficient support in the record for the MMI date found. Our remand is concerned with the issue of impairment.

The report of a Commission-appointed designated doctor is given presumptive weight. Section 408.122(b) and 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not non-medical testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

"Impairment" is defined in the 1989 Act as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Further, impairment must be based upon "objective clinical or laboratory finding" and, where assigned by a doctor chosen by the claimant, must be confirmable by a designated doctor. Section 408.122(a).

We have observed before that a designated doctor's own report can supply some of the "great weight" of contrary medical evidence. *See* Texas Worker's Compensation Commission Appeal No. 92621, decided December 23, 1992. In this case, we are concerned by the apparent oversight by Dr. T of an additional four percent impairment for loss of range of motion, which is not explained in his narrative report. Confusion may have been caused because the apparent summary of such measurements indicated that there were no valid lumbar range of motion measurements obtainable, although the underlying chart (taken from the Guides) plainly shows a total of four percent range of motion impairment.

Under these circumstances, and given that Dr. H has not certified MMI, which alone would preclude finding in favor of the 33% rating, we reverse the determination of the hearing officer to accord the 10% impairment rating of Dr. T presumptive weight, and remand so that the rating of the designated doctor can be clarified and, if necessary, properly tabulated to account for the apparent omission of four percent range of motion impairment. If there has been no oversight, the hearing officer should obtain clarification as to why the range of motion values were not included by Dr. T, which can then be weighed.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Gary L. Kilgore
Appeals Judge