APPEAL NO. 931125

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 14, 1993, in (city), Texas, with the record closing on October 19, 1993. (hearing officer) presided as hearing officer. The issues at the hearing were whether the appellant (claimant) timely disputed his treating doctor's initial impairment rating (IR), what was his correct IR, and whether the respondent (carrier) was entitled to credit for overpayment of impairment income benefits (IIBS). The hearing officer concluded that the issue of timely dispute of the claimant's IR was moot because the treating doctor rescinded and replaced this initial IR due to a substantial change in the claimant's condition, the claimant's correct IR was 18% as certified by the Texas Workers' Compensation Commission (Commission) selected designated doctor, and that the carrier is not entitled to recoupment of its overpayment of IIBS. The claimant appeals only the issue of correct IR, contending that the great weight of the medical evidence is contrary to the rating assigned by the designated doctor. The carrier has not provided a response to this appeal.

DECISION

Finding no reversible error, the decision of the hearing officer is affirmed.

It is not disputed that the claimant suffered a slip and fall accident in the course and scope of his employment on (date of injury) with resulting back and neck pain. In April 1991, (Dr. R), the claimant's treating physician, performed an L4-5 diskectomy and fusion. Because of continuing neck and left arm pain, in October 1992 claimant underwent an anterior cervical diskectomy and fusion at the C5-6 and C6-7 levels. Despite this operation and follow-on conservative treatment (physical therapy, moist heat and electrical muscle stimulation), the claimant testified that he still suffered from worsening lower back pain radiating into the left hip and leg, pain in the arms, numbness in the fingers, neck pain, headaches, impotence, and bowel and bladder control problems.

According to the text of a letter of April 22, 1993, from the carrier to the claimant, Dr. R first determined that the claimant reached maximum medical improvement (MMI) on November 25, 1991, and assigned an eight percent "disability," deemed by the parties to be an eight percent impairment rating (IR). The Report of Medical Evaluation (TWCC-69) on which this information was recorded was not introduced into evidence. On April 8, 1993, Dr. R completed a new TWCC-69 in which he certified MMI as of January 10, 1993, and assigned a 39% IR. In a letter of July 16, 1993, Dr. R explained to the carrier that because the claimant's "subsequent condition deteriorated necessitating neck surgery," he "rescinded" both the earlier MMI date and previously assigned IR in favor of the "up-dated" MMI of January 10, 1993, and 39% IR for injury to the cervical and lumbar spine.

In the April 22, 1993, letter to the claimant, the carrier contested this new IR and on June 9, 1993, the Commission selected (Dr. D) as designated doctor for assignment of an IR only. By means of a TWCC-69, received by the Commission on July 22, 1993, Dr. D, though not asked, determined an MMI date of July 8, 1993, the date of his examination of the claimant, and assigned an 18% IR. The hearing officer concluded that the claimant's correct IR was 18% as certified by Dr. D and that the great weight of the other medical evidence was not contrary to Dr. D's report. He also concluded that the claimant reached statutory MMI on January 15, 1993. In the discussion portion of the Decision and Order the hearing officer comments that Dr. R "fail[ed] to set out the objective clinical or laboratory findings" on which his conclusions are based.

The claimant appeals this determination of IR arguing that Dr. R's report is based on objective clinical findings and "should be given equal consideration, as far as validity is concerned, as that of [Dr. D];" that Dr. D failed to assign a rating for all the various symptoms described by the claimant in general, and in particular, failed to assign range of motion limitations of the cervical and lumbar spine even though his own report reflects objective findings of limitations; and that Dr. D's assigned IR is invalid because it is based, not on the statutory date of MMI of January 15, 1993, but on the date of his examination (July 8, 1993). Hence it failed to consider the claimant's condition on the "date the statutory maximum medical improvement was imposed."

Section 408.125(e) provides in relevant part:

> If the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence but only the great weight of the other medical evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special status given the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

Whether the great weight of the other medical evidence is contrary to the opinion of the designated doctor is normally a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of act, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence, including medical evidence. <u>Garza v. Commercial Insurance Company of Newark, New Jersey</u>, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); <u>Texas Employers Insurance Association v. Campos</u>, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In the case under consideration, Dr. D prepared a comprehensive report which addressed the entire range of symptoms described by the claimant in his testimony and included a review of his past operations. Dr. D considered range of motion limitations but refused to assign an IR for reduced range of motion of the lumbar and cervical spine because in his view the tests were invalid due to inconsistent test results and in part to claimant's diminished effort, inhibition and fear of pain with regard to the spine and lower extremities. Range of motion of the shoulders, elbows, wrists and fingers was found to be normal. Having reviewed the record in this case, we conclude that the hearing officer properly accorded presumptive weight to the designated doctor's report and that his determination that the claimant's correct IR is 18% is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). *See* Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

Nonetheless, we agree with claimant that the hearing officer mistakenly stated that Dr. R failed to set out objective clinical findings on which his conclusions are based. Dr. R assigned an IR based on specific disorders of the spine and range of motion limitations with the test results clearly set out. However, given the presumptive weight afforded Dr. D's report as discussed above, we believe that any error of the hearing officer in his concluding that Dr. R failed to set out his clinical findings was harmless. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ) and Texas Workers' Compensation Commission Appeal No. 93749, decided October 6, 1993.

In his final assertion of error, the claimant contends that Dr. D's assignment of an IR is invalid because he found MMI to have occurred on July 8, 1993, the date of his examination, not on the mid-January 1993 statutory date of MMI. *See* Section 401.011(30)(B). Thus, according to the claimant, Dr. D's calculation of IR did not take into consideration the claimant's condition on the date of statutorily imposed MMI. We find no merit in this argument. Although the Appeals Panel has stated that the "threshold issue of the existence of MMI cannot be neatly severed from assessment of an `impairment rating,'" and that these issues are "somewhat intertwined," *see* Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992, we have never held that MMI and IR can never be individually considered and decided. *See* Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993. IR can be decided separately from MMI, for example, when MMI is agreed to by the parties or when, as in this case, statutory MMI has been reached. In such cases, it is essential only that MMI be reached before an IR is assigned. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. In the case under appeal, there was by law no alternative MMI beyond the statutory MMI available for determination by any doctor, whether designated or not. Thus claimant's challenge to Dr. D's IR that Dr. D relied on a later and wrong date of MMI which caused a defective impairment rating is in effect a challenge to the presumptive weight of Dr. D's report. As we stated above, this presumptive weight can only be overcome by the great weight of the medical evidence to the contrary. The claimant's contention that Dr. D did not properly consider the claimant's condition as of the statutory date of MMI, or that there was a substantial change in the claimant's condition between January and July 1993 is not medical evidence. Texas Workers' Compensation Commission Appeal No. 92395, decided September 16, 1992. Dr. D's finding of MMI under these circumstances has no significance. In the absence of the great weight of the medical evidence to the contrary, the hearing officer correctly gave presumptive weight to the report of the designated doctor, Dr. D.

The decision of the hearing officer is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge