APPEAL NO. 931168

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 November 2, 1993, in (city), Texas, with the record closing on November 30, 1993. (hearing officer) presided as hearing officer. The single issue at the hearing was the appellant's (claimant) correct impairment rating (IR). The hearing officer determined that the great weight of the other medical evidence was not contrary to the report of the Texas Workers' Compensation Commission (Commission) selected designated doctor and that, consistent with this report, the claimant's correct IR was 12%. The claimant appeals asserting that the hearing officer "mischaracterized" the record and failed to make findings on certain issues. The claimant also contends that there is no evidence the designated doctor "correctly used the approved GUIDES," in according him the 12% IR, that the designated doctor failed to conduct an adequate examination of claimant's entire injury and that the decision of the hearing officer is not supported by the evidence. The respondent (carrier) replies that the decision of the hearing officer is fully supported by the evidence and should be affirmed.

DECISION

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

It is not disputed that on (date of injury), the claimant fell from a ladder and injured himself in the course and scope of his employment. The claimant described his injuries as extending to his tailbone, right side, back, right hip, left shoulder, neck and arm. The parties agreed that the claimant reached maximum medical improvement (MMI) on March 4, 1993.

Claimant received treatment from and was evaluated by numerous doctors who assigned varying impairment ratings. (Dr. B) was selected by the Commission as designated doctor for the purpose of assigning an IR only.[1] In a Report of Medical Evaluation (TWCC-69) of May 25, 1993, Dr. B assigned an IR of 12% based solely on a compression fracture of greater than 50% of a lumbar vertebrae (L1). The hearing officer determined that this IR was not "overcome by the great weight of the other medical evidence" and was correct.

Claimant contends that the hearing officer mischaracterized the record because, although the claimant challenged Dr. B's rating on several grounds, the hearing officer mentioned only one - the failure of Dr. B to perform an adequate examination of the claimant. Other grounds submitted were that Dr. B did not rate the entire compensable injury and that he failed to assign a rating based on the effects of the injury on the claimant's pre-existing

[1]According to the hearing officer's Finding of Fact No. 4 and his discussion of the evidence, Dr. B was the Commission-selected designated doctor. No appointment letter was in evidence, but neither party appeals this determination and both contested the issue of IR on the premise that Dr. B was a Commission-selected designated doctor, and we accept it for purposes of this appeal.

degenerative spinal condition, and that, although the hearing officer took official notice of the correct version of the Guides,[2] the decision and order fail to address this fact.

A hearing officer is not required in a decision to recite all the evidence admitted at the hearing and the contentions of the parties. The 1989 Act only requires findings of fact, conclusions of law, a statement of whether benefits are due and an award of benefits due. Section 410.168. If a statement of evidence is made, it need only reasonably reflect the record and the Appeals Panel will not ordinarily consider questions about why part of the evidence was included and part omitted. Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993. We have reviewed the transcript in this case and conclude that the hearing officer's statement of the evidence reasonably reflects the record. Similarly, the claimant's challenge of Dr. B's rating based on failure to rate the entire injury and consider the effect of the injury on pre-existing conditions did not have to be expressly stated by the hearing officer. These are more in the nature of contentions or conclusory statements that form some of the rationale for the claimant's attack on Dr. B's rating than evidence. None of the arguments or evidence offered by the claimant in support of these arguments were excluded from the record and all have been preserved for review. *See* Texas Workers' Compensation Commission Appeal No. 92650, decided January 20, 1993. We find no merit in claimant's contention that the hearing office mischaracterized the record.

For the same reason, we find no error in the failure of the hearing officer to expressly state that he took official notice of the Guides. Claimant asks that the Appeal Panel "acknowledge" this notice and that the Guides "are before the Appeals Panel as though admitted into evidence at the CCH." Because Section 408.124 mandates the use of these Guides in determining an IR and because they are part of the record in these proceedings, we are required by Section 410.203(a)(1) to "consider" them as necessary in reaching our decision in this case.

The crux of the claimant's attack on Dr. B's rating is twofold: first, that Dr. B did not adequately examine the claimant, and second, that Dr. B did not evaluate the entire compensable injury in assigning his IR. For these reasons, claimant argues that the great weight of the other medical evidence is contrary to the report of Dr. B.

On the question of adequacy of the examination, the claimant testified that Dr. B saw him for only five minutes and that during this time neither Dr. B nor any assistant performed any tests or measurements. In order to more fully develop evidence on this point, the hearing officer wrote Dr. B on November 2, 1993, and advised him of the claimant's contention, under oath, that:

> you did not perform a physical examination on [claimant]. He states he was fully clothed, sat in a chair in your office and you talked to him for approximately 5 minutes. He states you did not touch him, or perform any physical

[2]The AMA's Guides to the Evaluation of Permanent Impairment, 3d edition, 2d printing, February 1989.

examination of any type.

Your report of 5/25/93 refers to physical examination, range of motions, tenderness, reflexes, motor strength, sensory exam and pin prick. However, it is not clear if you personally performed any or all of these test (sic), or whether you relied on the reports of other medical providers.

Dr. B was then invited "to clear up" these question. He responded by letter of November 22, 1993, as follows:

. . . my initial report speaks for itself. I, in fact, did those items which are mentioned on the report. When performing these types of examinations I do these test (sic) rather abstractly so as not to alert the patient to the exact nature of my examination. However, be assured that all these test (sic) were performed.

In reviewing my previous examination I find it accurate and at this time I do not wish to change any statement in this exam.

Based on all the evidence, the hearing officer found that Dr. B "performed a physical examination on the Claimant."

In his appeal of this finding, claimant argues that it is "preposterous" to say that tests such as pin pricks and leg raises and reflex tests were performed "abstractly" and that the hearing officer improperly rejected the sworn testimony of the claimant in favor of "an unsworn, self-serving, and patently ridiculous response by a besieged designated doctor."

The Appeals Panel has held that a designated doctor must personally examine and evaluate a claimant. This does not preclude relying on tests performed by others provided the critical determination (in this case IR) is based on the designated doctor's own professional opinion. Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993. As we have previously said, "[w]hat is required is personal involvement in the examination process so that the certification is in fact the professional, medical opinion of the designated doctor . . . ." Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993. Whether a designated doctor performed an examination at all and what the extent of the examination was is a question of fact. In this case, Dr. B unequivocally asserted that he personally performed the tests he described in his report and reviewed the pertinent medical records. The claimant with equal vigor denies this and asks pointedly how a so-called "abstract" examination has any meaning at all. The hearing officer as fact finder is the sole judge of the weight and credibility of the evidence and is entitled to believe all, part or none of the testimony of any one witness. Section 410.165. We will reverse a finding of fact only if we determine that the evidence in support of the finding is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951). In this case, the hearing officer determined that Dr. B performed a physical examination adequate to support his assessment of an IR. Dr. B

said he personally performed the examination even though "rather abstractly." From this the hearing officer, despite some premature comments at the hearing about the claimant's credibility, found Dr. B credible about the extent of his examination. We cannot say that this determination was not based on sufficient evidence.

The claimant also challenges the findings of the hearing officer that Dr. B "correctly used the approved Guides in arriving at the 12% whole body impairment rating" and that Dr. B's assigned IR was not overcome by the great weight of the other medical evidence.[3] Specifically, claimant asserts that Dr. B erroneously failed to find and assign IRs for injury to the cervical spine and aggravation of the claimant's arthritis.

A review of the TWCC-69 prepared by Dr. B discloses awareness that the claimant was suffering from both back and neck pain. His review of previous test results included x-rays, myelogram and CT scans of the cervical spine. He specifically found "full range of motion in the neck area," and concluded "[b]asically, examination of the cervical area is normal . . . apparently the cervical area has resolved with conservative management." He also noted "long standing, advance degenerative joint disease of the spine including the neck and worse in the lower lumbar area" and considered this condition aggravated by the fall on (date of injury), which resulted in a greater than 50% compression fracture. For this fracture he assigned a 12% IR. Thus, on its face, Dr. B's report addresses the cervical spine (and found no impairment) and claimant's pre-existing condition which justified the higher rating of 12% for the compression fracture.

Other medical evidence assigning an IR after the date MMI was reached[4] includes a TWCC-69 of (Dr. R), a neurosurgeon, who specifically reviewed and commented on Dr. B's finding. Dr. R concurred with Dr. B that a 12% IR was correct for the compression fracture of the lumbar spine. Although he examined the claimant and reviewed the medical records, he noted the claimant's "neck pain has resolved with therapy" and that the cervical myelogram was "unremarkable." A CAT scan did show spondylosis at C3-4. He assigned an additional IR of 15% for limitation of range of motion of the lumber spine, but none for the neck. His treatment records show that the claimant's chief complaint was low back pain.

(Dr. P), another treating physician, also reviewed Dr. B's and Dr. R's assessment (as well as that of (Dr. F) who is discussed later) and assigned an IR of 21% based on 7% for the compression fracture and 15% for lumbar range of motion limitation. He also noted degenerative arthritic joint disease. He observed in a previous report that the claimant also

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[3]Carrier construes claimant's appeal also to include an assertion that Dr. B did not use the correct Guides. We do not agree. The thrust of claimant's case, restated on appeal, is that Dr. B incorrectly used the Guides. Use of the correct Guides was not an issue before the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92393, decided September 17, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 93787, decided October 18, 1993.

[4](Dr. Z), who was claimant's initial treating physician, diagnosed lumbar strain and assigned a zero percent IR based on an examination and a MMI date of March 23, 1992. She found no range of motion limitations and normal functioning without radiculopathy.

injured his cervical area with resulting radiculopathy, but declined to assign an IR for the cervical spine.

Dr. F examined the claimant at carrier's request on May 12, 1993, and assigned an IR of 37%, consisting of 32% for the lumbar spine (compression fracture with four-level spontaneous fusion) and 5% each for the cervical and lumbar spine because "[b]y history of one time examination, it seems reasonable to include cervical and lumbar radicular symptoms induced and preexisting degenerative changes . . . ." No rating was given for range of motion limitations.

Other medical evidence in the file consisted primarily of results of physical therapy and pain studies with no attempt to assign IRs.

Section 408.125(e) of the 1989 Act provides that when a designated doctor is chosen by the Commission, the report of that doctor shall have presumptive weight and the Commission shall base its determination of a correct IR on that report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has commented many times on the "unique position" and "special presumptive status" the designated doctor's report is accorded under the Texas workers' compensation system, and the fact that no other doctor's report, including those of treating doctors, is entitled to such deference. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992; Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. The final determination of IR by the Commission must be based on medical, not lay evidence. Texas Workers' Compensation Commission Appeal No. 93518, decided August 5, 1993. A designated doctor's report should not be rejected "absent a substantial basis to do so." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. And medical conclusions are not reached by counting the number of doctors who take a particular position. Their opinions must be weighed according to their "thoroughness, accuracy, and credibility with consideration given to the basis it provides for the opinions asserted." Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 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.

In this case, the disparity in IR's among the various doctors is attributable primarily to differences of opinion about limitations of range of motion of the lumbar spine. Claimant, however, does not assert error in Dr. B's failure to find limited range of motion. Dr. R's and Dr. P's assignment of 12% for the compression fracture was consistent with Dr. B's opinion which expressly included consideration of the claimant's degenerative arthritic condition. Only Dr. F's opinion was fundamentally contrary to the other doctors in its assigned IR for the spine and additional 5% for radiculopathy and cannot in itself be considered the great weight of the other medical evidence. Claimant's contention that his cervical spine condition merited an additional rating is not medical evidence and cannot be considered on the question of the correctness of Dr. B's rating. Considering all the medical evidence, the hearing officer was able to reach findings of fact and conclusions of law as to a correct IR.

He determined that Dr B's IR was not contrary to the great weight of the other medical evidence. Such a conclusion is not so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust. In re King's Estate, *supra*.

The decision and order of the hearing officer are affirmed.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Thomas A. Knapp
Appeals Judge