APPEAL NO. 931181

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 22, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The single issue at the hearing was the appellant's (claimant) correct impairment rating (IR). The hearing officer determined that the five percent IR assigned by the Texas Workers' Compensation Commission (Commission) selected designated doctor was correct and that the great weight of the other medical evidence was not to the contrary. The claimant appeals expressing disagreement with the decision of the hearing officer. The respondent (carrier) makes an evidentiary objection to the appeal and urges that the decision of the hearing officer be affirmed as sufficiently supported by the evidence.

DECISION

The decision of the hearing officer is affirmed.

There is no dispute that the claimant injured her back while lifting boxes of records in the course and scope of her employment on (date of injury). Her treating physician, (Dr. D), an orthopedist who was also her employer, initially diagnosed on April 10, 1991, low back pain and left-sided sciatica with L5 radiculopathy. On June 24, 1991, Dr. D diagnosed disc protrusion at L4-L5. Disc herniation at L4-L5 was diagnosed on September 18, 1991. On October 26, 1992, he added a diagnosis of spondylosis at L4-L5. An MRI of the lumbar spine on June 21, 1991, disclosed disc protrusion, herniation and degeneration at L4-L5, bulging disc with evidence of early disc degeneration at L5-S1 and a spinal canal "at the upper limits of normal." Nerve conduction studies on June 24, 1991, and October 8, 1992, of both lower extremities were within normal limits though right lumbosacral radiculopathy was noted. Range of motion testing of the lumbar spine and physical capacity testing were also conducted by Dr. D on numerous dates with varying results recorded. On October 8, 1992, (Dr. DA), a chiropractor, "agreed that there appears to be discopathy at L4/L5 & L5/S1 regions."

On March 30, 1993, Dr. D completed a Report of Medical Evaluation (TWCC-69) in which he certified a maximum medical improvement (MMI) date of March 30, 1993, and assigned a 14% IR based on loss of range of motion of the lumbar spine (seven percent) and disc herniation at L4-L5, a specific disorder of the spine (seven percent). A second MRI of the lumbar spine on July 8, 1993, disclosed degeneration and spondylosis at L4/L5, but no definite herniation.

According to the hearing officer's Finding of Fact No. 5, (Dr. C) was appointed as designated doctor only for the issue of IR. No appointment letter was in evidence, but neither party appeals this finding and both contested the issue on the premise that Dr. C was a Commission selected designated doctor and we accept it for purposes of this appeal. On August 19, 1993, Dr. C assigned an IR of five percent based on a specific disorder of the spine (mild disc degeneration and protrusion at L4-5 and L5 S1). He assigned zero percent for loss of range of motion because the claimant "unfortunately did not meet the validity criteria of the `Guides.'" In a letter of September 22, 1993, to the Commission Dr.

D registered his disagreement with Dr. C, specifically with regard to Dr. C's refusal to assign an IR for loss of range of motion and his refusal to consider her disorder of the spine more serious and meriting a seven percent, not a five percent IR.[1] The benefit review conference did not consider the issue of the second injury and the claimant refused to agree to its consideration at the hearing. We therefore do not consider it initially on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992.]

Claimant's appeal consists of a notice of service of the appeal on the carrier signed by the claimant and another letter signed only by Dr. D which again addresses perceived inadequacies in Dr. C's report. The carrier in response requests the Appeals Panel to disregard this letter as an attempt to introduce new evidence not previously made part of the record at the hearing. We agree. Appeals Panel review is limited to the record developed below. Section 410.203(a). We do not consider new evidence in an appeal except in limited circumstances not alleged to be present in this case. *See* Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993. We therefore disregard this letter in reaching our decision.

The claimant essentially contends that Dr. D's assignment of an IR constitutes the great weight of the other medical evidence contrary to the report of Dr. C, the designated doctor, and should be adopted. Specifically, Dr. D assigned seven percent for loss of range of motion of the lumbar spine. Dr. C invalidated his own range of motion tests and gave no IR in this category. The claimant now contends that with a herniated disc, she must have some loss of range of motion. She also contends that her disc degeneration is moderate to severe and deserves the seven percent rating given by Dr. D, not the five percent rating of Dr. C. Finally, she asserts the Dr. C saw her only one time while Dr. D treated her many times for this injury and his opinion should outweigh Dr. C's.

Section 408.125(e) of the 1989 Act provides that where 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 that of a treating doctor, 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. We have also frequently stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence. Appeal 92412, supra. This presumptive weight is accorded the report of the designated doctor under the 1989 Act even though the time spent with the designated doctor will almost never equal that spent with a treating physician. *See* Texas Workers' Compensation Commission Appeal No. 93674, decided September 17, 1993.

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[1]Dr. D also references a second injury to the claimant which in his opinion directly bears on her IR.

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 Texas Workers' Compensation Commission Appeal No. 93442, decided July 9, 1993, we observed that the ultimate determination of impairment, if any, must be based on medical and not lay evidence. The contested case hearing officer, as finder of fact, 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. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In the case under appeal, Dr. C, the designated doctor, did not consider the claimant's degenerative disc problem as serious as Dr. D found it. The most current MRI report reviewed by Dr. C did not confirm herniation but disclosed what in Dr. C's opinion was "mild degeneration." Similarly, the claimant disputes Dr. C's conclusion that the range of motion tests were invalid. A review of the record discloses that even Dr. D's extensive range of motion testing showed various results. In addition, claimant admitted that at a third evaluation of range of motion by her own referral doctor she displayed a "good range of motion" which claimant explained by saying she had "good days" and "bad days." In reviewing these different conclusions about the seriousness of the claimant's disc pathology and range of motion testing, the hearing officer considered the accuracy and thoroughness of the reports of Drs. C and D, as well as the medical opinions of other doctors in determining whether the great weight of the other medical evidence was contrary to the report of the designated doctor. Dr. C's report was comprehensive and he provided reasoned conclusions. Dr. D's disagreements on these points do not constitute the great weight of the other medical evidence. 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 five percent 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.

The decision of the hearing officer is affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge