APPEAL NO. 93210

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on February 9, 1993, in (city) Texas. The appellant, hereinafter claimant, appeals from hearing officer (hearing officer) determination that she reached maximum medical improvement (MMI) on May 1, 1992, with a 5% whole body impairment rating, as certified by the designated doctor, and that the great weight of the other medical evidence was not contrary to the designated doctor's report. The carrier filed no response to the appeal.

DECISION

Finding no error in the hearing officer's decision and order, we affirm.

The claimant, who was employed by (employer), testified that on (date of injury), she fell backwards when she bent to pick up a part she was working on, hurting her shoulder and back. She was initially seen at the medical where she was x-rayed and treated for contusion and sprain of the lumbosacral and thoracic regions. She later began treating with (Dr. H), who did x-rays and studies and prescribed medication. An October 21st bone scan was negative, and a lumbar spine MRI of the same date showed degenerative disc disease at L4-5. A December 4th MRI of the left shoulder raised the possibility of a rotator cuff tear, although a December 19th arthrogram was normal. Dr. H thereafter recommended arthroscopic examination of her shoulder, which disclosed torn cartilage, for which she had remedial surgery in January 1992. The claimant also underwent physical therapy and work hardening.

On April 29, 1992, Dr. H certified that the claimant had reached MMI on that date and gave her a whole body impairment rating of 39%, based on the claimant's rigidity of her cervical and lumbar spine and "persistent, painful limitation of the range of motion of" her left shoulder. He also wrote the claimant had extremely poor tolerance to pain with severe guarding. On May 12th the carrier disputed Dr. H's impairment rating, and the Texas Workers' Compensation Commission (Commission) appointed (Dr. A), an orthopedic specialist, as the designated doctor to resolve the dispute over MMI and impairment.

Dr. A certified claimant to have reached MMI on May 1, 1992, with a 5% whole body impairment rating. In his report he summarized his examination of the claimant as well as her medical records and extensive diagnostic test results and stated that the claimant's "extensive tenderness pattern by far exceeds beyond the tenderness pattern of any orthopedic lesion that I know of such as sprains or disc lesions of the neck or low back, but is of emotional tension." He also indicated that the claimant's complaints of pain over a great portion of her body were indicative of increasing emotional tension relating to her claim.

The claimant continued treating with Dr. H until at least July of 1992. (It is noted

that despite Dr. H's certification of MMI, he filed two subsequent medical reports stating that claimant's prognosis was "poor," and he disputed the work hardening program discharge summary, stating there was a contradiction between the supposed results obtained from work hardening and the reality of claimant's symptoms.) Claimant next began treating with Dr. P) on October 19, 1992. On December 9th, Dr. P assigned claimant an impairment rating of 40% but did not certify MMI. In addition, claimant had earlier seen (Dr. E) pursuant to a Commission medical examination order. On January 15, 1992, Dr. E summarized his examination and review of the claimant's medical records and stated his impression that the claimant had severe psychosomatic musculoskeletal condition or illness behavior. He wrote that claimant's back strain should have resolved six weeks following the injury, but she was at the time of his exam claiming she was 80% worse.

The hearing officer determined that Dr. A certified claimant as reaching MMI on May 1, 1992, with a 5% whole body impairment rating, and that the great weight of the other medical evidence was not contrary to the designated doctor's report. Claimant contends that the impairment rating should be allocated impartially, between Dr. P's 40% and the designated doctor's 5%; she also argues that the correct date of MMI should be December 9, 1992.

The 1989 Act, Article 8308-1.03(32), defines MMI as the earlier of (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Subsection (A) is applicable to this case. In addition, the Act provides that if the Commission appoints a designated doctor, the report of that doctor shall have presumptive weight, and the Commission shall base its determination on MMI and impairment rating on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. Articles 8308-4.25(b), 4.26(g). This panel has frequently commented upon the "unique position" and the "special presumptive status" that the designated doctor's report occupies under the Texas workers' compensation system, and the fact that to overturn such report requires more than a mere balancing of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

Upon review of the record in this case, we cannot say that the hearing officer erred in determining that Dr. A's report was not overcome by the great weight of the other medical evidence. Dr. P's finding of 40% impairment, while certainly medical evidence that the hearing officer was obliged to consider, was nevertheless diminished because not based upon a certification that the claimant had reached MMI. *See* Texas Workers' Compensation Commission Appeal No. 93124, decided April 1, 1993. Despite the fact that Dr. H gave an impairment rating of 39%, the disparity between this rating and that assigned by the designated doctor is not one that is without rationale or explanation apparent in the record. *Compare* Texas Workers' Compensation Commission Appeal No. 92561, decided

December 4, 1992. Dr. H found claimant's range of motion to be extremely limited, whereas Dr. A (as well as Dr. E, the independent medical examination doctor) found the claimant's subjective symptoms to be disproportionate to objective findings. These opinions are supported by the numerous, essentially negative, reports of tests which were in the record. In short, our review reveals nothing that would lead us to reverse the hearing officer's determination that the designated doctor's report was not overcome by the great weight of other medical evidence.

We affirm the hearing officer's decision and order.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur with the opinion of the author judge in this case. However, I remain concerned where there is significant disparity in the impairment rating of examining and treating doctors apparently using the same guides (AMA Guides to the Evaluation of Permanent Impairments, Third Edition). Where there is no satisfactory explanation and the reasons for the significant disparity are not apparent at all from a complete review of the record, we have remanded for further development of the evidence. Appeal No. 92561, *supra*. As we indicated in Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, the use of a designated doctor is intended to finally resolve disputes concerning MMI and impairment ratings. We also have stated that where a designated doctor's opinion is rejected, there must be some detailing of the evidence and the reasoning supporting such rejection. Texas Workers' Compensation Appeal No. 92522, decided November 9, 1992. While we have steadfastly accorded presumptive weight to the designated doctor's opinion, this does not mean that there is no need to have some explanation or rationale for a significant disparity between examining and treating physicians when nothing is apparent from the record and we are left to total speculation and

conjecture. In this case, I agree with the author judge's assessment that there is a sufficient rationale or explanation for the disparity here. The nature of the injury, together with considerable subjectivity in the symptoms as opposed to essentially negative objective tests, as noted by the designated doctor in his comprehensive and detailed report, can be and is appropriately considered.

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Stark O. Sanders, Jr.
Chief Appeals Judge