

APPEAL NO. 93689

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act) (formerly V.A.C.S. art 8308-1.01 *et seq.*), a hearing on remand was held in (city), Texas, on July 6, 1993, (hearing officer) presiding as hearing officer. The case was on remand pursuant to Texas Workers' Compensation Commission Appeal No. 93234, decided May 12, 1993, because of the inadequacy of the prior hearing. The hearing officer in the case on remand, after a hearing which was adequate and in substantial compliance with the 1989 Act, determined that the appellant (claimant) reached maximum medical improvement (MMI) on December 7, 1992 with a seven percent impairment rating (IR) in accordance with the report of a Commission-selected designated doctor. As best we understand the claimant's appeals, he is dissatisfied with the amount of income benefits he has received, does not feel he is able to work per his out-of-state doctor, and complains he did not give anyone the right to pick a designated doctor. There is no response from the carrier.

DECISION

Finding sufficient evidence to support the determination of the hearing officer and that the matter on remand has been corrected, we affirm the decision.

Suffice it to say the prior, *ex parte*, attempt at a contested case hearing fell short of the requirements of the 1989 Act. The claimant was present at the hearing on remand and was given the opportunity (the lack thereof being the thrust of his appeal following the original hearing) to present all the evidence he desired. The only issues at both hearings were whether the claimant had reached MMI and his correct IR; the claimant's sustaining of a back injury on (date of injury), not being disputed. After disagreement on MMI and IR, the Commission selected a designated doctor. He certified that the claimant reached MMI on December 7, 1992, with a seven percent IR. Because there was some question whether the designated doctor had considered a particular MRI in his report, the hearing officer sent it to him and asked if it changed his opinion concerning MMI and IR. The designated doctor stated that it did not change his opinion. The claimant testified that he had not yet reached MMI and asserted that the designated doctor's report should not be accepted because: (1) from all he heard, the designated doctor was an insurance company doctor; (2) the designated doctor did not take his history, have pertinent medical records, and only examined him for 10 to 15 minutes; (3) the designated doctor did not perform any range of motion (ROM) testing; and, (4) the designated doctor's opinion was influenced by an insurance adjuster. The hearing officer provided an opportunity for the designated doctor to respond and the response was accepted as an exhibit. The designated doctor disputed the assertions made by the claimant, indicated he had taken a complete history and performed a thorough examination including ROM testing, and had considered claimant's previous medical records. He stated his review of the MRI showed multiple arthritic changes that are not the type which are the result of an injury, but are a pre-existing condition. There was medical evidence in the record from a doctor who was apparently selected by the carrier. His certification indicates an MMI date of "01/15/92" with a zero percent impairment rating. Certain medical records apparently from the claimant's doctor

were not included in the hearing record; rather, a hearing officer's memo listed as Claimant's Exhibit 5 indicates that the claimant refused to give a copy to the hearing officer for the record.

The claimant's complaint that he did not give anyone the right to pick a designated doctor is without merit. In absence of agreement by the parties to a designated doctor, and there is nothing to indicate that any such agreement was ever contemplated, reached, or in issue at any stage of the dispute resolution process, the Commission selects the designated doctor. Section 408.122(b) and 4.08.125(b); Tex. W. C. Comm'n, 28 TEX.ADMIN.CODE §130.6 (TWCC Rule 130.6). *Compare* Texas Workers' Compensation Commission Appeal No 93099, decided March 25, 1993, where noncompliance with TWCC Rule 130.6 was clearly placed in issue by the testimony and documentary evidence and where we upheld a hearing officer's determination that the parties had not been provided an opportunity to agree on a designated doctor before a selection was made by the Commission. See also Texas Workers' Compensation Commission Appeal No.93170, decided April 22, 1993.

We have reviewed the evidence of record and do not find anything contrary to the hearing officer's conclusion that the designated doctor's examination was properly done and that his report was entitled to presumptive weight. Clearly, the great weight of the other medical evidence is not to the contrary of the designated doctor's report. It is accordingly entitled to presumptive weight. Section 408.125(e). As we have previously held, the designated doctor occupies a unique position under the 1989 Act and it take more than a balancing of the medical evidence to overcome the presumptiveness given to his report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. The hearing officer, as the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Section 410.165(a)), determined that the designated doctor's report was entitled to presumptive weight and found that the claimant reached MMI on December 7, 1992 with a seven percent IR. Only were we to find, which we do not, that his finding was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to disturb the decision. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Determining there is sufficient evidence to support the findings and conclusions of the hearing officer, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge