APPEAL NO. 93779

On January 29, 1993, a contested case hearing was held in (city), Texas, with the record being closed on July 23, 1993. (hearing officer). presided as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The parties stipulated that the appellant (claimant) reached maximum medical improvement (MMI) on July 9, 1992. The issue at the hearing was the claimant's impairment rating. The hearing officer decided that the claimant's impairment rating is five percent as reported by (Dr. O), the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant disputes the hearing officer's decision. The respondent (carrier) responds that the hearing officer's decision is supported by the evidence and should be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that the claimant was injured in the course and scope of his employment on (date of injury). According to the medical reports in evidence, the claimant was carrying a conference table down stairs when he experienced acute low back pain. The claimant has been treated by (Dr. T), who diagnosed lumbosacral sprain and strain and impingement syndrome of the shoulders. Dr. T noted that an MRI scan was negative for disc herniation. The claimant participated in a "functional restoration program." In a report dated July 9, 1992, Dr. T reported that the claimant had a 15% whole body impairment rating composed of 5% impairment for a specific disorder of the lumbar spine and 10% impairment for limited range of motion (ROM) of the lumbar spine. Dr. T noted that the claimant had not been symptomatic over a six-month period. In a report dated September 18, 1992, Dr. T reported that the claimant has a 19% impairment rating composed of 5% for a specific disorder of the lumbar spine and 15% for limited ROM of the lumbar spine. Dr. T again noted that the claimant had not been symptomatic over a six-month period.

The hearing officer found that Dr. O was chosen by the Commission as the designated doctor, which finding is not disputed. In a report to the Commission dated September 24, 1992, Dr. O reported that the claimant has a five percent whole body impairment rating based on a five percent specific disorder of the spine. Dr. O stated that ROM measurements were invalid and consequently gave no impairment rating for limited ROM. Dr. O indicated that ROM testing was done six times.

In a report dated November 5, 1992, Dr. T reported that the claimant has a 15% whole body impairment rating.

At the January 29, 1993, hearing the claimant urged that the designated doctor was incorrect in invalidating ROM measurements, that the ROM testing should have been repeated on a finding of invalid measurements, and that the rating was premature in that he had not had a minimum of six months of medically documented pain at the time of the designated doctor's evaluation.

In evidence is a letter from the hearing officer to the designated doctor dated April 19, 1992. It is clear from the course of events that the year stated on the letter is in error and that the actual date of the letter is April 19, 1993. In this letter the hearing officer sets out the concerns of the claimant regarding the designated doctor's findings and states that he has reopened the record and asks the designated doctor to "retest" the claimant. The hearing officer also requests the designated doctor to send a copy of the report following reexamination to the hearing officer and the parties. The hearing officer notes in the letter that the time limit for the parties to respond to the revised report will begin on the day the report is forwarded. The letter indicates that copies of the letter were sent to the claimant and the carrier.

The hearing officer notes in his decision that he also gave Dr. T the opportunity to revise his reports of impairment rating because Dr. T had indicated in his reports that he had used a 1990 edition of the "Guides to the Evaluation of Permanent Impairment" to determine impairment instead of the statutorily required third edition, second printing, dated February 1989. *See* Section 408.124(b).

In a report dated May 17, 1993, Dr. T said that his previous reports of impairment rating had been corrected using the statutorily required edition of the AMA Guides. Dr. T assigned the claimant a 15% whole body impairment rating composed of a 5% impairment rating for a specific disorder of the lumbar spine and a 10% impairment rating for limited ROM of the lumbar spine.

In a report to the Commission dated June 11, 1993, Dr. O, the designated doctor, responded to the hearing officer's request of April 19th. As he had done in his original report, Dr. O set forth the reasons why ROM testing in the original examination was invalid with specific references to the statutorily required edition of the AMA Guides. Dr. O further stated that on June 11, 1993, he repeated lumbar ROM testing twice and found both tests to be invalid based on specific criterion set forth in the AMA Guides. Dr. O reiterated that in his opinion the claimant has a five percent whole body impairment rating due to a specific disorder of the lumbar spine.

The hearing officer determined that the claimant reached MMI on July 9, 1992, as stipulated by the parties, and that the claimant has a five percent whole body impairment rating as reported by the designated doctor. The hearing officer further determined that the other medical evidence was insufficient to rebut the presumptive weight accorded to the report of the designated doctor.

On appeal the claimant contends that the great weight of the medical evidence is contrary to the report of the designated doctor and that the designated doctor incorrectly determined that ROM testing was invalid.

Having reviewed the record, the hearing officer's decision, and the arguments of the parties, it is our opinion that the hearing officer's decision is supported by sufficient evidence

and that it is not against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 93681, decided September 20, 1993, wherein we upheld the hearing officer's determination to give presumptive weight to the report of the designated doctor after the designated doctor reexamined the injured employee and found the ROM tests to again be invalid.

Section 408.125(e) provides that the report of a designated doctor chosen by the Commission regarding an impairment rating has 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 held that 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. We have also pointed out that it requires more than a preponderance of the medical evidence to overcome the report of the designated doctor; the medical evidence must be determined to be the "great weight" of the medical evidence contrary to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. In this case the hearing officer apparently concluded that the claimant had raised sufficient concerns about the report of the designated doctor to require reopening of the record and reexamination by the designated doctor. The designated doctor reexamined the claimant and arrived at the same opinion as he had given in his original report. We are convinced that the hearing officer gave due consideration to all the evidence and arguments presented in arriving at his decision to give presumptive weight to the report of the designated doctor. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a).

The claimant does not contend on appeal that he did not receive a copy of the second report of the designated doctor nor that he was not given sufficient time to respond to that report. He does assert, however, that he is "not aware" of the hearing officer's letter of April 19th to the designated doctor and that he does not feel it was proper for the hearing officer to contact the designated doctor. For these reasons, the claimant asserts that the letter of April 19th and the second report of the designated doctor should not be in evidence.

We have a serious reservation concerning the claimant's contention that he is not aware of the letter of April 19th considering that the letter shows that a copy was sent to him at the same address as is shown on his appeal and that he attended the second examination by the designated doctor. However, if he in fact did not receive a copy of that letter, we think the sequence of events (hearing wherein the claimant disputed the designated doctor's findings, subsequent appointment set with the designated doctor, and reexamination by the designated doctor) was certainly sufficient, under the circumstances presented, to put the claimant on notice that the Commission had ordered a second examination by the designated doctor.

We have previously held that the hearing officer has implied authority to reopen a hearing to receive additional evidence. *See* Texas Workers' Compensation Commission

Appeal No. 92029, decided March 11, 1992. We have also stated that, if information is missing or unclear at the time the hearing officer is asked to evaluate the designated doctor's report, it is appropriate for the hearing officer to seek additional information in carrying out his or her responsibility to fully develop the facts. *See* Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993. We have also observed that where there are problems concerning a report of a designated doctor, the hearing officer can appropriately effectuate corrective action. Texas Workers' Compensation Commission Appeal No. 93045, decided March 19. 1993. We have also cited with approval a hearing officer's attempt to clarify questions arising from a designated doctor's report which became evident at the hearing. *See* Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. In this case, the hearing officer was persuaded that there was sufficient reason to contact the designated doctor (with a copy of the letter to all parties) to seek clarification of the designated doctor's findings and to request reexamination of the claimant. We do not find the hearing officer's contact with the designated doctor to have been improper nor do we find any basis for exclusion of the letter of April 19th or the designated doctor's second report.

The decision of the hearing officer is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge