APPEAL NO. 93906

This case returns to us after remand pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.203(b) (1989 Act) (formerly V.A.C.S., Article 8308-6.42(b)). In our decision in Texas Workers' Compensation Commission Appeal No. 93140, decided on April 12, 1993, we reversed the hearing officer's decision which accorded presumptive weight to the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission) and which determined that the appellant (claimant) reached maximum medical improvement (MMI) on July 22, 1992, with a whole body impairment rating of 18% for his lumbar spine injury. We remanded to allow a designated doctor to certify to MMI and an impairment rating, and to cure various defects in the designated doctor's report. According to the subsequent decision of the hearing officer, (hearing officer), another hearing was convened in (city), Texas, on July 7, 1993, at which time the parties discussed the inability or failure of the designated doctor to properly complete a report and agreed to the selection of a new designated doctor by the Commission. The new designated doctor then examined claimant and issued his report stating that claimant had reached MMI on July 22, 1992, with a whole body impairment rating of seven percent. The claimant disagreed with that rating and the hearing officer reconvened the hearing on September 7, 1993, and took evidence on the issues of claimant's MMI date and impairment rating. The hearing officer issued his decision which accorded presumptive weight to the new designated doctor's report and determined that claimant had reached MMI on July 22, 1992, with an impairment rating of seven percent. Claimant has requested our review of that decision. He has not taken issue with the MMI date of July 22, 1992, but rather asserts that there was no need to select another designated doctor, that when he agreed to the Commission's selecting another designated doctor he did not realize he had a choice in the matter, and that if the original designated doctor's report was not acceptable because he did not "perform the actual impairment rating," then the new designated doctor's report is equally objectionable because that doctor, too, had a physical therapist do it. Claimant requests the Appeals Panel to determine that the 18% impairment rating of the original designated doctor was the valid rating. The respondent (carrier) filed a response which asserts that the hearing officer correctly appointed a new designated doctor, correctly accorded presumptive weight to that doctor's report, and correctly determined claimant's MMI date and impairment rating.

DECISION

Finding no reversible error and the evidence sufficient to support the hearing officer's findings and conclusions, we affirm.

At the hearing on September 7, 1993, the hearing officer incorporated all previously admitted exhibits in the case, took testimony from the claimant, and admitted three additional forms entitled Report of Medical Evaluation (TWCC-69). According to the evidence, (Dr. R) was selected by the Commission on July 7, 1992, as the designated doctor to determine whether claimant had reached MMI and, if so, his whole body impairment rating. Claimant's

examination was scheduled for July 22, 1992. Dr. R, in his deposition, said he decided to have (Dr. C) perform the evaluation but also said he did examine claimant. He also said he used the 1990 edition of the "Guides for the Evaluation of Permanent Impairment" published by the American Medical Association. The 1989 Act mandates use of the third edition, second printing, dated February 1989. *See* Section 408.124; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(e) (Rule 130.1(e)); and Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992. The claimant testified at the initial hearing that while Dr. R was present for the examination, it was Dr. C who actually took his history and performed the examination including range of motion (ROM) measurements. Following that examination, a TWCC-69 was signed, ostensibly by Dr. R, on August 31, 1992, which stated that claimant reached MMI on July 22, 1992, with an impairment rating of 18%. Aside from this statement, no other information was provided in blocks 13, 14 and 15 of that TWCC-69 except for the comment that Dr. R was "in total agreement with [Dr. C's] rating of 18% as of July 22, 1992." It was Dr. R of course and not Dr. C who had been selected as the designated doctor. The host of problems pertaining to the initial designated doctor's report are set forth in detail in our decision in Appeal No. 93140, *supra*, and need not be repeated here.

According to the decision of the hearing officer on remand, an effort was made to seek clarification from Dr. R but the response was inadequate. At the hearing on September 7th the hearing officer admitted two copies of a TWCC-69 (a later version of the form), bearing the signature of Dr. C and the date "7-22-92," which stated that claimant reached MMI on "7-22-92" with an 18% impairment rating. This form did contain specific information called for in blocks 15, 16, and 17, including the following breakout of the 18% rating: disorder - 7%; range of motion (ROM) - 11%; and "neuro" - 1%. One copy of Dr. C's TWCC-69 also bore the signature of (Dr. H) who was one of several doctors at the same back clinic who had treated claimant's spinal injury. This copy was apparently transmitted to the Commission on June 24, 1993. The other copy of Dr. C's TWCC-69 also bore the signature of Dr. R beneath the statement: "I concur with [Dr. C's] findings," and reflected that it was received by the Commission on July 7, 1993. In the discussion portion of his decision upon remand the hearing officer stated that Dr. R had been erroneously selected as a designated doctor in that he practiced at the same back clinic as did Dr. H and (Dr. HO) both of whom had treated claimant.

One of the hearing officer's factual findings upon remand, challenged by the claimant, stated that "[Dr. R] would not timely perform the duties of a designated doctor and Dr. (sic) the parties agreed to have the Commission appoint a new designated doctor to replace [Dr. R]." At the hearing on July 7, 1993, the hearing officer discussed his unsuccessful efforts to obtain an adequate response from Dr. R and said he was going to take action to get a new designated doctor approved. He stated that consistent with the parties' earlier discussion off the record, it probably would be (Dr. F) since (Dr. G) would not be available until late August. Claimant registered no objection and responded "no" when asked if he had any comment. Further, at the outset of the September 7th hearing, the hearing officer averred that at the July 7th hearing "it was agreed that we would redesignate" a doctor to

see claimant. Claimant indicated no disagreement with that statement. Accordingly, we find no merit in claimant's assertion on appeal that he did not know he could voice disagreement with the Commission's selection of another designated doctor. Further, we are aware of no prohibition against the Commission's selection of another designated doctor when a previously selected doctor is unable or refuses to resolve the medical dispute consistent with the requirements of the 1989 Act and the Commission's rules. *See* Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993.

We now address the sufficiency of the evidence respecting the seven percent impairment rating of Dr. F to which the hearing officer gave presumptive weight. The real complaint of claimant both at the hearing and on appeal is the failure of Dr. F to assign any impairment for abnormal ROM. He points out that Dr. R, (Dr. V), whom he saw at the carrier's request, and Dr. F all had another person perform ROM measurements and that of the three only Dr. F failed to assign any additional impairment for ROM.

Section 408.125 provides that if an impairment rating is disputed, the Commission shall direct the employee to be examined by a designated doctor and that if the designated doctor is chosen by the Commission, as was the case with Dr. F, the Commission shall base the impairment rating on such report unless the great weight of the other medical evidence is to the contrary in which case the Commission shall adopt the rating of one of the other doctors. Claimant testified that he thought his rating should be higher than the seven percent determined by Dr. F and the 11% determined by Dr. V, that his condition is now more painful and getting worse, that he is still "thinking about" the surgery recommended in the fall of 1991, and that he should have the 18% rating determined by Dr. R because Dr. C, who did the measurements for Dr. R, "is more accurate than both of these [Dr. F and Dr. V] put together."

The final determination of impairment rating by the Commission must be based on medical and not lay evidence. Texas Workers' Compensation Commission Appeal No. 93518, decided August 5, 1993. The "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided December 2, 1992. 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. Medical conclusions are not reached by counting the number of doctors who take a particular position. The opinions must be weighed according to their "thoroughness, accuracy, and credibility with consideration given to the basis it provides for opinions asserted." Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993.

The hearing officer determined that Dr. F's report was not against the great weight of the other medical evidence and concluded that claimant reached MMI on July 22, 1992, with a seven percent whole body impairment rating. Our review of the evidence reveals there is sufficient support for the hearing officer's findings and conclusions. Dr. F's TWCC-69 stated that claimant reached MMI on "7-22-92" with a whole body impairment rating of seven

percent. According to his attached narrative report, the seven percent whole body impairment rating was based on claimant's specific disorder in the lumbar region of his spine and was made pursuant to the provisions of Table 49 of the "Guides for the Evaluation of Permanent Impairment," third edition, second printing, published by the American Medical Association (AMA Guides). Dr. F's report indicated he did not assign any additional impairment for abnormal ROM because claimant's ROM measurements were invalidated by the results of his straight leg raise (SLR) test.

Claimant testified that while Dr. F did not put measuring equipment on him and referred him to a physical therapist for ROM measurements, Dr. F did personally perform a physical examination and also did SLR testing. We have recognized that a designated doctor can consider and rely on tests, examinations, and data performed by others in arriving at his or her own evaluation. *See* Texas Workers' Compensation Commission Appeal No. 93381, decided July 1, 1993, and cases cited therein. Attached to Dr. F's narrative report were two pages containing the results of lumbar ROM measurements, presumably those of the referral therapist, which indicated that three sets of each mobility movement were performed and that they fell within plus or minus 10% or five degrees of each other. Chapter 3, section 3.3 of the AMA Guides states that with respect to the general principles of spinal measurement, "the examiner must take at least three consecutive mobility measurements which must fall within +/- 10% or 5 [degrees] (whichever is greater) of each other to be considered consistent."

According to the "bottom line" of the lumbar ROM charts with Dr. F's narrative report, claimant's "Total Lumbar [ROM] Impairment" was "7%." However, in the portion of his narrative report addressing ROM impairment, Dr. F stated, in part: "The sum of the sacral flexion and extension [ROM] is, therefore, only three degrees. [SLR] on the right certainly exceeds the sum of sacral flexion and extension by greater than 10%, therefore, the lumbar [ROM] test is invalid in this particular case. Therefore, according to the technique for calculation of whole person impairment for a lumbar type injury, his entire impairment is derived from Table 49 and he is granted a value of 7%." According to the AMA Guides, Chapter 3, Section 3.3, the SLR test provides an additional "effort factor" to check lumbar spine flexion and provides "a validation measure independent of reproducibility." *See* Texas Workers' Compensation Commission Appeal No. 93890, decided November 17, 1993. Notwithstanding the statement of seven percent impairment on the bottom of the ROM charts, Dr. F apparently invalidated the lumbar spine flexion ROM by applying the SLR test. Claimant did not contend that Dr. F failed to follow the provisions of the AMA Guides.

As for the other medical evidence of claimant's impairment, in evidence was an undated TWCC-69 from (Dr. D), claimant's original treating doctor, which stated that claimant's MMI date was "unknown." Dr. C's TWCC-69 (concurred in by Dr. R) reflected that he assigned 11% for ROM and one percent for "neuro" in addition to the seven percent for the spinal disorder. Dr. C's TWCC-69 also stated that the AMA Guides were used. Though not required, no ROM data whatsoever accompanied Dr. C's report.

On March 5, 1992, claimant was examined by (Dr. M), apparently at the request of the carrier. In his report, Dr. M stated, among other things, that claimant had "marked decreased [ROM] of the back, with lumbar guarding and spasm," and that "[SLR] causes some back pain at about 60 degrees on the right, and causes back and leg pain on the left at 45 degrees, with positive Lesegue's maneuver for leg and back pain."

In her TWCC-69, which stated that claimant reached MMI on May 14, 1992, with an 11% impairment rating, Dr. V referred to "an attached spine impairment rating." Though not attached to her report, there was among the medical records in evidence a report to Dr. V from (therapy center), dated April 8, 1992, stating that claimant was measured for spine impairment according to the AMA Guides and that he "appeared to be uncooperative and inconsistent." According to this report the therapist was unable to perform the supine SLR testing due to claimant's resistance. Further, according to the report, although claimant's maximum forward bend of his trunk measured 12 degrees, he "was observed to sit in a chair, raise his left leg to cross it over the right to remove his shoes with no observed difficulty." This report purported to assign five percent impairment for claimant's specific spinal disorder and six percent for ROM for a "total spine impairment" of 11%. The six percent related to claimant's lateral flexion ROM. The report also stated that the lumbar flexion and extension measurements were "invalid," that the tightest SLR was "refused," that the combined sacral flexion and extension was a minus seven degrees, and that the "validity criterion" were "not met."

Dr. V wrote the carrier on June 4, 1992, stating, among other things, that the therapy center's 11% impairment was "probably an underestimate," and that had they been able to use the "invalid" measurements, claimant's ROM impairment rating would have been 24% which, with the five percent for his specific spinal disorder would yield a 28% total spinal impairment.

We are satisfied, after a careful review of the evidence, that the hearing officer correctly gave presumptive weight to Dr. F's report and that the great weight of the other medical evidence was not contrary to Dr. F's report.

We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge