

APPEAL NO. 93949

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 September 28, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the hearing was the appellant's (claimant) correct impairment rating. The hearing officer found that the 10% whole body impairment rating certified by the Texas Workers' Compensation Commission's (Commission) selected designated doctor was not against the great weight and preponderance of the other medical evidence. The claimant appeals this determination asserting only that the correct impairment rating should be 30%. The respondent (carrier) urges that the decision of the hearing officer was correct and should be affirmed.¹ The parties stipulated that maximum medical improvement was reached on March 1, 1993.

DECISION

The decision of the hearing officer is affirmed.

There is no dispute that the claimant injured his back on (date of injury), while working in an auto parts store when a rack of tires fell on him. He sustained a herniated lumbar disc at the L5-S1 level and lumbar radiculopathy and underwent a laminectomy on March 26, 1992. He completed a work hardening program on December 26, 1992, and, as of the date of the hearing, continued to complain of recurrent back pain. A progress report of the work hardening program dated December 22, 1992, is completely positive and states the claimant appears "capable physically of performing the like and similar duties required of him previously."

In March 1993, (Dr. S), the claimant's treating doctor, in a Report of Medical Evaluation (TWCC-69), gave claimant a whole body impairment rating of 12% based on injury to the lumbar spine. In testimony at the hearing, Dr. S stated that this rating was in error and given prior to his attendance at a Commission-sponsored training session on use of the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Second Printing, dated February 1989 (Guides). In a second TWCC-69, received by the carrier on March 29, 1993, Dr. S rendered a whole body impairment rating of 25% based on a specific disorder of the lumbar spine (10% for a surgically treated disc lesion, with residual pain, from Table 49 of the Guides); loss of range of motion (12%); sensory loss in the lower extremities (10%); and sexual dysfunction (15%). Apparently realizing that this second TWCC-69 contained faulty combined values,² Dr. S rendered a third TWCC-69, which was dated March 1, 1993, but received by the Commission on August

¹(DB) is described in the decision and order of the hearing officer as an attorney at law. It is clear, however, from the record that he is an adjuster for the respondent and does not hold himself out to be an attorney at law.

²We note that Dr. S improperly applied the Combined Value Chart of the Guides in arriving at a 25% whole body impairment rating in his second TWCC-69. Proper application of the chart yields a 40% whole body impairment rating.

4, 1993. This third TWCC-69 contains what are apparently alternative whole body impairment ratings. In one case, a whole body impairment rating of 30% is based on a specific disorder of the spine as noted above (10%); loss of range of motion (18%); and loss of sensation in the lower extremities (five percent). Alternatively, a whole body impairment rating of 41% is noted in parentheses on the TWCC-69 and is arrived at by adding a 15% rating for sexual dysfunction (impotency) to the other listed ratings.

On May 18, 1993, (Dr. P), a Commission-appointed designated doctor, certified an impairment rating of 10% based solely on a specific disorder of the spine (surgically treated disc lesion, with residual pain, Table 49 of the Guides). Dr. P gave no additional ratings for loss of motion, nerve loss or sexual dysfunction. The hearing officer found that Dr. P's whole body impairment rating was not against the great weight of the other medical evidence and that the claimant's correct whole body impairment rating is 10%.

The claimant appeals these determinations of the hearing officer stating only that his "correct impairment rating should be 30%."³

The designated doctor holds a unique position under the 1989 Act. See Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992; Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Section 408.125(e) accords the report of the designated doctor "presumptive weight." In Appeal No. 92412, *supra*, we pointed out that to outweigh the report of the designated doctor requires more than a mere balancing of the medical evidence or even a preponderance of medical evidence. Rather, such other medical evidence must be determined to be the "great weight" of the medical evidence contrary to the report. We have also held that a claimant's lay testimony does not constitute medical evidence that can be considered in determining whether the "great weight" rebuts the "presumptive weight" of the designated doctor's report. See Texas Workers' Compensation Commission Appeal No. 93072, decided March 12 1993. Our review of the record in the instant case indicates that the specific basis for the claimant's appeal is that Dr. P only examined him for 10 or 15 minutes and, unlike Dr. S, did no range of motion testing or perform "pelvic tilt" testing. Dr. S testified that he too disagreed with Dr. P's rating and asserted that Dr. P did not properly use the Guides and did not account for "neurologic changes" in the claimant's lower extremities. In his report attached to the TWCC-69, Dr. P recounts a reasonably extensive physical examination which expressly describes range of motion testing of the claimant's lumbar spine as well as an evaluation of muscle and neurologic functions of the lower extremities in arriving at the 10% rating. Dr. P also based his rating on an evaluation of previous records relating to the claimant's medical care. Given the comprehensive report of Dr. P and the numerous attempts of Dr. S to arrive at what, in his opinion, was an accurate impairment, we conclude that issue of correct impairment amounts, in this case, to a

³Because claimant is no longer asserting that his correct impairment rating is 41%, we assume for purposes of this appeal that he no longer is challenging Dr. P's refusal to give a rating for sexual dysfunction.

disagreement between the designated doctor and the treating doctor. Under these circumstances, we find sufficient evidence to support the hearing officer's decision that the claimant's correct impairment rating is 10% and that the great weight of the other medical evidence did not overcome the "presumptive weight" of the designated doctor.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be give that evidence. Section 410.165. Where, as here, there is sufficient evidence to support this determination, there is no sound basis to disturb the decision of the hearing officer. Only if we were to determine, which we do not in this case, that the decision of the hearing officer is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust would we reverse. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

The decision and order of the hearing officer is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge