APEAL NO. 94044

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). At a contested case hearing held in (City), Texas, on November 16, 1993, the hearing officer, (Hearing Officer), considered the following disputed issues: 1. Who is the designated doctor selected by the Texas Workers' Compensation Commission (Commission); 2. If the Appellant and Cross-Respondent (claimant) has reached maximum medical improvement (MMI) what is the correct impairment rating (IR); and 3. Has the claimant reached MMI, and if so, on what date. Finding that the Commission selected two designated doctors within a week of each other, that the first doctor selected determined that claimant reached MMI on October 27, 1992, with a 13% IR, and further finding that such determinations by the first designated doctor were not contrary to the great weight of the other medical evidence, the hearing officer concluded that the first doctor selected by the Commission was the designated doctor, that his determinations were entitled to presumptive weight, and, thus, that claimant reached MMI on October 27, 1992, with an IR of 13%. Claimant appeals contending the designated doctor failed to assign a sufficiently high IR to account for all of her spinal injuries, but does not appear to challenge the determination that she has reached MMI. She also disagrees with the five percent IR, later revised to 11%, determined by the second designated doctor, and seeks a decision assigning her a higher IR, apparently, the 19% IR determined by her treating doctor. The respondent and cross-appellant (carrier) specifically challenges the finding that the first designated doctor's determinations are not against the great weight of the other medical evidence, as well as the conclusions that the first designated doctor selected by the Commission was the designated doctor, that his determinations were entitled to presumptive weight, and that claimant reached MMI on October 27, 1992, with an IR of 13%. The carrier asks us to adopt the revised 11% rating of the second designated doctor. In the alternative, the carrier seeks a remand to attempt to obtain the concurrence of the two designated doctors or, in the further alternative, to cause the selection of a third designated doctor. Each party filed timely responses.

DECISION

Finding the evidence sufficient to support the findings and conclusions, we affirm.

No witnesses were called at the contested case hearing and the parties submitted their respective cases with documentary evidence. By letter of May 11, 1993, the Commission selected (Dr. RS) to examine claimant on May 26, 1993, for the purpose of determining whether claimant had reached MMI and, if so, on what date; and to determine her IR, if any. Apparently through inadvertence, the Commission, by letter of May 18, 1993, selected (Dr. B) to examine claimant on June 9, 1993, for the same purposes. The claimant underwent both examinations and the carrier represented that it paid for both examinations.

In a Report of Medical Evaluation (TWCC-69), dated May 26, 1993, Dr. RS certified that claimant reached MMI on "10-27-92" with a 13% IR consisting of six percent for disc degeneration of C5 along with spasm and pain, and seven percent for disc degeneration and painful L5. According to Dr. RS's narrative report accompanying his TWCC-69,

claimant, age 58, slipped on grease and water while working at (employer) on (date of injury), and fell on her back hitting her head on the floor. She felt immediate head and back pain but took medication and continued working. Later that day claimant saw (Dr. Mc), who had treated her for a previous fall, and obtained medication. Dr. Mc referred claimant to (Dr. S) who treated her with therapy and medication, had some tests done, and later referred her to (Dr. M), who apparently became her second treating doctor. Dr. RS's report indicated he reviewed the records of Dr. Mc, Dr. S, and Dr. M, and was aware that Dr. M had assigned claimant an IR of 19%.

Dr. RS's narrative report stated that claimant complained of pain in her neck, upper back, thoracic spine, and lower back. He said that during his examination claimant "jumps and complains with pain" when touched on the back of the neck, but yet her cervical spine and upper extremities "go through a normal range of motion [ROM]." He also observed that though claimant appeared to be in no acute distress, she "is very sensitive though to walking, guarding and protecting herself considerably." Dr. RS found no structural abnormalities, obvious muscle spasm, or pelvic tilt in claimant's lumbar spine and he also measured her lumbar spine ROM. His examination of x-rays revealed slight degenerative changes and stenosis between C5-6 and facet changes between L4-5 and L5-S1 along with moderate disc degeneration of the L5 disc with narrowing. Dr. RS stated: "In essence, we are dealing with a lady that fell, suffering some soft tissue injuries superimposed on the previously existing degenerative changes of the neck and low-back." Dr. RS concurred with Dr. S that claimant reached MMI on "10-27-92," and he felt claimant should pursue "a very aggressive exercise program." Dr. RS's narrative report stated that claimant's IR included six percent due to the disc degeneration of the C5 disc along with the spasms and pain, and seven percent due to the disc degeneration and painful L5 disc giving claimant a total whole body IR of 13% which was "based on the 3rd edition of the AMA Guidelines."

Dr. B's TWCC-69, dated June 14, 1993, certified that claimant reached MMI on May 12, 1992, and assigned her an IR of five percent "for soft tissue lesion low back." In the history portion of his narrative report which accompanied his TWCC-69, Dr. B quoted claimant as saying: "My body is run down, all worn out." This report also stated that claimant advised she had fallen at work in (month, year) and was off work for two days with low back pain "but this cleared." Claimant reported neck and back pain. Dr. B's report summarized his review of various medical records of other doctors which included, among other things, an apparent disagreement over whether claimant was correctly diagnosed with cervical spine stenosis. Dr. B's report also indicated that an impairment evaluation done at the (the center) on May 15, 1992, apparently for Dr. M, indicated 10% impairment due to decrease in cervical spine ROM and 17% impairment for upper extremity loss of strength, yielding a whole body IR of 19%. Dr. B also indicated he felt Dr. M's determination that claimant reached MMI on "5/15/92" was appropriate. Dr. B stated "5/12/92" as the MMI date on his TWCC-69 and "5/15/92" as the MMI date in his narrative report.

Dr. B's impression was "Myofascial Pain Syndrome, cervico-dorso-lumbosacral, chronic." His report, after reciting the results of his ROM measurements of claimant's cervical, thoracic, and lumbar spine areas, stated that claimant's "[e]ffort was submaximal." Dr. B commented that "[o]n examination it was evident that there was considerable symptom magnification and inappropriate illness behavior," that claimant was not cooperative in measuring for ROM, and the results could not be used for an IR. Dr. B further stated that claimant had had good workups, "and good and considerable treatment in the two years since her injury including physical therapy, numerous injections and multiple studies, all of which have been unremarkable for showing objective pathology to account for the patient's symptoms." Dr. B felt that claimant's condition was not consistent with cervical spine stenosis; that while there was a diagnosis of degenerative disc disease at L5-S1, because of her diffuse symptomatology the most probable diagnosis was his impression as stated above; and that her IR should be determined on the basis of his diagnosis. In addition to assigning no impairment for abnormal ROM, Dr. B also stated he found no indication of radiculopathy or decrease in strength and assigned no impairment therefore.

Dr. B wrote the carrier on June 23, 1993, acknowledging carrier's contact with him the previous week to discuss claimant's IR. (The Appeals Panel has in several decisions discouraged and specifically cautioned against unilateral contacts by parties with designated doctors and indicated that such contacts should be through the Commission. *See e.g.,* Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993; Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993.) In his letter Dr. B said that he had discussed claimant's IR with Dr. RS, that they felt claimant had "minimal" degenerative disc disease at the C5-6 level for which she should have four percent impairment and "clear-cut" degenerative disc disease at the L5-S1 level for which she should have seven percent impairment, and that her combined whole body IR was 11%. Dr. B wrote the carrier again on September 13, 1993, in response to another contact by the carrier, stating that he agreed with Dr. M that claimant reached MMI on "5/15/92" and reiterating that her IR was 11%.

Also in evidence was a TWCC-69 from Dr. M stating that claimant reached MMI on "5-15-92" with a 19% IR. Attached to Dr. M's TWCC-69 was the report of a physical therapist dated May 15, 1992, which stated that claimant's whole body IR was 19% based on the "Guides to the Evaluation of Permanent Impairment, as revised in 1990." Apparently, Dr. M adopted this 19% IR. The report indicated that the 19% IR consisted of 10% for abnormal cervical ROM, zero percent for sensory deficit, pain, or discomfort, and 10% for upper extremities power loss. This report is not clear as to whether any impairment is assigned for any specific spinal disorders. Section 408.124 provides that the Commission, in determining the existence and degree of an employee's impairment, shall use the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. In his note of October 26, 1993, Dr. M stated: "I do not make disability ratings nor perform them."

The record reveals no irregularity in the Commission's selection of Dr. RS as the designated doctor and mere inadvertence in later selecting Dr. B as the designated doctor. We see no basis to disturb the hearing officer's determination that Dr. RS was the designated doctor. Further, we are satisfied that the hearing officer correctly accorded presumptive weight to Dr. RS's report and just as correctly determined that claimant reached MMI on October 27, 1992, with a 13% IR. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)), and it is for the hearing officer to resolve the conflicts and inconsistencies in the evidence. We will not substitute our judgment for that of the hearing officer where the findings are supported by sufficient evidence. Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993. Sections 408.122(b) and 408.125(e) provide that a Commission-selected designated doctor's report shall have presumptive weight and that the Commission shall base the determinations of MMI and IR on that report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has previously observed that the ultimate determination of the extent of impairment must be made upon medical and not lay evidence. Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. We have frequently noted the important and unique position occupied by the designated doctor in the resolution of disputes over MMI and impairment ratings. *See e.g.*, Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. And we have stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence (Appeal No. 92412, *supra*), and that the "great weight" standard is clearly a higher standard than that of a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 93432, decided July 16, 1993.

That Dr. RS determined a later MMI date and an IR which was six percent lower than the IR adopted by Dr. M and two percent higher than the revised IR of Dr. B does not equate to being contrary to the great weight of the other medical evidence. 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. And 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.

We do not find that the 11% determined by Dr. B or the 19% determined by Dr. M constituted the great weight of the other medical evidence against Dr. RS's report or that the Dr. RS failed to give appropriate consideration to ROM limitations and all of the claimant's diagnosed spinal injuries. The hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J.,508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust and we do not find them to be so in this case. In re King's Estate,

150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge