APPEAL NO. 94075

At a contested case hearing (CCH) held in (city), Texas, on December 13, 1993, the hearing officer, (hearing officer), giving presumptive weight to the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission), determined that appellant's (claimant) whole body impairment rating (IR) was seven percent. The claimant contends that the Commission should adopt the rating of his treating doctor because that doctor was more knowledgeable about his condition and spent more time with him. The respondent (carrier) urges affirmance contending the evidence sufficiently supports the hearing officer's determination.

DECISION

Affirmed.

The tape recording of the CCH was very difficult to hear and nearly required remand of the case for reconstruction of the record.

Claimant, the sole witness, testified that he went to work for (employer) in April 1992 as an assistant pipe cutter and that in (month) of that year he hurt his back. According to the medical records of his treating doctor, (Dr. D), claimant gave a history of slipping on a scaffolding step and bumping down four steps on his buttocks. Dr. D stated that claimant had previously been seen in his office for low back pain with degenerative disc disease of the lumbar spine and posterior protrusion at L4-5 and L5-S1. On (date), Dr. D diagnosed "acute back pain, probable exacerbation of a previous bilateral degenerative protrusive disc disease." Dr. D's records of December 22, 1992, showed that claimant had a normal EMG in November 1992; however, x-rays showed the L5 vertebral body was slipping behind the S1, giving him a diagnosis of "instability," and that claimant could not complete an MRI due to pain. Dr. D imposed on claimant various motion restrictions and said "he still is not going back to light and heavy manual labor." Dr. D also said claimant was "going to go a long time before he gets well," and that, hopefully, "we can get by without having him have surgery, even if he has to have epidural steroid injections."

An undated Report of Medical Evaluation (TWCC-69) signed by Dr. D stated that claimant reached maximum medical improvement (MMI) on "2-9-93" with an IR of 20%. This TWCC-69 referred to MRIs of August 1988 and "10-29-91" describing degenerative disc disease at L4-5 and L5-S1 with bulge and herniation.

The TWCC-69 of (Dr. S), the Commission-selected designated doctor, stated that claimant's IR was seven percent for a lumbar disc. In an accompanying narrative report of August 4, 1993, Dr. S stated that claimant had complete lateral rotation, flexion, and extension of the lumbar spine, and that he had no sensory deficit or motor weakness in the lower extremities. According to Dr. S's observations of claimant, "he did not appear to be in any discomfort." Dr. S's report stated that the seven percent IR he assigned to claimant

was based on Table 49, Section II, Part C, of the Guides for the Evaluation of Permanent Impairment.

With respect to the determination of an employee's IR, the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 408.125(e) (1989 Act) (formerly V.A.C.S., Article 8308-4.26(g)) provides that the report of the designated doctor chosen by the Commission shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. This "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 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. 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.

Claimant argued that Dr. D's IR should be the one he is given since Dr. D had been treating him since his accident and was more familiar with his condition whereas Dr. S only saw him for the IR examination and evaluation. In Texas Workers' Compensation Commission Appeal No. 93674, decided September 17, 1993, the Appeals Panel pointed out that "[w]hile the time spent with a designated doctor will almost never be equal to that the patient spends with the treating doctor, Texas Workers' Compensation Commission Appeal No. 93031, decided February 25, 1993, observed that the 1989 Act provides a presumption to the designated doctor, not the treating doctor, even though the treating doctor would normally be more familiar with the claimant's injury." The Appeals Panel went on to note that "the designated doctor's purpose is to evaluate, not carry out a plan of treatment, . . . ."

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. The hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 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 so in this case. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge