APPEAL NO. 941011
FILED SEPTEMBER 7, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 8, 1994, a contested case hearing (CCH) was held in _____, Texas, with (hearing officer) presiding. The issues were: "1.hat is the correct date of maximum medical improvement [MMI]?" and "2. What is CLAIMANT'S correct whole body impairment rating [IR]?" The hearing officer determined that claimant reached MMI on December 23, 1993, with a seven percent whole body IR based on the designated doctor's report and that the great weight of the other medical evidence was not contrary to the designated doctor's report.

Appellant, claimant, contends that the 21% IR given by the treating doctor and other medical evidence does constitute the great weight of other medical evidence and asks that we review the evidence and render a decision in his favor. Respondent, carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

It is undisputed that claimant was employed as a roustabout by (employer) when, on September 3, 1992 (all dates are 1992 unless otherwise noted), he sustained a low back injury doing heavy lifting. Claimant sought treatment with Dr. G on September 4th and was taken off work. A bone scan on September 17th was normal. Dr. G, in a report dated September 20th, commenting on a lumbar MRI, indicated "[t]here appears to be a herniated nuclear [sic] pulposis at the level of L4/L5 and L5/S1." Apparently Dr. G referred claimant to Dr. C for a consultation and Dr. C, in a report to Dr. G dated October 19th, confirmed "a small contained herniated nucleus pulposus at L4-5 and L5-S1." Claimant had good motor function and in Dr. C's opinion was ". . . not a candidate for surgical intervention at this time." Claimant, around October 18th, was also seen by a Dr. Z (it is unclear in what capacity). Dr. Z also noted the herniations, indicated "no specific evidence of nerve root irritation or compression" and recommended work hardening. Dr. C wrote Dr. G in a letter dated November 10th, that claimant "[n]eurologically is intact." Dr. G filed a Specific and Subsequent Medical Report (TWCC-64) showing complaints of back pain and a treatment plan of "physical therapy daily." Dr. G indicated a prospective return to work on December 28th.

At some point in time, claimant saw Dr. W who, in a Report of Medical Evaluation (TWCC-69) dated February 15, 1993, and narrative dated February 4, 1993, states claimant is not yet at MMI. Dr. W's impression is "[l]umbar strain" and he states it is "difficult to tell" why claimant is not improving. Dr. W recommends claimant's therapy "be discontinued because it is not doing any good."

Claimant requested a change in treating doctors from Dr. G to Dr. D on July 1, 1993. The request was approved on July 16th. Dr. Z, in a progress note of November 11, 1993, states "[w]e do not feel that he has reached MMI and we do not feel it is reasonable to assess PPI at present." Dr. D, in a note dated December 23, 1993, states claimant had reached MMI on that date, assessed a seven percent IR based on table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and an additional 14% IR for loss of range of motion (ROM), which, according to Dr. D "meets the validity requirements," and assigned a 21% whole body IR. Claimant testified Dr. D certified MMI at claimant's request so that he could go back to work. Claimant also testified that Dr. D had recommended that surgery might be necessary but that is not borne out in any of the medical reports. Claimant agreed that the December 23, 1993, date of MMI was correct.

Carrier apparently requested that a designated doctor be appointed. Dr. LW was appointed as the Texas Workers' Compensation Commission (Commission)-selected designated doctor and by TWCC-69 and narrative report, both dated March 24, 1994, certified MMI on December 23, 1993 (the same date as Dr. D), assessed a seven percent IR and invalidated claimant's ROM. Dr. LW refers to the other medical evaluations, notes claimant's "disc hernias at L4-5 and L5-S1" and discusses how she arrived at claimant's IR and invalidated ROM.

The hearing officer in his discussion noted the designated doctor:

> was not able to objectively confirm the loss of [ROM] and found CLAIMANT's [ROM] did not meet the validity requirements of the [AMA Guides]. Therefore, [Dr. LW] assigned CLAIMANT a 7% whole-body [IR] based on his diagnosis.

* * * *

The great weight of the other medical evidence is not contrary to the opinion of the Commission designated doctor. No one argues with the fact that CLAIMANT has a herniated disc. Both [Dr. D] and [Dr. LW] have rated CLAIMANT based on that diagnosis. The difference is in the [ROM] found by the doctors. [Dr. LW] did not find a valid loss of [ROM]. I adopt the findings of her report.

Claimant appealed, complaining that the hearing officer had not admitted x-ray and MRI films into evidence because it would not help him as he is not a doctor, yet the hearing officer makes a medical decision on the IR. Claimant contends Dr. D's examination was more thorough and that Dr. D used more equipment. Claimant alleges that the MMI date should have been the date Dr. LW examined him, rather than three months earlier.

When the Commission selects a doctor as a designated doctor to determine MMI and IR, the report of the designated doctor has presumptive weight and the Commission must base its determinations of MMI and IR on the designated doctor's report, unless the great weight of the other medical evidence is to the contrary. Sections 408.122(b) and 408.125(e). No other doctor's report, including that of a treating doctor, is entitled to presumptive weight. To overcome the presumptive weight accorded to the report of the designated doctor requires more than a preponderance of the evidence; it requires the "great weight" of the other medical evidence to be contrary to the report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992; Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

In Texas Workers' Compensation Commission Appeal No. 931190, decided February 8, 1994, the Appeals Panel noted that a doctor can select an MMI date earlier than claimant's examination date and that it was "most important" that the date selected "reflect professional judgment based on the examination conducted and a review of the medical evidence." Texas Workers' Compensation Commission Appeal No. 92648, decided January 21, 1993. Dr. LW reviewed the various reports, including Dr. D's certification of MMI on December 23, 1993, and, based on her examination and the medical records, also selected December 23, 1993, as the MMI date.

In the instant case, both Dr. LW, the designated doctor, and Dr. D, agreed that claimant had a seven percent IR based on the specific disorder table. Their only difference was that Dr. D assessed a 14% IR due to validated loss of ROM, while the designated doctor, three months later, failed to find a valid loss of ROM. Dr. LW suggests that "the reason for the patient having such improved [ROM] is his own excellent efforts at rehabilitation." Having reviewed the record, we conclude that the hearing officer did not err in finding that the great weight of the other medical evidence was not contrary to the report of the designated doctor.

We do not find the hearing officer's determination to be so against the great weight and preponderance of the evidence as to be manifestly wrong or 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). Consequently, there is no sound basis on which to disturb the hearing officer's decision.

The decision and order of the hearing officer are affirmed.

_____
Thomas A Knapp
Appeals Judge

CONCUR:

_____
Alan C Ernst
Appeals Judge

_____
Tommy W Lueders
Appeals Judge