APPEAL NO. 94130

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 January 4, 1994, the hearing officer, (hearing officer), took evidence on the two disputed issues, namely, whether the appellant (claimant) has reached maximum medical improvement (MMI) and, if so, on what date; and, what is claimant's correct impairment rating (IR). The hearing officer, recognizing that the Texas Workers' Compensation Commission (Commission) selected the designated doctor only for the determination of claimant's IR, gave presumptive weight to the designated doctor's report for that evaluation and determined that claimant's IR was seven percent. The hearing officer further determined, based on the evidence, that claimant reached MMI on September 20, 1992. In his appeal, which is essentially a challenge to the sufficiency of the evidence, claimant says his MMI date should be January 1, 1994, the date determined by his second treating doctor, and notes that he still has severe pain and limitations to his mobility. Claimant further asserts that his IR should be the 17% determined by his second treating doctor since that rating provides for impairment for loss of range of motion (ROM). The respondent self-insured school district (employer/carrier) did not file a response to claimant's request for review.

DECISION

Affirmed.

Claimant, the sole witness, testified that he worked for the employer/carrier as a custodian, that on (date of injury), he hurt his back when moving boxes of paper, that he stopped working on March 2, 1992, and that he has been unable to return to work since that date. He also stated that his current treating doctor, (Dr. M), agrees with that assessment. Claimant indicated that when his first treating doctor, Dr. S), released him to return to work with restrictions, he did not feel he was ready and that the employer/carrier did not have qualifying work. Dr. M wrote a letter of January 3,1994, stating: "[Claimant] has a non-surgical degenerative disc disease. He suffers chronic pain and is medically unable to work indefinitely." However, there was no disputed issue at the hearing concerning whether claimant has disability as defined by Section 401.011(16).

Dr. S's Report of Medical Evaluation (TWCC-69) certified that claimant reached MMI on "09-20-92" with a 15% IR which included nine percent for lumbar ROM and seven percent for the diagnosed lumbar spinal condition. According to Dr. S's accompanying narrative report of September 14, 1992, he initially diagnosed an acute lumbar spine strain when he first saw claimant on March 2, 1992. This report detailed the particular findings of certain diagnostic tests performed in April, May and June 1992. Dr. S's records also reflected that he released claimant to return to work on October 12, 1992, with certain lifting and motion restrictions.

The first TWCC-69 of (Dr. P), the Commission-selected designated doctor, signed on March 10, 1993, stated claimant's IR as five percent. Dr. P's accompanying narrative

report of March 3, 1993, indicated he did not have Dr. S's records available though they had been requested. He said he based the five percent on Table 49 of the "AMA Guidelines for the Evaluation of Permanent Impairment" for "an unoperated back with greater that six months of pain, muscle spasm or rigidity and none to minimal degenerative changes on structural test." Section 408.124(b) provides that for determining the existence and degree of an employee's impairment the Commission shall use the "Guides to the Evaluation of Permanent Impairment," third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

Dr. P's report further stated that claimant's straight leg raise (SLR) testing invalidated the inclinometer measurements of his lumbar spine ROM. Dr. P's second TWCC-69 of June 2, 1993, stated that claimant reached MMI on "9/20/92" with a seven percent IR. According to Dr. P's accompanying narrative report, claimant again invalidated his ROM testing, not only with his SLR test results but also by "exhibiting guarding and co-contractions" while being tested for ROM with an inclinometer. Dr. P also reported that Dr. S's records did not indicate, in assigning claimant nine percent impairment for lumbar ROM, how the ROM figures were obtained and whether there were inclinometer measurements "as prescribed by the AMA Guidelines." However, Dr. P further stated he had no reason to disagree with Dr. S's MMI date of September 20, 1992, and that he did not feel that further medical treatment would benefit claimant.

Claimant said he changed to Dr. M as his treating doctor because he did not feel he was ready return to work. Dr. M's TWCC-69 stated that claimant reached MMI on "1/1/94" with a 17% IR. This TWCC-69 contained no other information on its face respecting the specific "body part/system" involved and the rating although the form requires such if the rating is five percent or greater. However, attached to the exhibit of which Dr. M's TWCC-69 was a part was a report of claimant's lumbar spine ROM measurements performed by (Mr. B), a physical therapist, on October 25, 1993, upon the referral of Dr. M. Mr. B's report stated claimant's ROM impairment to be 11%, his diagnosis-based impairment to be seven percent, and his total whole person IR to be 17%.

By the time of the hearing, claimant felt his condition had not worsened but was about the same, and that he had not improved. Claimant asserted that Dr. M's 17% IR should be used by the Commission because the seven percent IR of Dr. P, the designated doctor, did not provide an impairment rating for his ROM. Claimant acknowledged that he was twice examined by Dr. P because Dr. P did not have Dr. S's records on the first occasion, that Dr. P had his ROM measured on both occasions, that some of the testing devices used were the same as those used by Dr. M, and that Dr. P also personally moved him around and did SLR testing. He stated that he tried to comply with the instructions for Dr. P's measurement testing but was in pain.

As the hearing officer made clear in his decision, Dr. P was selected as the designated doctor only to determine claimant's IR, and the hearing officer properly gave presumptive weight only to Dr. P's determination of the IR. Section 408.125(e) provides that the Commission-selected designated doctor's report 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. We are satisfied that the evidence sufficiently supports the hearing officer's determination of this issue. Dr. P twice examined claimant for abnormal lumbar ROM and found the ROM measurements to be invalid. Further, Dr. P commented that he reviewed Dr. S's report and could not determine how claimant's ROM measurements were obtained and whether the evaluation complied with the AMA Guides. 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 September 28, 1992. A designated doctor's report should not be replaced "absent a substantial basis to do so." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. Further, medical conclusions are not reached simply 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.

As for the hearing officer's determination of claimant's MMI date as September 20, 1992, again we are satisfied such is supported sufficiently by the evidence. Dr. S, claimant's first treating doctor, felt claimant reached MMI on that date and Dr. P, who reviewed Dr. S's records, found no basis to disagree with Dr. S's assessment. According to Dr. M's records, claimant did not begin seeing Dr. M until November 1992. Dr. M's initial report noted that claimant had been seeing other doctors and had been through rehabilitation. According to his records, Dr. M planned further conservative treatment and referred claimant to a neurosurgeon whose desire for additional diagnostic testing was apparently disapproved by employer/carrier. One of Dr. M's records noted that claimant had had epidural injections and work rehabilitation all of which had "failed."

Section 401.011(30)(a) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." In Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, the Appeals Panel, noting that reaching MMI does not necessarily mean complete recovery and the absence of continuing pain, stated: "When the doctor finds MMI and assesses an impairment, he agrees, in effect, that the injured worker is likely to continue to have effects, and quite possibly pain, from the injury. However, he has determined, based upon his medical judgment, that there will likely be no further substantial recovery from the injury."

The findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge