APPEAL NO. 94164

At a contested case hearing held in (city), Texas, on January 5, 1994, the hearing officer, (hearing officer), took evidence on the two disputed issues, namely, whether the appellant (claimant) had reached maximum medical improvement (MMI) and, if so, on what date, and the claimant's correct whole body impairment rating (IR). The hearing officer, finding that the great weight of the other medical evidence was not contrary to the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission), concluded that claimant reached MMI on October 6, 1993, with an IR of 10%. Claimant's request for review essentially challenges the sufficiency of the evidence to support the designated doctor's 10% IR because it failed to provide additional impairment for loss of range of motion (ROM). The response filed by the respondent (carrier) asserts the sufficiency of the evidence and requests our affirmance.

DECISION

Affirmed.

Claimant, the sole witness, testified that he was injured on the job on (date of injury), when he fell from a tree, landed on his feet, and fell backward onto concrete. He said the accident injured him from his head to his feet, that his head hit his knees, and that he has ever since had headaches and neck pain. Claimant said he continued working and did not indicate when he stopped working. He also said he did not see a doctor until sometime in February 1992 when he saw a doctor in (country). He said he subsequently began chiropractic treatment with (Dr. S) in February 1992; was seen on referral first by (Dr. RKR), who indicated he could not do anything for him, and later by (Dr. O) who hospitalized him for four days for injections and diagnostic tests. According to the records in evidence, neither Dr. S, Dr. RKR nor Dr. O made determinations concerning claimant's MMI date and IR. Claimant also said he had been involved in an auto accident in June 1992 but was not further injured.

Claimant testified that he later went to the Texas Back Institute (the Institute) where he commenced treatment with (Dr. H) and was eventually seen by a number of other doctors with the Institute for injections, testing, medications and various evaluations. Dr. H's records showed he performed an L5-S1 level excision and fusion procedure on December 16, 1992. (Dr. RR), also of the Institute, saw claimant on June 3, 1993. His report stated that there was a "significant component of symptom magnification," that additional surgery was not necessary; that claimant needed to get into a rehabilitation program and be sent back to work (but not in the oil fields); and that "[t]he patient is at MMI in my opinion at this time." According to claimant, Dr. H told him in July 1993 that he was "chronic" and that he could do nothing further for claimant. Claimant said he was thereafter evaluated for MMI and IR by (Dr. C) of the Institute, and still later by (Dr. RD), the designated doctor.

Claimant said he is not now working because of his injuries. Regarding MMI, claimant acknowledged at the hearing having seen many doctors whose uniform opinion

was that his condition cannot be improved. However, he asserted he had not reached MMI because "none of the doctors have checked me right to see what I have." Since claimant does not challenge on appeal the MMI date of October 6, 1993, determined by the hearing officer, which was the date certified to by Dr. RD and, apparently, the date of Dr. RD's examination of claimant, we need not determine whether that date is contrary to the great weight of the other medical evidence. *See* Section 408.124. However, according to the evidence, Dr. RR felt claimant had reached MMI as of June 3, 1993, and both Dr. H and Dr. C felt that claimant had reached MMI as of July 27, 1993. Section 401.011(30)(B) provides in part that if MMI is not reached earlier, then it is reached on "the expiration of 104 weeks from the date on which income benefits begin to accrue." Section 408.082(b) contains provisions with respect to when income benefits begin to accrue. We observe that there was no mention at the hearing of the statutory MMI date nor is that date mentioned in the hearing officer's decision. Dr. C's TWCC-69 stated claimant's MMI date as "7-27-93" and his accompanying narrative report indicates that Dr. H had previously determined that claimant reached MMI on that date. Dr. C's report, in referring to claimant's MMI date, states: ". . . and his MMI date which [Dr. H] said was 07/27/93, although it appears that he did reach his two year statute on 06/07/93." Disability was not an issue at the hearing. The evidence contained a letter from Dr. S, dated February 14, 1992, which took claimant off work until further notice due to his on-the-job injury "that occured (sic) on the 7th day of (month Year)." Since the extent of claimant's period(s) of disability was not a disputed issue below, and since no contention was made that he had reached statutory MMI prior to the MMI date determined by the hearing officer, we need not further address such potential issue.

Claimant testified that with respect to his examinations by Dr. C and Dr. RD, both used a small apparatus in performing ROM measurements. Claimant said that Dr. C had him bend from the waist including bending forward, told him what his forward limitation was, and also had him do straight leg raises (SLRs.) As for Dr. RD's examination, claimant initially stated that Dr. RD "didn't do absolutely anything." He later acknowledged that Dr. RD had him walk, performed supine (but not sitting) SLRs, and had him bend to the sides, but not forward.

Respecting claimant's correct IR, it was claimant's position at the hearing, and remains his position on appeal, that his IR should have a loss of ROM component for, basically, two reasons. First, logic dictates that claimant's disc fusion surgery (single level) would necessarily have resulted in some loss of ROM. And second, Dr. C's and Dr. RD's findings that claimant's lumbosacral ROM measurements were invalid must have resulted from their faulty testing techniques. Claimant asserted, in essence, that had Dr. C had him bend further forward (as distinguished from bending backwards and to the sides), and had Dr. RD had him bend forward at all, there may well have been a less than 10% difference between claimant's tightest SLR and the sum of his sacral flexion and extension, and thus his lumbar ROM measurements would not have been invalid. Claimant also makes the point that Dr. RD did not record his ROM measurements.

Dr. C's Report of Medical Evaluation (TWCC-69), dated August 5, 1993, together with the accompanying narrative report, stated that claimant reached MMI on "7-27-93" with a 10% IR for his specific spinal disorder, a surgically treated disc with residual pain. Dr. C's report also stated the IR was based on the "AMA Guides to Evaluation of Permanent Impairment, second printing of the third edition [AMA Guides]." Claimant asserts there is no evidence that the AMA Guides "were designed to be used for the purpose of determining a person's physical impairment or ability to work." *See* Section 408.124 which provides that the Commission shall use the AMA Guides for determining the existence and degree of an employee's impairment. We do not address claimant's assertion on the constitutionality of the AMA Guides for the reasons discussed in Texas Workers' Compensation Commission Appeal No. 92094, decided April 27, 1992. Regarding claimant's ROM testing, Dr. C's report stated that claimant did not meet the validity criteria of the AMA Guides respecting the relationship between his tightest SLR and the sum of his sacral flexion and extension. Dr. C summarized that claimant "has a 10% impairment for a specific disorder, a 0% impairment for range of motion deficit and 0% impairment for neurological deficit."

Dr. RD's TWCC-69 and the accompanying narrative report of his October 6, 1993, examination of claimant stated that claimant reached MMI on that date with a 10% IR. Dr. RD reported his observations of claimant upon physical examination and testing such as claimant's resistance to abduction testing being negative, his SLR or "flip test" being negative, his having no paraspinous muscle spasm, and his having normal sitting and standing attitudes. Dr. RD's report also mentioned claimant's ROM measurements in "his T.W.C.C. 69 for review," apparently referring to and adopting the ROM measurements recorded on the charts attached to Dr. C's TWCC-69 and narrative report. Dr. RD's report went on to note the results of his other testing, his finding no motor or reflex deficits, and stated that "based on the assessment that I have here, I would agree with the assessment of [Dr. C] with a 10% whole body permanent physical impairment." The Appeals Panel has stated that a designated doctor can appropriately rely on tests, exams, data, and medical reports of others in arriving at a final evaluation ultimately based on his or her own professional opinion. *See e.g.*, Texas Workers' Compensation Commission Appeal No. 93381, decided July 1, 1993. Unlike the evidence of lack of examination by the designated doctor which caused the Appeals Panel to remand in Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993, here claimant testified that Dr. RD examined him and did measurements with an "apparatus." Claimant's complaint goes to Dr. RD's flawed testing technique but no evidence was adduced to support claimant's assertion in that regard other than his testimony as a layman. Claimant also complains of Dr. RD's failure to record ROM measurements. However, Dr. RD's report can be read to indicate that Dr. RD agreed with the ROM measurements recorded in Dr. C's charts which Dr. RD apparently had available.

We are satisfied that the hearing officer's determinations that Dr. RD's report was entitled to presumptive weight and that claimant's IR was 10% are sufficiently supported by the evidence. The only other medical evidence stating an IR was the report of Dr. C, a doctor at the Institute where claimant was treated, which also determined his IR was 10%. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and

credibility of the evidence. It is for the hearing officer to resolve 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 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, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge