APPEAL NO. 94218

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 18, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) has an impairment rating (IR) of 12% as found by the designated doctor. Claimant asserts that the hearing officer did not consider that she had two surgeries, that range of motion (ROM) was not made a part of the IR, that her weight should not have been considered, and that her treating doctor's opinion evidence overcame that of the designated doctor. The respondent (carrier) replies that the hearing officer should be upheld.

DECISION

We affirm.

Claimant was injured when she attempted to lift a patient while at work as a nurse on (date of injury). She saw her family doctor, (Dr. Y) and then saw (Dr. W), an orthopedic surgeon. She had surgery in February 1992 to remove an L4-L5 disc; then in January 1993, she had surgery to fuse her spine at that level. She lost work starting on February 18, 1991, and the carrier at the two year point after the start of temporary income benefits (TIBS), estimated her impairment at 12%, notified her, and started paying impairment income benefits on that basis. Claimant's doctor, Dr. W, did not agree with that figure; he did not agree that maximum medical improvement (MMI) had been reached and stated as much, but added that 25% would be her rating if she had no more surgery.

The Texas Workers' Compensation Commission (Commission) order stated that it appointed, "Designated Doctor (city) Impairment Center." While claimant appeals the amount of total rating of 12% given by a (Dr. T), who apparently works at (city) Impairment Center, she does not appeal that the Commission appointed an entity that is not a doctor. *See* Texas Workers' Compensation Commission Appeal No. 93833, decided October 25, 1993, which found no basis for appointing anyone other than a doctor as the designated doctor. The discrepancy in names is not confined to the Commission; Dr. T indicates in his report that claimant is (Mrs. G), not (Mrs. R). The hearing officer found that Dr. T's report dealt with claimant even though the name was inaccurate.

Dr. T correctly points out that Dr. W in his various reports does vary the amounts of IR subtotals, but always reaches a total of 25%. On most of his ratings, Dr. W does agree with Dr. T as to claimant's two surgeries amounting to 12% impairment. The medical evidence contrary to that of the designated doctor does not comprise the great weight in this particular subtotal. In addition, claimant's assertion that the hearing officer did not consider her two surgeries is without merit because the IR he chose is made up of those two ratings. In addition, the hearing officer is to consider what the IR is at the time that MMI occurs. No appeal is made of the hearing officer's finding of fact that claimant reached MMI on February 18, 1993, which is 104 weeks after claimant began receiving TIBS. Texas Workers' Compensation Commission Appeal No. 94022, decided February 16, 1994, approved an IR

that was accurate at the time statutory MMI was reached although surgery was contemplated. It was not necessary to assign a rating for possible future surgery.

Claimant received no IR from her treating doctor for ROM, although he did award her eight percent for ankylosis (stiffness of a joint or union of bones) of the lumbar spine. Dr. T in his report of June 25, 1993, states that claimant cannot be given impairment for ankylosis based on page 74 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He then states in his report of November 23, 1993, that he cannot tell where Dr. W got the eight percent for ankylosis. The AMA Guides do provide in Section 3.3a, page 74, that ROM or ankylosis is to be used in impairments of the spine. (*See* Texas Workers' Compensation Commission Appeal No. 94181, dated March 24, 1994, which pointed out that both amounts could not be used.) It is difficult to determine how Dr. W arrived at eight percent for ankylosis since Table 50 on page 79 of the AMA Guides does not use that figure in regard to any lumbar value or combination of vertebrae.

Dr. T observes that claimant's ROM findings were invalid because she "did not meet the validity criteria." This statement was made by Dr. T in a letter dated December 13, 1993, in which he also said, "[t]he problem also with this patient is that she cannot be measured adequately in many respects due to her size." He added that her inconsistencies in ROM were documented by other physicians and by testing within the (city) Impairment Center in his impairment report dated June 25, 1993.

Dr. T also commented that claimant had no reproducible neurological deficits so she received no neurological impairment. Dr. T in his letter of November 23, 1993, finally points out that Dr. W's notes and other physicians' notes show no sensory changes in the lower extremities which, Dr. T says, confirm his findings; he states that with no such changes, no impairment in this area should be given. Dr. W in turn states that he stands by his ratings. (Dr. T accurately points out that Dr. W adds figures to get 25% without factoring the subtotals by the Combined Values Chart of the Guides.)

Claimant pointed out that she weighed much less when injured than she does now, partly due to inactivity since the injury. She says that because of this, her weight should not have been viewed as having any effect on the injury. Dr. Y and Dr. W both agree with this point. The statement of Dr. T as to weight was made in addition to his previous statement in the same paragraph that the claimant had invalidated her ROM studies.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He determined that the opinions of Dr. T were credible and that he was entitled to presumptive weight. The evidence contained in Dr. T's reports and letters was sufficient to support the hearing officer's decision that Dr. T's opinion be given presumptive weight. ROM studies were explained by Dr. T, and Dr. W did not assign any rating for ROM. The hearing officer could reasonably consider all of Dr. T's letters and reports and conclude that claimant's weight was not the basis for his opinion as to ROM invalidity. The IR of Dr. W does vary somewhat depending on the report he provided; in

addition, his IR is subject to question because he does not accept that MMI has been reached, and he states that claimant has not reached that point yet. Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992, stated that a physician should be satisfied that MMI has been reached before assessing an IR.

Finding that the decision and order of the hearing officer are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge