APPEAL NO. 94290

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on February 8, 1994, (hearing officer) presiding as hearing officer. She determined that claimant reached maximum medical improvement (MMI) on July 31, 1993, with an impairment rating of nine percent as certified by the Commission-selected designated doctor, (Dr.T). The appellant (claimant) asserts error in the hearing officer's determination that she has reached MMI, with an impairment rating of nine percent. Claimant further asserts that the 1989 Act is unconstitutional; that the procedure utilized to select a designated doctor is unconstitutional; that the 1989 Act is discriminatory; and, that the 1989 Act prevents her from establishing the true degree of her disability. Finally, claimant takes issue with fact that the designated doctor's report is afforded presumptive weight in the 1989 Act and contends that her average weekly wage (AWW) is higher than that calculated by the Texas Workers' Compensation Commission (Commission) and the carrier. Respondent carrier maintains that there is sufficient evidence to support the decision of the hearing officer and it should, therefore, be affirmed.

DECISION

Finding no error in the hearing officer's conclusions of law and sufficient evidence to support her factual findings, the decision and order are affirmed.

It is undisputed that on (date of injury), the claimant sustained a compensable injury to her lumbar spine at L5-S1, while she was employed as an licensed vocational nurse at (senior living center). At the time of her injury, claimant was replacing the oxygen tanks of three of the nursing home residents. She testified that after she lifted the first tank, she felt a "twinge" in her back, that the pain intensified as she lifted the second tank, and when she lifted the third tank the pain had her on the ground. Claimant further testified that she finished her shift that evening because she feared that she would "be brought up on charges," if she left.

Following her injury, claimant began treatment with (Dr. H) and the treatment with Dr. H continued throughout the period of her injury. Dr. H certified MMI on April 27, 1993, with an eight percent impairment rating (IR). While he was treating claimant, Dr. H referred her to (Dr. Z). In December 1992, Dr. Z recommended that claimant have surgery on her lumbar spine. At the request of the carrier and pursuant to § 408.026 of the 1989 Act, (Dr. A) performed an examination of the claimant to provide a second opinion as to the necessity of spinal surgery. In a report dated January 26, 1993, Dr. A did not concur with the recommendation for spinal surgery. At the time of the hearing, Claimant had not sought Commission intervention in the dispute regarding her need for spinal surgery pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.205 (Rule 133.205) and she had not had spinal surgery.

After Dr. H certified MMI as of April 27, 1993, with an IR of eight percent, claimant timely disputed the certification and IR. Therefore, pursuant to a letter dated November 8,

1993, (Dr. T) was appointed by the commission as the designated doctor for an assessment of MMI and IR. In a Report of Medical Evaluation (TWCC-69) dated November 30, 1993, Dr. T certified MMI on July 31, 1993, with an impairment rating of nine percent. In his written report accompanying the TWCC-69, Dr. T also opined that further surgery would not benefit claimant.

At the CCH only two issues were submitted to the hearing officer for resolution, namely, whether or not the claimant has reached maximum medical improvement, and if so, on what date and what is claimant's correct impairment rating. According the designated doctor's report presumptive weight, the hearing officer determined that claimant reached MMI on July 31, 1993, with an impairment rating of nine percent.

On appeal, claimant asserts that she is "permanently and totally disabled from being able to do her job." Thus, it appears that she is attempting to challenge the certification of MMI and assessment of IR, as she did at the CCH. It is well-settled that the designated doctor provisions of the 1989 Act were designed to apply in a case, such as this one, where there is conflicting medical evidence as to MMI and IR. Section 408.125(e) provides in relevant part that where there is such a dispute and the commission selects a designated doctor "the report of the designated doctor shall have presumptive weight, and the commission shall base the impairment rating on that report unless the great weight of other medical evidence is to the contrary." The Appeals Panel has consistently noted the unique position that a designated doctor's report occupies under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992 and Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Further, we have stated that a designated doctor's report should not be rejected absent a substantial basis to do so. Texas Workers' Compensation Commission Appeal No. 93483, decided July 26, 1993; Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. That is, "it is not just equally balancing evidence or a preponderance of the evidence that can outweigh [a designated doctor's] report but only the `great weight' of the other medical evidence that can overcome it." Appeal No. 92412, *supra*.

After reviewing all of the medical evidence in this case, we are satisfied that Dr. T's report was not overcome by the great weight of the other medical evidence. Both Dr. T and claimant's treating doctor, Dr. H, have certified MMI and assigned an IR. The fact that Dr. H certified MMI three months earlier with a one percent lower impairment rating does not significantly undermine Dr. T's conclusions. Dr. Z, who recommended that claimant have spinal surgery, indicates in his report that claimant has not yet reached MMI. With the evidence in this posture, it appears that, at most, the medical evidence is in some degree of balance. The contrary medical evidence in this case falls far short of rising to the level of the great weight of the evidence which would permit the hearing officer to reject the report of the designated doctor. Therefore, we find no error in the hearing officer's having accorded the designated doctor's report presumptive weight, finding that the claimant reached MMI on July 31, 1993, with a nine percent impairment rating.

We will not address the constitutional challenges raised by the claimant to the 1989 Act and its designated doctor provision. The Appeals Panel has no jurisdiction to consider those questions. Texas State Bd. of Pharmacy v. Walgreen Texas Co., 520 S.W.2d 845, 848 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.) (administrative agencies have no power to determine the constitutionality of statutes). *See also* Texas Workers' Compensation Commission Appeal No. 94214, decided April 6, 1994; Texas Workers' Compensation Commission Appeal No. 93940, decided November 30, 1993; Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992; Texas Workers' Compensation Commission Appeal No. 92094, decided April 27, 1992.

Finally, for the first time on appeal, claimant raises a challenge to the fact that the designated doctor's report is given presumptive weight, asserts error in the calculation of her average weekly wage, asserts that the 1989 Act is discriminatory, and asserts that the 1989 Act prevents her from establishing the true degree of her disability. It is undisputed that the only issues raised at the CCH were whether the claimant had reached MMI and if so, on what date and what is the claimant's correct impairment rating. Because none of these issues were raised below, and we have held that new issues may not be raised on appeal, we will not further address these matters in this decision. *See* Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992 and Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge