APPEAL NO. 94304

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*., (1989 Act). On February 16, 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 specified by the designated doctor, (Dr. C). Claimant asserts that the designated doctor did not adequately consider his residual symptoms specified by the treating doctor as stiffness and decreased range of motion (ROM); in asking the Appeals Panel to decide in his favor, the appeal will be considered to be an assertion that the great weight of other medical evidence is contrary to the opinion of the designated doctor. The respondent (carrier) replies that the evidence is sufficient to support the hearing officer.

DECISION

We affirm.

Claimant had worked as a maintenance man for an apartment complex (employer) for seven years when he hurt his back moving a refrigerator on (date of injury). The injury included a herniated disc for which surgery was performed on August 17, 1992. Claimant's treating doctor, (Dr. D), noted in his records in October 1992 that claimant was "basically asymptomatic" and was "moving comfortably and easily." Dr. D on April 6, 1993, certified that maximum medical improvement (MMI) had been reached and that claimant had 17% impairment; at the time, Dr. D also said that claimant was "asymptomatic except for stiffness and decreased [ROM]."

The carrier took issue with the IR and the Texas Workers' Compensation Commission (Commission) appointed Dr. C as the designated doctor to provide an opinion as to IR. Dr. C examined claimant on July 6, 1993, and agreed that MMI occurred on April 6, 1993. Dr. C provided a thorough report that awarded eight percent impairment for a surgically repaired disc lesion with no residuals. He stated that claimant invalidated the ROM criteria, but still awarded three percent based on the ankylosis resulting from the fusion, as shown on Table 50 of the Guides for the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Dr. C's total IR was 11%. Dr. D had given 12% for segmental instability or spondylolisthesis involving a single level operation with residual symptoms, on Table 49. He also awarded five percent based on Table 50. (Table 50 does not list five percent under any combination of lumbar impairment.)

After Dr. C's rating, Dr. D noted that such rating had been brought to his attention and stressed that claimant had a fusion because he had segmental instability. This instability caused Dr. D to use Section IV of Table 49 from which he took 12% based on residual symptoms being present. (*See* Section IV B.) He added three percent for the fusion (apparently this three percent comes from Table 50) for a total of 15% minimum. (Dr. D said he also had given two percent for mild symptoms of nerve root involvement, which "could be disputed.")

When asked to comment as to Dr. D's re-assertion of his IR after considering Dr. C's rating, Dr. C made a minor change in his rating. Dr. C stated that he discussed the case with Dr. D and pointed out that tests did not show spondylolisthesis or stenosis; nevertheless, he understood that Dr. D felt instability existed. Therefore, because of such instability, Dr. C said that he then looked at Table 49, Section IV, rather than Section II as he had done before. In considering Table 49, Section IV, however, Dr. C still chose Section IVA, rather than Section IVB, based on his decision that there were no residuals. The IR for this portion is nine percent, and Dr. C continued to add three percent for ankylosis in Table 50, totalling 12%. (Dr. C found no neurological deficit.) Dr. C added that he chose the non-residual category based on Dr. D's note of April 6, 1993, when MMI was found which said that claimant was "asymptomatic except for stiffness and decreased [ROM]." Clearly, Dr. C considered the basis for Dr. D's opinion as to IR.

Claimant did not testify that Dr. C failed to use the inclinometer in determining an IR, but did say that Dr. C had him squat once in checking ROM and questioned that procedure. There were no other doctor's opinions as to IR in this case.

The hearing officer correctly pointed out that there was a difference of opinion between the designated doctor and the treating doctor in this case as to whether "residuals" were applicable. He then observed that unless the great weight of the other medical opinion was contrary to that of the designated doctor, that doctor's opinion was statutorily entitled to presumptive weight.

The medical evidence sufficiently supported the hearing officer's determination that the designated doctor's opinion had not been overcome by the great weight of other medical evidence. Assigning presumptive weight to the opinion of the designated doctor results in a determination that the IR was 12%. Finding that the decision and order 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:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge