APPEAL NO. 94528

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.*(1989 Act). On January 13, 1994, a contested case hearing (CCH) was held. The record was held open until April 11, 1994, to permit the hearing officer to send additional medical records, generated after the initial evaluation of the designated doctor, to the designated doctor for review, to permit the designated doctor to clarify and explain his report in light thereof, and to permit the parties to respond to any such modifications. With respect to the sole issue before him, the hearing officer determined that respondent's (claimant) correct impairment rating (IR), resulting from his compensable back injury, was five percent in accordance with the revised report of the Texas Workers' Compensation Commission (Commission) selected designated doctor. Claimant appeals essentially challenging the sufficiency of the evidence to support the hearing officer's determination that the great weight of other medical evidence was not contrary to the report of the designated doctor. Respondent (carrier) urges affirmance, arguing that sufficient evidence supports the hearing officer's determinations.

DECISION

We affirm.

It is undisputed that on (date of injury) , claimant, who was employed as a mechanic for (employer), compensably injured his back while moving some wheels on a van. Claimant's principle complaints included chronic back pain and numbness in his left leg. The parties stipulated that claimant reached maximum medical improvement on September 7, 1993.

Dr. L became claimant's treating doctor after his injury. Dr. L diagnosed a herniated disc causing L5 radiculopathy. In a report dated July 8, 1993, Dr. L assessed an impairment rating of 23% in accordance with the "AMA Guides to the Evaluation of Permanent Impairment, Third Edition Revised."[1] Dr. L's impairment assessment included ratings for range of motion (ROM) deficits observed in claimant. On November 10, 1993, Dr. L repeated the impairment rating calculation, using the statutorily mandated version of the Guides, and assessed a whole body IR of 28%, consisting of 21% for range of motion deficit, five percent, under Table 49, for a single level herniated disc at the L5 level, and four percent for a mild residual L5 radiculopathy.

Claimant was examined by Dr. S, at the request of the carrier. In a Report of Medical Evaluation (TWCC-69) dated June 18, 1993, Dr. S assigned an IR of seven percent. In a narrative report dated December 14, 1993, Dr. S indicated that after reviewing additional medical records, he increased claimant's IR to nine percent. Dr. S

[1]As the carrier noted, this is the incorrect version of the Guides. The 1989 Act specifically requires that an impairment rating be calculated in accordance with Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (Guides). Section 408.124.

stated that "[t]he increase from 7% is based primarily on the chronicity of his symptom complex."

Dr. D was selected by the Commission as the designated doctor. In a TWCC-69 and an accompanying narrative report, Dr. D assessed a zero percent IR based upon his determination that the compensable injury was resolved and his determination that the noted spondylosis pre-existed the injury. After Dr. D issued his report, the carrier had Dr. P review the medical records in this case in order to provide an opinion as to the correct IR. In a narrative report dated December 3, 1993, Dr. P stated his concurrence with Dr. D's zero percent IR.

A Benefit Review Conference (BRC) was held in this case on November 19, 1993. The Commission's Benefit Review Officer (BRO), recommended that the finding of the designated doctor was against the great weight of the evidence and further recommended that the 28% rating of Dr. L should be adopted by the Commission. The BRO issued an interlocutory order requiring the carrier to pay impairment income benefits for 84 weeks on the basis of the 28% IR. Carrier asserts that it made an oral request at the BRC for the BRO to send the report of the designated doctor back to Dr. D for clarification and explanation, if she disagreed therewith. The BRO refused the request and according to the carrier said that the hearing officer could do so if he/she felt it was necessary. Following the BRC, the carrier sent a letter to the Commission dated November 23, 1993, repeating its request that the Commission obtain clarification and explanation from the designated doctor of his rating. This letter also was of no effect. We are at a loss as to the refusal of the BRO and the Commission to entertain the carrier's request for clarification from the designated doctor where there appears to be a legitimate reason. New medical evidence and situations where a designated doctor's opinion is not clear or his report is ambiguous are examples where it is appropriate to make inquiry of the designated doctor. The Appeals Panel has stated and the Commission has issued an advisory (Texas Workers' Compensation Commission Advisory 94-02 dated March 14, 1994), that unilateral contact by the parties with a designated doctor is restricted. Parties are advised to go through the Commission, yet, the actions in this case thwarted a party's attempt to obtain clarification. Such action is to be discouraged. Also, appropriate action by the BRO should have made available for use at the CCH information needed for dispute resolution and eliminated the need to hold the record open.

At the end of the CCH, the hearing officer determined that he needed to obtain clarification from Dr. D of his rating. Thus, by letter dated January 24, 1994, the hearing officer forwarded additional medical records to Dr. D and asked that he review his IR on the basis of this additional information, the most significant piece of which (according to Dr. D) was an MRI dated November 12, 1993. In response thereto, Dr. D issued a narrative report dated February 24, 1994. In that report, Dr. D assigned an IR of five percent for a herniated disc at L5-S1, which he concluded was the result of the compensable injury. Dr. D specifically noted that he was not assigning a rating for loss of ROM because "[t]he limitation of motion, again, in my mind, is mostly due to voluntary restriction on the part of the examinee with some symptom exaggeration." After the hearing officer received

comments from the parties on Dr. D's revised report, he determined that claimant's IR was five percent on the basis of that report, according it presumptive weight on the basis of his determination that the rating was not contrary to the great weight of other medical evidence.

Under the 1989 Act, a report of a designated doctor is to be is to be accorded presumptive weight, unless the great weight of other medical evidence is contrary thereto. Sections 408.122(b) and 408.125(e). We have 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. D's report was not overcome by the great weight of other medical evidence. In challenging the report of the designated doctor, claimant focuses almost exclusively on Dr. D's failure to provide a rating for loss of ROM. We note that Dr. S's rating, like that of the designated doctor, did not include a factor for loss of ROM. In addition, Dr. P, who agreed with Dr. D's initial assessment of a zero percent IR, similarly concluded that an ROM rating appropriately was not assigned to the claimant in this case. Only Dr. L assigned a rating premised on loss of ROM and his inclusion thereof accounts for the disparity between his rating and those of Drs. D, S, and P.

The correct IR is a question of fact. Under the 1989 Act, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and the weight and credibility to be given thereto. Section 410.165(a). As the finder of fact, the hearing officer can believe all, part, or none of any witness's testimony. The hearing officer can also resolve the conflicts in the medical evidence. Texas Employers Ins. Co. v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The medical evidence herein provides a sufficient basis for the hearing officer's decision and we do not believe that the report of Dr. L rises to the level of the great weight of other medical evidence to the contrary, particularly because Dr. S and Dr. P concur with Dr. D that a rating for loss of ROM was not justified in this instance. Where, as here, sufficient evidence supports a hearing officer's conclusions and his findings are not so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust, the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Therefore, we find no error in the hearing officer's having accorded the designated doctor's report presumptive weight and adopting the five percent IR as claimant's correct whole body impairment.

Finding that sufficient evidence exists to support the determinations of the hearing officer, the decision and order are hereby affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge