APPEAL NUMBER 94937
FILED AUGUST 31, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was convened in (City), Texas, on May 16, 1994, with the record being held open for 10 days to give the claimant an opportunity to show good cause for his failure to appear. The hearing reconvened on May 26, 1994; at that time the hearing officer, held that the claimant had good cause for his earlier failure to appear, and proceeded with the hearing. With regard to the single issue, "what is claimant's impairment rating [IR]," the hearing officer determined that the report of the designated doctor had not been overcome by the great weight of the other medical evidence, and she accepted that doctor's amended IR of 20%. In his appeal the claimant contends that the designated doctor's IR was premature, as it was assessed prior to his surgery; that it did not include any impairment for range of motion; and that it did not assign impairment for all injured discs at the cervical, thoracic, and lumbar levels. He also contends that the hearing officer acted unprofessionally. The carrier contends in its response that the hearing officer's decision should be affirmed.

DECISION

We affirm.

The claimant, who worked as an aircraft mechanic for (employer), was injured on _____, when he fell down some stairs while working on an airplane, striking his head, neck, buttocks, legs, and several parts of his back. He was seen by several doctors and had numerous tests over an approximate two-year period. His treating doctor, Dr. S, found he reached maximum medical improvement (MMI) statutorily, with a 49% IR. Dr. S's IR was comprised of 29% due to range of motion (ROM) impairment; six percent due to cervical spine (herniation at C6); 14% due to lumbar spine (bulging disc at L4-5, and herniation at L5-S1); and 12% due to cubital tunnel syndrome of the right elbow. Dr. S's Report of Medical Evaluation (Form TWCC-69) also referenced an MRI of the cervical and lumbar spine and an EMG/NCV test for cubital tunnel syndrome.

Dr. B was appointed designated doctor by the Texas Workers' Compensation Commission (Commission). He also found that MMI had been reached statutorily on May 24, 1993, and assigned a 25% IR, comprised of six percent for the cervical spine, five percent and seven percent for the lumbar spine due to "abnormal fissures" at L4-5 and L5-S1, and nine percent due to right cubital tunnel syndrome, operated. Dr. B found claimant's ROM to have been invalidated for lack of maximum effort in grip and paraspinals. On June 1, 1994, in response to an inquiry by the hearing officer, Dr. B changed claimant's IR to 20%, stating that he had erroneously assigned five percent for L4-5 when claimant had not had surgery at that time. (The claimant subsequently underwent surgery, in February of 1994, approximately nine months after statutory MMI.)

Claimant's challenge to Dr. B's report is essentially based upon three contentions: that Dr. B failed to evaluate and rate all injured discs at all levels of his spine, as disclosed by his testing; that he erroneously invalidated ROM, based upon a nurse's opinion that he had lack of submaximal effort in a hand grip strength test for which there was no documentation; and that he gave claimant a rating when he knew claimant was going to have surgery. Each of these will be discussed separately below.

FAILURE TO RATE FOR ALL INJURIES

The claimant contends that various studies show defects in the thoracic spine which Dr. B failed to rate, notably a May 17, 1993, myelogram showing "ventral extradural defects at T6-7 and T12-L1 that do not contact or deform the thoracic spinal cord." It is clear from his report that Dr. B reviewed this test, that he did not consider the results significant, and that neither he nor Dr. S chose to assign any impairment for these levels. The claimant also complains of Dr. B's rating only the C5-6 disc, stating that the May 1, 1992, myelogram shows cervical bulges at two other levels. Once again, it appears from Dr. B's report that he considered all claimant's cervical spine studies, and assigned six percent impairment due to defects at C5-6 (as did Dr. S). Moreover, as Dr. B points out in his June 1, 1994, letter, the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (Guides) do not allow consideration of additional unoperated levels in a single spinal segment. (See further discussion herein.)

In his response to Dr. B's letter, claimant said the doctor also had not considered nerve damage in his legs, arms, back, and sciatic area as showed by various tests. Dr. B's original report referenced a February 20, 1992, EMG which he said showed ulnar neuropathy, but no evidence of cervical radiculopathy. Neither Dr. B nor Dr. S assigned any impairment due to neurological deficit. It is clear from Dr. B's report and an attached summary that he considered all of the studies and tests which claimant believed to be significant. We find the hearing officer did not err in refusing to disregard Dr. B's report on these grounds.

INVALIDATION OF RANGE OF MOTION

Dr. B's original report stated that claimant's ROM studies were invalidated due to lack of maximum effort in grip and paraspinal motions. Dr. B's report included a letter from a physical therapist stating that she had evaluated claimant's grip strength bilaterally and his lumbar and cervical strength, adding:

> There are validity criteria which indicate whether the examinee is performing with maximum effort and whether the test results are valid. [Claimant] had 2 coefficients of variation that were 20% and above and he failed the Jamar Five Position Hand Grip Test, indicating submaximal effort.

In Dr. B's explanatory letter of June 1, 1994, he stated that:

> [Claimant's] motion in practically all of his movement of his spine was so minimal in all directions that his total range of motion whole person, had it been valid, would have measured 62% whole person, 20% being in the thoracic area. This is, of course, totally unrealistic in someone who had never had, at that point, any spinal surgery at all.

He went on to point out that a February 16, 1993, MRI of the thoracic spine showed it to be normal, as did a May 17, 1993, myelogram; he stated:

> This is completely inconsistent with a range of motion showing 20% whole person impairment. In fact, I could find in his chart, no objective evidence of anything wrong with his thoracic spine anywhere. It is well known that if a person exerts very little motion in the spinal column, at all, that repetitions of this same movement will almost invariably show validity because of the lack of 5 degrees or 10% differences. Of course when these motions are so tiny, there isn't room for the 5 degrees or 10% variations to occur. Therefore, other means of checking validity have to be utilized, such as the static strength the [sic] testing, push-pull, the Jamar grip. When these were done, the COV's showed that [claimant] simply was not exerting the maximum effort required by the Guides.

Dr. B said claimant's lack of motion, in his opinion, resulted from other conditions, such as gout (citing to claimant's uric acid measurement), obesity, and deconditioning. The claimant disputed that he actually had gout, stating that he was taking gout medication as a preventive measure. He conceded that he was overweight and deconditioned.

The hearing officer, upon review of Dr. B's original report and his reply to her inquiry, chose to determine that Dr. B's IR, in which claimant's ROM had been invalidated based upon a cross-check provided by strength testing, was not outweighed by the report of Dr. S, who assigned 29% impairment due to ROM. We do not find this to be error; as we have previously stated, medical opinion should be weighed according to its thoroughness, accuracy, and credibility with consideration given to the basis it provides for opinions asserted. *See* Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993; Texas Workers' Compensation Commission Appeal No. 93119, decided March 29, 1993. In addition, Dr. B in his June 1, 1994, letter offered to re-examine the claimant for ROM; we note that the claimant in his reply did not ask for a re-examination.

And see also Texas Workers' Compensation Commission Appeal No. 94149, decided March 16, 1994, in which the hearing officer gave presumptive weight to the designated doctor who, among other things, invalidated a claimant's otherwise valid ROM

measurements due to that claimant's movements when he was not aware he was being observed; Texas Workers' Compensation Commission Appeal No. 94131, decided March 16, 1994, which upheld a designated doctor's invalidation of ROM measurements based upon the results of a "sitting root" test.

We find, based upon the foregoing, that the hearing officer did not err in according presumptive weight to the report of the designated doctor. *See* Section 408.125(e). *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992 (discussing the "unique position" the designated doctor's report occupies under the Texas Workers' Compensation system).

EFFECTS OF CLAIMANT'S SURGERY

The claimant states in his appeal that Dr. B knew at the time he examined claimant that he was going to have back surgery, and that it was going to be a 360 fusion-decompression. He further said that he did not believe the doctor should have subtracted the five percent he originally attributed to L4-5, because that disc and the L5-S1 discs were removed in the course of his February 11, 1994, surgery. Dr. B's original report mentions claimant's ulnar nerve release but does not mention any proposed or upcoming back surgery. His later, clarifying letter indicates that it was not clear to him whether claimant had had surgery; moreover, he subtracted the five percent he had previously assigned for L4-5 due to the fact that the claimant had already been assigned seven percent for L5-S1 and "the Guides do not permit the evaluation of more than one disc level in any spinal segments unless surgery has been performed on these."

Dr. B examined the claimant on September 13, 1993, and issued his report on October 4, 1993. The only evidence in the record which, prior to that date, refers to the possibility of surgery, are patient notes of Dr. H, an orthopedic surgeon who apparently became claimant's treating doctor after Dr. S. Dr. H's notes of July 20, 1993, state that the claimant had "elected to proceed with operative intervention" and that claimant was scheduled for surgery on an unspecified date. In addition, August 24, 1993, notes from Dr. H indicate that claimant was seen by a Dr. HN for a second opinion but that Dr. HN apparently did not concur in the need for surgery (Dr. HN's records were not in evidence); in those notes Dr. H also states that he is requesting a third opinion, although that opinion, according to the record, was not rendered until December 11, 1993, more than two months after claimant saw the designated doctor.

The hearing officer found, and this finding was not challenged on appeal, that the claimant reached MMI by operation of law on May 24, 1993. *See* Section 401.011(30).

There have been cases in which the Appeals Panel has found that the fact that surgery occurred after a claimant reached statutory MMI did not preclude the designated doctor from reevaluating the claimant and revising his IR based on the surgery. For example, in Texas Workers' Compensation Commission Appeal No. 94492, decided June

8, 1994, we acknowledged that there will be "those rare, exceptional cases where compelling circumstances, such as the need for further surgery, might reasonably be expected to, or necessarily will, affect the claimant's ultimate IR resulting from a compensable injury." And in Texas Workers' Compensation Commission Appeal No. 93856, decided November 4, 1993, we reversed the hearing officer and remanded the case for further consideration of evidence of impairment in light of the claimant's surgery. In that case, the procedure by which the Commission approves spinal surgery was in progress very close in time to the date of statutory MMI (which was March 25, 1993, with Commission approval of surgery occurring in early May 1993), as well as to the date the claimant was seen by the designated doctor. *And see also* Texas Workers' Compensation Commission Appeal No. 94794, decided August 2, 1994, in which this panel rejected the carrier's contention that no events occurring subsequent to the date of statutory MMI may be considered in the determination of an IR.

We believe this case, however, is factually distinguishable from those cited above and is more controlled by those cases in which it has been held that there is no basis for questioning the use of an IR that is presently accurate at the time MMI is reached by operation of law. *See* Texas Workers' Compensation Commission Appeal No. 94022, decided February 16, 1994. In the instant case, statutory MMI was reached in May of 1993; the designated doctor examined the claimant some four months later, after the claimant's treating doctor had already found statutory MMI and rendered an IR. As noted earlier, there are unsigned patient notes from July 1993 indicating that surgery was going to be scheduled, but it is not entirely clear whether the spinal surgery review process had been invoked at the time the designated doctor was appointed. Unlike Appeal No. 93856, *supra*, it does not appear that the designated doctor was even informed that surgery was a possibility. Based upon the evidence as a whole, we do not find such "compelling circumstances" to exist as would require the issue of claimant's IR to be revisited after it was rendered. Accordingly, we find no error by the hearing officer in failing to reject Dr. B's report on these grounds.

HEARING OFFICER'S CONDUCT AT THE HEARING

The claimant basically contends that he had a personality conflict with the hearing officer arising out of his failure to appear at the first session of the contested case hearing. The record shows that when claimant failed to appear the hearing officer attempted unsuccessfully to contact him, then sent him a letter giving him 10 days in which to show good cause for his failure to appear. The record further reflects that at the reconvened hearing on May 26th, the hearing officer accepted into evidence a letter from claimant's doctor concerning his inability to participate in the hearing, and ruled that claimant had good cause for not appearing. She proceeded at that point with the contested case hearing. We are unable to discern from the record any prejudice or impropriety on the part of the hearing officer. The fact that she "lowered" claimant's IR was due only to the amended opinion of the designated doctor, whose report is entitled to presumptive weight. As we have previously held, a hearing officer is responsible for the full development of facts required for the determinations to be made, which can include further inquiry of the doctor appointed by the Commission. Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993. In short, we find no error on the part of the hearing officer which would require reversal and remand.

Based upon the foregoing, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge