

APPEAL NO. 980114

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 5, 1997, a contested case hearing (CCH) was held with hearing officer. The issue concerned the correct impairment rating (IR) to be assigned to the appellant, (claimant), and whether the respondent (self-insured) was entitled to a credit against any impairment income benefits (IIBS) and supplemental income benefits because of contribution from an earlier compensable injury.

The hearing officer held that the claimant's IR for his current compensable injury was zero percent, in accordance with the report of the designated doctor, which was not overcome by the great weight of the contrary medical evidence. Because there was no IR, there was no contribution.

The claimant has appealed, arguing that he is entitled to an IR for his aggravated disc herniation, and a zero percent IR found by the designated doctor is against the great weight of the contrary medical evidence. The carrier responds that claimant had not had documented pain for six months and therefore was not entitled to an IR for a specific disorder from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

DECISION

Affirmed.

Claimant had both a 1990 and 1993 back injury. Although he first stated that he did not receive any workers' compensation benefits from either injury, it was proven that there were at least claim files opened for each, as indicated by a lawsuit settlement decree for the 1990 injury, and a medical report on an official Texas Workers' Compensation Commission medical report form filed for the 1993 injury.

For the 1996 injury, claimant stated that he hurt his back on _____, while employed by the (employer), a self-insured governmental entity that shall be referred to herein as "employer" or "carrier," depending upon the context of the reference. Claimant was out of work until July 1996. He had worked since then and said that his effects from his back injury were that the pain would "sometimes" recur. However, he had not been troubled with back pain for two to three months prior to the CCH. Claimant agreed he was not a candidate for surgery. Claimant received temporary income benefits (TIBS) for his 1996 injury, although the benefit review conference report indicated that he received them for just a little over five weeks.

Medical records show that he was treated for his 1990 injury at least through early 1994 and that a herniated disc was one of the diagnoses listed on medical reports for this injury. A medical report filed on November 4, 1993, for an (injury date 2) injury shows a diagnosis of lumbar sprain. An MRI was done on October 26, 1993, which showed a herniation of the L4-5 disc. An MRI taken on February 11, 1997, is reported as showing the same herniated disc but with more leftward tearing.

Claimant's treating doctor, (Dr. L), assigned an eight percent IR, with a maximum medical improvement (MMI) date of July 17, 1996, for claimant's compensable injury. Only one percent was assigned for loss of range of motion, with lumbar flexion and extension being invalidated and right lateral lumbar flexion showing no impairment. Most of the IR, seven percent, was assigned from Table 49 of the AMA Guides for an unoperated disc lesion and a minimum of six months of documented pain. The narrative attached to the Report of Medical Evaluation (TWCC-69) of Dr. L does not mention previous injuries. Asked to comment on the appropriateness of assigning an IR for a herniated disc that was present after the 1993 injury, Dr. L pointed out in a later letter that the herniation was larger after the 1996 occurrence and claimant should not be precluded from receiving an IR simply because he had relatively good movement.

A designated doctor, (Dr. R), examined claimant and filed his report on August 30, 1996. He certified a zero percent IR, with the same MMI date found by the treating doctor. As Dr. R pointed out, there had not been six months of medically documented pain by the time claimant reached MMI and, therefore, an IR from Table 49 was not warranted. His report also does not indicate an awareness of previous injuries. Dr. R wrote to the benefit review officer, on May 21, 1997, stating that claimant has had longstanding degenerative disease in his spine (as indicated by the 1993 MRI). He noted that there was no permanent impairment from the effects of the 1996 injury.

Although claimant indicates that the hearing officer's decision deprives him of compensation for his injury, claimant already has received compensation for his "injury" and the effects on his ability to work after that injury. Unlike the facts which warrant payment of TIBS, IIBS is payable based upon an IR which is not awarded for "an injury" per se but for an "impairment." Impairment is defined in the 1989 Act as "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Further, impairment must be based upon an "objective clinical or laboratory finding." Section 408.122(a). Although the claimant's doctor argued that an IR was warranted because his herniated disc was shown to be larger in an MRI after his 1996 injury as opposed to the 1993 injury MRI, the medical evidence does not demonstrate that this translates to a worsening or aggravation of the preexisting herniated disc. Although the zero in this case resulted from the fact that there were not six months of documented pain at the time he had reached MMI, which we agree (along with the hearing officer) is a justifiable medical opinion, even an IR awarded under Table 49 would have been no greater than that which existed after the 1993 injury, and likely would have been subject to 100% contribution had the hearing officer reached

that issue. The medical evidence against Dr. R's opinion as designated doctor does not constitute a great weight.

We emphasize that nothing in this decision should be interpreted to change our often stated proposition that the effects of a prior injury should not be discounted in the assessment of a current IR. Texas Workers' Compensation Commission Appeal No. 980284, decided March 19, 1998.

We cannot agree that the hearing officer's determination is against the great weight and preponderance of the evidence and we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge