

APPEAL NO. 980284
FILED MARCH 19, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 6, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. The issue at the CCH was, "What is claimant's impairment rating [IR]?" The hearing officer gave presumptive weight to the report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. AN, and determined that the IR is 10%. Appellant (claimant) appeals, contending that the hearing officer erred and that the designated doctor's report is incorrect because he improperly invalidated range of motion (ROM) and because he did not include the proper percentage of impairment for specific disorders. Respondent (carrier) responds that sufficient evidence supports the hearing officer's determinations and requests affirmance.

DECISION

We reverse and remand.

Claimant contends that the hearing officer erred in according presumptive weight to the designated doctor's report and in determining that her IR is 10%. She first contends that the designated doctor improperly invalidated ROM because claimant had a prior fusion. The hearing officer determined that, although it was improper for the designated doctor to invalidate ROM just because claimant had a fusion, because the designated doctor also gave a proper reason for invalidating ROM (suboptimal effort), the designated doctor's report could still be given presumptive weight.

Claimant sustained a compensable lifting injury to her low back on _____. A January 26, 1996, myelogram report stated that claimant had "large defects at L4-L5 level, consistent with herniated disc and disc space narrowing at L5-S1." In a January 26, 1996, post-myelogram lumbar CT scan report, Dr. RI stated that there were no abnormalities seen at L4-L5, and that level L5-S1 showed "post-laminectomy changes to the left, degenerative gas in the disc space, no evidence of displacement of the contrast column." In a February 8, 1996, report, Dr. LE, who gave a second opinion regarding proposed spinal surgery by Dr. SA, noted under "past history" that claimant had prior lumbar laminectomies, and that "in 1985 she had an L5-S1 discectomy and a recurrence operated on in 1988." In a March 13, 1996, operative report, Dr. SA, stated that on that date he performed a two-level fusion, laminectomy, and bone graft.

In a January 20, 1997, report, Dr. SA said that claimant reached maximum medical improvement (MMI) on January 16, 1997, and that her IR is 30%. His report indicates that claimant had segmental instability and that the 30% IR consisted of 14% for specific disorders and 19% impairment for loss of ROM. In a November 11, 1997,

report, Dr. DA, stated that claimant's IR is 17% and that this consisted of 11% for specific disorders under Table 49, IV(D) and seven percent for loss of ROM.

The designated doctor filed his Report of Medical Evaluation (TWCC-69) on April 22, 1997, certifying that claimant's IR is 10%. In his April 15, 1997, report, the designated doctor noted that claimant had two prior work-related low-back injuries, "which both resulted in surgeries in [1985] and 1988." In the report, he said:

Regarding specific disorders of the spine, 10% WP is given on Table 49, page 73, II-E Lumbar.

No impairment is given for abnormal [ROM] of the lumbar spine because of prior fusion surgery which invalidates the flexion and extension measurements, and also because the narrow [ROM] demonstrations on side-bending, left and right, was due to [suboptimal] effort [sic].

In my opinion apportionment is not appropriate in this case since so much time had elapsed between [claimant's] previous two surgeries and the injury of _____, during which she had no residual symptoms, that her condition should be evaluated independently.

* * * *

A Texas Workers' Compensation Commission (Commission) dispute resolution officer sent a letter to the designated doctor and asked for clarification of his report and apparently enclosed a letter from claimant's attorney. The designated doctor replied on September 2, 1997, as follows:

First, regarding [claimant's attorney's] statement that lumbar flexion and extension measurements are not invalidated by fusion surgery, I disagree. The purpose of fusion surgery is to prevent these movements, and postsurgical radiographs did indicate that fusion had occurred. Also, impairment was given for the surgery.

Second, regarding [claimant's attorney's] comment on segmental instability, the purpose of fusion surgery is to stabilize the spinal segments.

Third, regarding [claimant's attorney's] statement that impairment should be added for [claimant's] prior two surgeries, there is no documentation in the medical records that impairment existed before the _____ injury.

As a matter of fact, [claimant] stated to me that she was doing just fine with no residual symptoms from the prior surgeries at the time of the _____ injury. In my opinion, if there is no impairment from the prior

surgeries, no other impairment is justified. Therefore, my [IR] remains the same.

* * * *

The report of a Commission-selected designated doctor is given presumptive weight with regard to maximum medical improvement (MMI) status and IR. Sections 408.122(b) and 408.125(e). The amount of evidence needed to overcome the presumption is the "great weight" of the other medical evidence. See Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. See Texas Workers' Compensation Commission Appeal No. 92166, decided June 8, 1992. A mere difference in medical opinion is not enough to overcome the presumption in favor of the designated doctor. Texas Workers' Compensation Commission Appeal No. 960034, decided February 5, 1996.

It appears that the designated doctor stated that there can be no impairment for loss of ROM if a claimant has ever had fusion surgery. This contention is not supported by the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). In several cases, the Appeals Panel has affirmed a decision giving presumptive weight to the designated doctor where the designated doctor's IR included impairment for loss of ROM in claimants who have had fusion surgery. Texas Workers' Compensation Commission Appeal No. 971368, decided September 2, 1997; Texas Workers' Compensation Commission Appeal No. 971733, decided October 20, 1997. Therefore, we must remand this case to the hearing officer so that he may seek clarification from the designated doctor regarding any impairment for loss of ROM, and for an IR determination consistent with this decision. The hearing officer should instruct the designated doctor that the fact that there has been fusion surgery does not automatically mean there can be no impairment for loss of ROM. We would further note that the Appeals Panel has said that it is up to the designated doctor's medical judgment whether to rate a claimant for ROM or for ankylosis under Table 50 where there has been fusion surgery. Texas Workers' Compensation Commission Appeal No. 950991, decided July 28, 1995.

We note that the designated doctor gave a second reason for invalidating ROM in this case: suboptimal effort. The Appeals Panel has previously held that a doctor may invalidate ROM measurements based on the doctor's observations of the claimant's ROM. Texas Workers' Compensation Commission Appeal No. 960034, decided February 5, 1996. We have upheld a hearing officer's decision giving presumptive weight to a designated doctor who invalidated ROM based on clinical observation of suboptimal effort. Texas Workers' Compensation Commission Appeal No. 951283, decided September 19, 1995. In this case, the designated doctor indicated that he invalidated *lateral* ROM because of suboptimal effort, but did not invalidate flexion and extension for that reason. As set forth above, it appears that

flexion and extension ROM was invalidated for an improper reason. Because we are remanding regarding ROM impairment (flexion and extension), we also remand regarding all impairment for loss of ROM so that clarification may be sought from the designated doctor and for a decision and order consistent with this decision.¹

Claimant next contends that the designated doctor improperly found that claimant had only 10% impairment under Table 49, II(E).² In his report, the designated doctor said that after her _____, injury, claimant underwent a laminectomy at L4-5 and a fusion from L4-5 to the sacrum. This is a two-level fusion. The designated doctor said that he arrived at the 10% IR using Table 49, II(E). Under Table 49, II(E), it indicates that the impairment for specific disorders for an intervertebral disc lesion that is surgically treated with residuals is 10%. Section II(E) also indicates that, for "multiple operative levels," one must "add one percent" per level. Because there was a two-level fusion, the AMA Guides indicate that the impairment for specific disorders should be 11% (10% plus one percent for an additional level). See *generally* Texas Workers' Compensation Commission Appeal No. 961499, decided September 11, 1996.

Because we are remanding regarding ROM, we also remand regarding the issue of the impairment for specific disorders so that the hearing officer may seek clarification or an explanation from the designated doctor regarding his use of Table 49, II(E).

Claimant next contends that the designated doctor improperly failed to include impairment for specific disorders for prior surgery to claimant's spine. In his September 1997 letter, the designated doctor indicated that he did not include any impairment for the 1955 and 1988 surgeries to level L5-S1 because claimant had been "doing just fine" and he perceived no impairment regarding the prior spinal surgeries.

The effects of a prior injury should not be discounted in the assessment of an IR for the current injury. Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994. In Texas Workers' Compensation Commission Appeal No. 94517, decided June 14, 1994, we held that in rating impairment under the AMA Guides, a designated doctor may not "download" the effects of a prior injury from a compensable injury. In Texas Workers' Compensation Commission Appeal No. 972048, decided March 31, 1997, the Appeals Panel discussed facts involving an IR that included impairment for specific disorders for a surgically treated disc from a prior compensable injury. The Appeals Panel discussed how contribution works in such cases; contribution is available so that a claimant is not compensated twice for the same impairment from two different compensable injuries to the same body part. Although contribution is not an issue in this case, we note that the Appeals Panel has

¹We note that the designated doctor said in the April 1997 report, "Lasegue's (sitting) negative 90 degrees bilaterally," but this was not discussed further.

²Claimant also contends that the specific disorders impairment should have been calculated under Table 49,IV(D).

said that it is the Commission, and not a doctor assessing impairment, who is to determine the extent to which any contributing compensable injury is one for which the claimant "has already been compensated." Texas Workers' Compensation Commission Appeal No. 931130, *supra*. The Appeals Panel has held that contribution applies to injuries which occurred under the prior workers' compensation law also. Texas Workers' Compensation Commission Appeal No. 92549, decided November 24, 1992. Because we are remanding regarding other issues, we also remand so that the hearing officer may seek clarification about the inclusion of impairment for specific disorders regarding claimant's prior spinal surgeries.

To the extent that claimant contends that the designated doctor improperly applied the AMA Guides and did not give any impairment for segmental instability under Table 49, IV, we note that whether this section of Table 49 applies, as opposed to section II, is a matter involving a difference in medical opinion. Texas Workers' Compensation Commission Appeal No. 960931, decided June 28, 1996.

We remand this case to the hearing officer for reconsideration of the IR issue, consistent with this decision. The hearing officer may seek clarification and an explanation from the designated doctor after indicating to the designated doctor the Appeals Panel's holdings as set forth above. The hearing officer may appoint a second designated doctor if the designated doctor cannot or refuses to comply with the requirements of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993.

We reverse the hearing officer's decision and order and remand the IR issue and this case, as set forth above. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which

such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Judy L. Stephens
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Christopher L. Rhodes
Appeals Judge