

APPEAL NO. 980288  
FILED MARCH 26, 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 20, 1998, in Austin, Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were the date of maximum medical improvement (MMI) and the impairment rating (IR). The hearing officer found that the appellant (claimant herein) attained MMI on October 8, 1996, with a four percent IR based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals arguing the MMI and IR certification of the designated doctor was incorrect and that the certification of her treating doctor should be adopted. The respondent (carrier herein) replies that the hearing officer properly gave presumptive weight to the MMI and IR certification of the designated doctor.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarized the evidence and we adopt his rendition of the evidence. We will only briefly touch on the evidence germane to the appeal. These include the fact that it was undisputed that the claimant suffered a compensable back injury on \_\_\_\_\_. The claimant's treating doctor, Dr. H, D.C., referred the claimant to Dr. C, D.C., for an impairment evaluation. Dr. C certified on a Report of Medical Evaluation (TWCC-69) dated October 11, 1996, that the claimant had attained MMI on October 10, 1996, with a seven percent IR. Dr. C arrived at his rating from combining a two percent whole body impairment for loss of lumbar range of motion (ROM) with a five percent whole body impairment for loss of cervical ROM. Dr. H indicated his agreement with Dr. C's certification of MMI and IR. The carrier disputed the IR and as a result Dr. F, D.C., was selected by the Commission as the designated doctor. Dr. F certified on a TWCC-69 dated February 4, 1997, that the claimant attained MMI October 8, 1996, with a four percent IR. This rating consisted of combining a three percent whole body IR for loss of lumbar ROM with a one percent whole body impairment for loss of cervical ROM. Dr. C wrote a letter dated April 27, 1997, criticizing Dr. F's rating and contending that Dr. F should have included impairment for specific disorders of the claimant's spine using 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). Specially, Dr. C stated that the claimant should receive a five percent whole body impairment for specific disorders of the lumbar spine and four percent for specific disorders of the cervical spine. Dr. C then combined these impairments for specific disorders to the spine with Dr. F's impairments for loss of ROM to arrive at a 13% IR. Dr. F was requested to respond to criticisms of his IR by both Dr. C and Dr. H. Dr. F did so in a letter of

September 1, 1997, and noted that Dr. C's initial rating did not include any impairment for specific disorders of the spine. Dr. F states as follows in his letter:

I find it rather curious that he [Dr. C] chooses to dispute my impairment, without having performed a follow up examination, and subsequently attribute [sic] specific disorder deficit, some six months after his original evaluation.

The claimant objects to the hearing officer's determination of MMI and IR based upon Dr. F's report for a number of reasons. She contends that the ROM examinations were not performed in the same way and that specifically Dr. F only performed three ROM tests while Dr. C performed six. She asserts that her treating doctor's opinion should take precedence over that of the designated doctor, as her treating doctor was more familiar with her condition. She also complains that Dr. F provided no impairment for neurological disorders and that she should be sent to a neurologist for this determination because as a chiropractor Dr. F was not qualified to determine whether or not she had neurological impairment.

Section 408.122(c) provides:

If a dispute exists as to whether the employee has reached [MMI], the commission shall direct the employee to be examined by a designated doctor chosen by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor chosen by the commission. The designated doctor shall report to the commission. The report of the designated doctor has presumptive weight, and the commission shall base its determination of whether the employee has reached [MMI] on the report unless the great weight of the other medical evidence is to the contrary.

Section 408.125(e) provides:

If the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the [IR] on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the [IR] contained in the report of the designated doctor chosen by the commission, the commission shall adopt the [IR] of one of the other doctors.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers'

Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, we would defer to the hearing officer in rejecting the criticisms by Dr. C of Dr. F's rating. We would also affirm the hearing officer's finding that the claimant reached MMI on October 8, 1996, noting that not only was the MMI date entitled to presumptive weight, but it was also the MMI date found by Dr. C and the only MMI date used by any of the doctors who evaluated the claimant. We also point out generally no particular specialization is required of a designated doctor and that the Commission's selection of a chiropractor designated doctor was probably based upon the claimant's choice of a chiropractor treating doctor. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(b)(4) (Rule 130.6(b)(4)). Also none of the doctors who evaluated the claimant found impairment due to the neurological deficits.

The 1989 Act requires that any determination of IR be based upon the AMA Guides. Section 408.124. Failure by a designated doctor to properly follow the Guides has led to reversal of a decision on IR based upon the designated doctor's report. See Texas Workers' Compensation Commission Appeal No. 93296, decided

May 28, 1993; Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993; Texas Workers' Compensation Commission Appeal No. 931008, decided December 16, 1993; and Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994. Where there are sufficient questions concerning whether or not a designated doctor had properly followed the Guides, we have remanded to allow the hearing officer to seek clarification from the designated doctor. See Texas Workers' Compensation Commission Appeal No. 93600, decided August 31, 1993; Texas Workers' Compensation Commission Appeal No. 931085, decided January 4, 1994; and Texas Workers' Compensation Commission Appeal No. 931099, decided January 11, 1994.

Here, the claimant contends that the designated doctor failed to follow the AMA Guides in assessing her IR because he performed three, rather than six, ROM tests. We have held that where three tests are performed meeting the validity requirements of the AMA Guides that it is not necessary to perform additional ROM testing. Texas Workers' Compensation Appeal No. 950331, decided April 18, 1995. That was exactly the case here.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge