APPEAL NO. 990051

Following a contested case hearing held on December 11, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant's (claimant) impairment rating (IR) is eight percent as determined by Dr. R, the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). Claimant appeals this determination for insufficiency of the evidence, asserting that an instrument used by Dr. R, apparently an inclinometer used to measure claimant's range of motion (ROM), fell on the floor and broke but that Dr. R continued to use it, and that both the respondent's (carrier) doctor, Dr. C, and claimant's doctor, Dr. P, assigned higher IRs. The carrier contends that the evidence is sufficient to support the appealed findings and conclusion.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury to his back on _____, and that he reached maximum medical improvement (MMI) on October 8, 1997.

Not appealed (and thus final per Section 410.169) are findings that on December 2, 1996, claimant underwent a lumbar laminectomy, foraminectomy, partial facectomy, decompression of the sequestered extruding disc at L5-S1, and posterior lateral fusion at L5-S1; that Dr. P is claimant's treating doctor; that on October 14, 1997, Dr. C certified that claimant reached MMI on October 8, 1997, with an IR of 10%; that Dr. C assessed impairment values of 10% for specific disorders of the spine and zero percent for sensory and ROM deficits; that Dr. C invalidated claimant's measured ROM deficits on observational criteria; that on November 12, 1997, Dr. P certified that claimant reached MMI on November 7, 1997, with a 26% IR; that Dr. P assessed impairment values of 10% for specific disorders of the spine, combined with 18% for ROM deficits; that on December 18, 1997, the Commission appointed Dr. R as the designated doctor; that the designated doctor assessed impairment values of eight percent for specific spinal disorders and zero percent for sensory and ROM deficits; that the designated doctor found that the lumbar ROM did not meet the straight leg raising (SLR) validity criteria; that on January 27, 1998, Dr. P agreed that claimant reached MMI on October 8, 1997, but did not agree with the designated doctor's assessment of claimant's eight percent IR; that Dr. P's January 28, 1998, letter explained that he disagreed with the eight percent IR because in his opinion, claimant suffered residual symptoms of his low back injury and the lateral flexion should not have been invalidated; and that on April 23, 1998, claimant's bone stimulation battery was removed.

In addition to the conclusion of law that claimant's whole person IR is eight percent, claimant appeals findings that on January 7, 1998, the designated doctor certified that he reached MMI on October 8, 1997, with an eight percent IR; that the designated doctor

invalidated lateral ROM deficits on observational criteria and his opinion that claimant exerted submaximal effort; and that there was not a great weight of medical evidence contrary to the opinion of the designated doctor.

Claimant testified that he injured his back on _____, while working for a drilling company, when he slipped on a roller and fell, ending up in a sitting position; that he underwent spinal surgery on December 2, 1996, and has not improved; that he has constant pain and also numbness in his legs and feet; and that he cannot sit or stand for prolonged periods. He further stated that the designated doctor's examination only took 10 to 15 minutes; that while Dr. R was using an instrument to measure him, the instrument fell to the floor and broke in half; that Dr. R continued to use the instrument; that he does not know whether the instrument is designed to come apart and snap back together; and that Dr. R had him bend in different directions, had him lie on a mattress and raise his legs, hit his knees with a hammer, and rolled a small star across the soles of his feet. Claimant also stated that Dr. P's examination lasted a lot longer and that Dr. P tested his ability to lift and carry and sit and walk. Claimant agreed that he had Dr. P write two letters questioning Dr. R's report and that he had three benefit review conferences. Claimant, who indicated he had no medical training, stated that he disagreed with Dr. R's IR because of the brevity of the examination and because Dr. R broke the instrument. He also said that when he was examined by Dr. C, he still had the battery implanted.

Dr. C's Report of Medical Evaluation (TWCC-69) dated October 14, 1997, certified that claimant reached MMI on October 8, 1997, with an IR of 10%. Dr. C's narrative report of October 8, 1997, states that claimant's 10% IR is from Table 49 II E of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Dr. C further states that on ROM testing, "applying all appropriate validity criteria," claimant's impairment is zero percent and that he failed to meet the SLR test on lumbar flexion and extension. Dr. C also stated that claimant had no objective, measurable motor or sensory deficits.

Dr. P's TWCC-69 dated November 12, 1997, certified that claimant reached MMI on November 7, 1997, with an IR of 26%. Dr. P's narrative report of November 7, 1997, states that the 26% IR consists of 18% for ROM, 10% under Table 49, and zero percent for radiculopathy.

Dr. R's TWCC-69 dated January 7, 1998, certified that claimant reached MMI on October 8, 1997, with an IR of eight percent. Dr. R's narrative report of the same date states that he did not feel claimant had reached MMI when he first saw claimant on August 30, 1996; that claimant subsequently underwent a laminectomy and fusion of L5-S1 on December 2, 1996; that claimant has recovered from the surgery and "has no residuals from it"; that claimant is at MMI and fit to return to work; and that the eight percent is based on Table 49 II D of the AMA Guides. Dr. R further reported that claimant's observed spinal ROM as he moves about is greater than that formally measured; that claimant's SLR is measured to be less than his observed stride when walking; that claimant's neurologic

exam is grossly normal; and that it was impossible to assess the knee and ankle jerks since claimant's leg muscles were being held in tension.

Dr. P, who performed claimant's lumbar spine surgery, wrote on January 28, 1998, that he disagreed with Dr. R's eight percent IR and felt that Dr. R had not followed the AMA Guides. Dr. P specified that claimant had residual symptoms and thus should be assigned a 10% rating under Table 49 II E, that "[a]ccording to the law in Texas, a physician cannot declare the lateral flexion invalid," and that if Dr. R had any problems with ROM, he could use Table 50 for ankylosis.

Dr. R, who was sent a copy of Dr. P's letter, wrote on February 18, 1998, that his examination indicated that claimant recovered from his surgery without residuals from the surgery or the underlying condition and that claimant had discomfort from tissue tenderness over the sacroiliac joint some distance from the operative site, thus accounting for Dr. R's assignment of eight percent under Table 49. Dr. R further wrote that he invalidated claimant's lateral flexion ROM because he observed motion greater than that measured and the AMA Guides do allow for invalidation based on submaximal effort. He also stated that since claimant's spine is not ankylosed, the use of Table 50 is wholly inappropriate and that he stands by his examination and evaluation of an eight percent IR.

Dr. P wrote on February 26, 1998, that a Commission course teaches that lateral bending cannot be invalidated and that only a hearing officer can state whether there is invalidity. He also stated that claimant does have ankylosis of L5-S1 secondary to the fusion and that Table 50 of the AMA Guides is used for ankylosis.

Dr. R wrote on April 27, 1998, that the examination of a patient includes both observation and measurement, and that since the examiner is assessing permanent impairment, an observed motion must be used in rating a patient even if it cannot be obtained again for measurement for whatever reason. He said that in claimant's case, claimant was willing to laterally flex his spine until instruments were applied for measurement.

Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of that 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. We are satisfied that the challenged findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The Appeals Panel has frequently noted the important and unique position occupied by the designated doctor under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have just as frequently stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence (Appeal No. 92412) and that a designated doctor's report should not be rejected "absent a substantial basis to do so." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993.

Claimant produced no medical evidence that Dr. R's examination, though perhaps more brief than the examination by Dr. P, was incomplete or inadequate to comply with the AMA Guides nor did he produce medical evidence that Dr. R's ROM measurements were invalid for having been taken with a broken inclinometer, goniometer, or other such instrument. That Dr. P and Dr. R differed with respect to whether claimant had residual symptoms following the surgery for his disc lesion was a matter of professional judgment and a difference in such judgment does not constitute the great weight of the other medical evidence. Finally, Dr. R's having invalidated claimant's lateral ROM measurements based on his clinical observations that claimant displayed greater lateral bending motion before the measurements were undertaken likewise does not invalidate Dr. R's report. *See* Texas Workers' Compensation Commission Appeal No. 960868, decided June 20, 1996.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge