APPEAL NO. 990160

This appeal is brought 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 December 2, 1998. The issue reported as unresolved at the benefit review conference (BRC) was: what is the claimant's impairment rating (IR). The hearing officer denied a motion to add the issue of whether the Texas Workers' Compensation Commission (Commission) should appoint a second designated doctor to evaluate the appellant (claimant) and a motion for a continuance so that the claimant could comply with Commission rules so that the issue could be added. The claimant and the respondent (carrier) stipulated that the claimant sustained a compensable low back injury on _____, and that she reached maximum medical improvement (MMI) on _____, as certified Dr. B, the Commission-selected designated doctor. The hearing officer determined that the November 14, 1997, certification of Dr. B that the claimant's IR is 14% is entitled to presumptive weight; that that certification is not contrary to the great weight of the other medical evidence; and that the claimant reached MMI on September 17, 1997, with a 14% IR. The claimant appealed, contended that the hearing officer erred in not adding the requested issue, urged that she met her burden of proving that the great weight of the evidence is contrary to the report of the designated doctor that her IR is 14%, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that her IR is 23% as certified by Dr. M, her treating doctor. The carrier responded, urged that the hearing officer did not commit error in not adding the requested issue and in determining that the claimant's IR is 14% as assigned by the designated doctor, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

We first address the hearing officer's denial of the request to add the requested issue. Unlike many hearing officers, the hearing officer included the motions made by the claimant, information related to those motions, and how he ruled on the motions in his Decision and Order. The BRC was held on November 3, 1998, and at the conclusion of that BRC the claimant , the attorney representing her, and the attorney who represented the carrier at the BRC signed a Notification of Scheduling of Benefit Contested Case Hearing stating that the CCH was scheduled for December 2, 1998, and that certain things, including that a party is not prepared, will not be considered good cause for granting a continuance. It appears that the expedited scheduling of the CCH was done at the request of the claimant because she had been paid 104 weeks of temporary income benefits and 42 weeks of impairment income benefits based on the 14% IR and was not receiving income benefits. The BRC report contains the following:

> ISSUE RAISED BUT NOT RESOLVED AFTER [BRC]: What is the Claimant's [IR]?

> CLAIMANT'S POSITION: Claimant's [IR] is undetermined at this time. Claimant disputes the 14% [IR] as assigned by the designated doctor, [Dr. B]. Claimant underwent spinal surgery on 07-28-98. The Commission should appoint a new designated doctor to address claimant's current condition as a result of the second spinal surgery. The designated doctor also misapplied the AMA guide [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association] in invalidating the range of motion [ROM] and impairment for sensory loss. Claimant's [IR] is 23% as assigned by her treating doctor, [Dr. M].
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> CARRIER'S POSITION: Claimant's [IR] is 14% as assigned by the designated doctor, [Dr. B]. Claimant underwent spinal surgery 9 months after the date of statutory [MMI]. There was no recommendation for spinal surgery during the period when she was initially evaluated by the designated doctor. It is improper to send medical back to the designated doctor after the statutory date of [MMI].

The benefit review officer recommended that the claimant's IR is 14% as certified by Dr. B and included rationale for that recommendation. At the CCH the parties agreed that the issue was as stated in the BRC report. During his opening statement, the attorney representing the claimant stated that a second designated doctor should be appointed because Dr. B is not of the same specialty as is Dr. M. He argued that the BRC report indicated that the issue of appointing a new designated doctor was included in the issue in the BRC report; that it was not necessary that the claimant respond to the BRC report to have the issue added; and that, because of the scheduling of the BRC, there was not adequate time to request that the issue be added. The hearing officer did not agree, did not add the issue, and stated that the issue before him was as it is stated in the BRC report.

The hearing officer read portions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.7 (Rule 142.7), Statement of Disputes. Rule 142.7(a) provides:

> Statement of Disputes. The statement of disputes is a written description of the benefit dispute or disputes to be considered by the hearing officer. A dispute not expressly included in the statement of disputes will not be considered by the hearing officer.

Rule 142.7(b) provides:

> Statement of disputes after a [BRC]. The statement of disputes for a hearing held after a [BRC] includes:
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> (1) the benefit review officer's report, identifying the disputes remaining unresolved at the close of the [BRC];

(2) the parties responses, if any;

(3) additional disputes by unanimous consent, as provided by subsection (c) of this section; and

(4) additional disputes presented by a party, as provided by subsections (d) and (e) of this section, if the hearing officer determines that the party has good cause.

Subsections (d) and (e) provide that a request to add a dispute must be in writing. The claimant requested an expedited setting of a CCH, the expedited setting of the CCH precluded the claimant from submitting a timely request, and she did not submit a request to add an issue in writing at any time. The hearing officer determined that the requested issue was not included in the issue in the BRC report and did not find good cause for adding the requested issue. He did not commit error in making that determination and not finding good cause to add the requested issue.

We next address the contention that the great weight of the evidence is contrary to the report of the designated doctor that the claimant's IR is 14%. If the Commission selects the designated doctor as was done in this case, the Commission shall base its determination of whether the claimant has reached MMI and the claimant's IR on the report of the designated doctor unless the great weight of the other medical evidence is to the contrary. Section 408.125(e). 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 report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report is accorded the special presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

The Decision and Order of the hearing officer includes a detailed statement of the evidence. A brief summary of the medical evidence will be included this decision. On September 17, 1997, Dr. M completed a Report of Medical Evaluation (TWCC-69) in which he certified that the claimant reached MMI by operation of law on that date with a 19% IR. The narrative attached to that TWCC-69 states that she had a percutaneous discectomy at L3-4 and L4-5; that she may have to have a laminectomy and fusion; and that she was assigned 11% impairment under Table 49 of the AMA Guides and 11% for loss of ROM for a 21% IR at the present time. In a TWCC-69 dated November 14, 1997, Dr. B, the designated doctor, certified that the claimant reached MMI on September 17, 1997, with a 14% IR. In a narrative attached to that TWCC-69, Dr. B stated that the claimant invalidated lumbar flexion and extension ROM because of the straight leg raising test, that she failed to reveal any sensory or motor loss, and that he assigned 11% under Table 49 of the AMA Guides and three percent for loss of lateral ROM to arrive at the 14% IR. In a letter dated December 23, 1997, Dr. M stated his disagreement with the IR assigned by Dr. B; said that Dr. B did not used Table 49 of the AMA Guides and assigned 14% for loss of ROM, and that he, Dr. M, would combine Dr. B's 14% for loss of ROM with 10% under Table 49 for a

23% IR. In a letter to Dr. B dated April 9, 1998, a Commission dispute resolution officer asked Dr. B to review enclosed information submitted by the attorney representing the claimant and to submit an amended TWCC-69 if he changed the IR. The letter in the record does not have an attachment. In a letter dated April 27, 1998, Dr. B stated that he reviewed the enclosed information; that it was apparent to him that no one had read his report dated November 14, 1997; that his examination did not reveal sensory or motor deficits and no impairment for them was assigned; that the claimant's complaints of chronic pain did not follow the specific course of any of the involved peripheral nerves as described in Table 14 of the AMA Guides; that he assigned 11% under Table 49 of the AMA Guides; that he invalidated lumbar flexion and extension because of straight leg raising tests; that he assigned three percent for loss of ROM in the lateral bends; and that the 14% IR is correct and was determined according to the AMA Guides.

The claimant had additional surgery at L3-4 and L4-5 on July 28, 1998. When surgery is considered or proposed prior to the date the claimant reaches MMI by operation of law, an IR is assigned after the claimant reaches MMI, and the surgery is performed after the IR is assigned; a designated doctor may reevaluate the claimant and assign another IR within a reasonable time. Texas Workers' Compensation Commission Appeal No. 94978, decided September 8, 1994. The claimant attempted to have another designated doctor appointed; a second designated doctor is appointed under limited circumstances, such as when the designated doctor is unable or unwilling to render a report in compliance with the AMA Guides, Texas Workers' Compensation Commission Appeal No. 941635, decided January 24, 1995; the claimant did not seek to have Dr. B reexamine the claimant and assign another IR; and additional evidence that would be considered in determining whether Dr. B should have reexamined the claimant and assigned another IR after the second surgery will not be summarized in this decision.

The hearing officer resolves conflicts in expert evidence and assesses the weight to be given to expert evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer determined that the report of the designated doctor is entitled to presumptive weight and that the great weight of the other medical evidence is not contrary to the report of the designated doctor. Only were we to conclude, which we do not in this case, that those determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust would there be a sound basis to disturb his determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge