APPEAL NO. 990228

Following a contested case hearing held on December 28, 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 zero percent. Claimant has appealed, asserting, in effect, that the determination is not sufficiently supported by the evidence. The respondent (carrier) responded and contends that the evidence is sufficient to support an affirmance.

DECISION

Affirmed.

The parties stipulated that claimant's date of maximum medical improvement (MMI) is June 10, 1998, as determined by Dr. R, the designated doctor selected by the Texas Workers' Compensation Commission (Commission). Not appealed are findings that claimant worked as a machine operator for the employer and began experiencing lower back pain in _____; that claimant sought medical treatment for low back pain in _____ and missed approximately six days from work; that claimant returned to her regular duties in late _____ and continued to work until mid-January 1998 when she again sought medical treatment for low back pain; and that claimant began treating with Dr. B on January 21, 1998, was taken off work for approximately one month, and then returned to her regular duties as a machine operator.

Claimant testified that on the date of her injury (_____), she felt pain in her low back when she leaned forward and reached while sewing jeans at her machine at work. She acknowledged that she did not fall or strike her back on anything and recognized that she had earlier agreed that her injury did not include her right hip. Claimant further stated that she first sought medical treatment at "(Clinic)" on September 14th where she was given medication and taken off work for two days, and that she next was treated by a doctor in City 1, who also gave her medication and took her off work for three days. Claimant, who indicated that she was 45 years of age and had no medical training, also stated that she returned to work on September 21 or 22, 1997, and worked until she was laid off in April 1998.

The March 26, 1998, MRI report states the impression as L4-5 mild disc bulge with a small right paramedian focal disc herniation resulting in mild to moderate spinal canal stenosis and L3-4 mild disc bulge resulting in mild spinal canal stenosis.

In his April 4, 1998, report of his required medical evaluation, Dr. H stated that claimant's x-rays were unremarkable and that her March 26, 1998, MRI showed some L4-5 mild disc bulging with a small right paramedial focal disc herniation resulting in mild to moderate spinal canal stenosis. Dr. H's diagnosis was unspecified backache (ICD 724.5) and he recommended that claimant be managed with over-the-counter medications and exercise, stating that he did not feel that continued acupuncture or passive modality

treatment was indicated. Dr. H assigned no impairment for range of motion (ROM) but did assign seven percent for a herniated disc.

In his June 10, 1998, report, Dr. R noted that claimant complained of low back pain; that during the examination, she dropped her purse on the floor and readily stooped to retrieve it; that her lumbar spine was measured and found to have a normal ROM; and that her neurological exam was within normal limits. Dr. R further stated that he examined and assessed claimant according to the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); that her diagnosis is back strain; that she is at MMI and fit to work; and that her whole person IR is "0%." Claimant said that at the outset of Dr. R's exam, he asked her for her records and that when she advised him that she did not have them with her, he said that was okay, that he would have them forwarded. She also indicated that Dr. R had her stand on her toes and heels, lift her legs, and perform "exercises" and that he asked her questions about her general health. Claimant said she disagrees with Dr. R's zero percent IR because she continues "to be sick and have pain."

In his July 15, 1998, report, Dr. B stated that claimant continues to have pain in the lumbosacral area radiating in her right hip and down her leg and that his diagnostic impression included lumbar strain, sacroiliitis, bursitis of the right hip, and lumbosacral radiculopathy. Dr. B further stated that based on Table 49 of the AMA Guides, claimant is entitled to a seven percent rating for her lumbar area; that she has some lumbar ROM extension deficits which equate to a three percent rating; that she has a ROM deficit in her right hip which equates to a one percent rating; and that these ratings combine to a total whole person IR of 11%.

In evidence is Dr. R's letter of September 1, 1998, responding to the August 21, 1998, letter from a Commission dispute resolution officer which advised Dr. R that an attorney had disputed his IR and which requested that Dr. R "review the attached request." However, no attachment or enclosure accompanied this exhibit. Dr. R's response stated that "it would have been nice" had the dispute been put into words; that he presumed that the attorney was taking the MRI report to describe the result of trauma; that he, Dr. R, sees the report as describing degenerative disease; that claimant did not describe the sort of incident which might result in serious spinal injury; and that Dr. R's worksheet which accompanied his report clearly showed that claimant had no permanent lumbar spine impairment.

Claimant testified that the benefit review officer (BRO) who conducted the benefit review conference on October 28, 1998, forwarded more medical records to Dr. R and wrote another letter for clarification of his IR. In evidence is a November 9, 1998, letter from Dr. R stating that he is responding to the November 2, 1998, letter of a Commission BRO. Dr. R states that he had to assess claimant on the basis of her history and his physical exam since no medical records were sent to him; that claimant reported that she did not fall; that no great forces were at work as discernable from the history; that his examination found her spine to be entirely normal; and that the medical records include a

report that an MRI showed degenerative disc disease at several levels with a small prolapse at L4-5 superimposed on a bulge. Dr. R further stated that he was asked if an assessment of seven percent from Table 49 II C was appropriate since two other doctors had done so. He concluded that the documentation he received with the BRO's letter strongly supports a diagnosis of degenerative disease and not of trauma, that claimant's history failed to describe an accident likely to result in trauma, and that he does "not think that Table 49 is appropriate in this case."

Section 408.125(e) provides that the report of the Commission-selected designated doctor shall have presumptive weight and that the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Section 408.124(b) provides that the Commission shall use the AMA Guides for determining the existence and degree of an employee's impairment. Section 401.011(23) defines impairment to mean any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. The Appeals Panel has frequently noted the important and unique position occupied by the designated doctor under the 1989 Act. *See, e.g.,* 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 challenges findings that she was evaluated by Dr. R, the Commission-selected designated doctor, on June 10, 1998, and Dr. R concluded that she had a lower back strain with a zero percent IR; that as of November 9, 1998, Dr. R had reviewed claimant's medical records prior to his second letter of clarification dated November 9, 1998; that in a clarification letter dated November 9, 1998, Dr. R confirms his initial diagnosis and IR and specifically states that an IR under Table 49 is not appropriate in this case; and that the determination of Dr. R, the designated doctor, is not contrary to the great weight of the other medical evidence. Claimant also appeals the hearing officer's conclusions that the determination of the designated doctor is entitled to presumptive weight and that her IR is zero percent.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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).

Claimant's predominant concerns are that Dr. R did not have her medical records when he examined her and did not assign impairment under Table 49 for the disc lesions disclosed by the March 26, 1998, MRI report. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(h) (Rule 130.6(h) provides, in part, that the treating doctor and insurance carrier are both responsible for sending to the designated doctor all the employee's medical records relating to the medical condition to be evaluated by the designated doctor that are in their possession and that such records must be received by the designated doctor at least three days prior to the date of the appointment specified in the Commission order. This rule also provides for an administrative penalty for violations. Rule 130.6(j) provides, in part, that the designated doctor must evaluate the complete clinical and non-clinical history of the medical condition, perform an examination of the employee, analyze the medical history with the clinical and laboratory findings, and assess and certify an IR according to the AMA Guides. While the record indicates that Dr. R did not have claimant's records at the time he examined her, the hearing officer found that he later acquired them and his assessment remained unchanged. While the correspondence between the Commission employees and Dr. R were not models of clarity, we believe the hearing officer could reasonably infer from that correspondence that Dr. R did review the relevant medical reports, albeit after he examined claimant. Accordingly, we do not find a basis in Rule 130.6(j) to invalidate Dr. R's report.

As for the matter of a rating under Table 49, it was for Dr. R to determine whether claimant had any impairment, as defined in Section 401.011(23), from the compensable injury. The Appeals Panel wrote in Texas Workers' Compensation Commission Appeal No. 94570, decided June 15, 1994, that a spinal abnormality (in that case, a bulging) "is not necessarily in itself evidence of a compensable injury but can be simply a deviation from a norm, or ideal condition, that may or may not constitute damage or harm to the physical structure of the body produced by a compensable injury," and that to be the basis of an IR under Table 49, the bulging "must rise to the level of a pathology or lesion caused by the compensable injury. [Citation omitted.]" It seems clear from his report and correspondence that Dr. R did not consider that claimant's low back injury, diagnosed, variously, as backache, back strain, and sacroiliitis, resulted in a lumbar intervertebral disc or other soft tissue lesion warranting a rating under Table 49. *And see* Texas Workers' Compensation Commission Appeal No. 951921, decided December 11, 1995, where the employee's treating doctor assigned ratings under Table 49 for specific disorders of the cervical spine and lumbar spine whereas the designated doctor did not, the hearing officer rejected the designated doctor's IR, and the Appeals Panel reversed and rendered a new decision adopting the designated doctor's IR.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge