APPEAL NO. 990449

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 26, 1999. The issue at the CCH was the impairment rating (IR) to be assigned to the appellant, who is the claimant, for his compensable injury of _____.

The hearing officer found that the claimant had a 12% IR in accordance with the report of the designated doctor, which was not against the great weight of the contrary medical evidence. It was stipulated that the claimant had reached maximum medical improvement on January 23, 1995.

The claimant has appealed the decision and argues that it is against the great weight of the evidence. He argues that important evidence was excluded by the hearing officer that would have changed the result. Claimant also says his attorney had obtained valuable information that should have been allowed. The respondent (carrier) argues that the decision is supported by the evidence and would not have been changed by the evidence not admitted, and asks that the decision be affirmed.

DECISION

Affirmed.

Claimant injured his back on _____, while employed by (employer). Claimant's injury was essentially a soft tissue injury, with an MRI showing only a mild bulge and degenerative conditions in the lumbar spine. Claimant agreed he had been treated with pain medication and there was no recommendation for surgery. His treating doctor was Dr. N.

The designated doctor was Dr. A, who evaluated claimant on March 6, 1995. He assessed a 12% IR, based entirely on range of motion (ROM) deficits. Dr. N had assessed a 22% IR, 17% of which was for ROM deficits and five percent for specific conditions of the lumbar spine. Dr. A noted in his report that a carrier doctor had certified a 13% IR.

Claimant argued that Dr. A failed to answer interrogatories which were sent to him sometime in the month before the CCH. There was testimony that these may not have been sent, as well as evidence that the hearing officer discussed with Dr. A the questions that did and did not have to be answered. Claimant also objected to Dr. A's IR because he purportedly took only five to 10 minutes in his examination and, compared to Dr. N, he was unfamiliar with claimant's case. The claimant argued that because he could still not work, he should have more than a 12% IR.

At the beginning of the CCH, one of claimant's exhibits, which included another copy of Dr. N's certification of IR, as well as answers to questions sent to Dr. N, was objected to as not having been timely excluded. The claimant said that he thought his prior attorney

(by whom he had not been represented for 10 months) had sent all pertinent information to the carrier. The hearing officer excluded this exhibit for failure to timely exchange and found no good cause. If the claimant's previous attorney had obtained additional evidence relevant to the case, it was not presented as evidence in the case.

Evidence not exchanged with the other party may be excluded from evidence at the hearing. Section 410.161. The claimant did not show that the answers to questions from his treating doctor had been timely exchanged, and we cannot agree that the hearing officer committed error by excluding them. We would note that much of the excluded exhibit, Dr. N's report of IR, was already in evidence. We have reviewed the answers to the questions and find nothing in them that would have changed the outcome of this decision.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). She could disbelieve claimant's assessment that his examination took only five to 10 minutes. The designated doctor recorded three trials of each ROM and the claimant agreed he had been examined in this regard. The IR report of the designated doctor is entitled to presumptive weight unless the great weight of other medical evidence is to the contrary. We cannot agree that a great weight exists in this case to refute the designated doctor's opinion. Indeed, with essentially a back strain and no surgical action taken, it can be argued that the IR of the designated doctor is even somewhat high, rather than low, for such a condition. Whether the claimant feels he can return to work is not a consideration in assessing an IR, which is based upon objective evidence of physical impairment. In light of the time that passed between Dr. A's report of IR and the CCH, it would appear that there was more than enough time to clear up questions about Dr. A's methods and assumptions, and we will not therefore assign error because questions are asserted to have been sent to, but never answered by, the designated doctor.

In reviewing the record, we cannot agree that the decision is erroneous legally or that it is against the great weight and preponderance of the evidence, and we therefore affirm.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Judy L. Stephens
Appeals Judge