

APPEAL NO. 990610

Following a contested case hearing held on February 22, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the sole disputed issue ("What is the [respondent] Claimant's impairment rating [IR]") by determining that the report of Dr. RB, the designated doctor selected by the Texas Workers' Compensation Commission (Commission), is not against the great weight of other medical evidence and is entitled to presumptive weight, and that based on that report, claimant's IR is 25%. The appellant (carrier) has appealed, asserting that Dr. RB's report is against the great weight of the other medical evidence because the 25% IR includes impairment from previous back injuries and that the correct IR is either the seven percent assessed by the carrier's peer review doctor, Dr. JS, or the 11% assigned by claimant's treating doctor, Dr. FB. The file does not contain a response from claimant.

DECISION

Affirmed.

We note at the outset that the hearing officer's decision and order fails to reflect that the parties stipulated that the carrier accepted liability for a _____, injury to claimant. The parties also stipulated that Dr. RB served as "a commission designated doctor," and that the parties do not disagree with Dr. RB's determination that claimant reached maximum medical improvement (MMI) on April 7, 1998.

Claimant testified that he injured his back on _____, when he picked up a trash can and heard his back "pop" and felt pain; that he had a previous back injury, which he termed a major injury, on (previous date of injury), when he fell from a scaffold; that he was unsure whether he had another back injury on (alleged date of injury), but that if he did, it was minor; and that in January 1993, he underwent a laminectomy and fusion operation at the L5-S1 level. Claimant further stated that he disagreed with the 11% IR assigned by his treating doctor, Dr. FB, for his _____, injury; that he was later examined for approximately one hour by the designated doctor, Dr. RB; and that he agrees with Dr. RB's 25% IR.

Dr. FB wrote on _____, that sometime after claimant returned to work following his fusion surgery, which then appeared solid, the stresses of working caused it to eventually fail; that claimant would not have had the fusion but for his prior injury and it now needs repair; that claimant's symptoms never entirely disappeared following the surgery and have increased since the surgery has failed; and that this is an exacerbation of claimant's prior 1991 problem and a new on-the-job injury. Dr. FB wrote on August 26, 1996, that, in his opinion, claimant's fusion failed in February 1996, probably due to repetitive stress at work; that this is a new injury; and that claimant also recently reinjured his back pushing a heavy can.

Dr. FB's Report of Medical Evaluation (TWCC-69) dated January 29, 1998, states that claimant reached MMI on that date with an IR of 11%. In his accompanying narrative report, Dr. FB states that claimant came in seeking an IR for his _____, lumbar spine injury; that the finding of pain with pressure on the spine (head loading test) was non-physiologic; that a positive Hoover's test was non-physiologic; that claimant had great discrepancy between sitting and supine straight leg raising (SLR); that he had normal lower extremity strength and his sensory loss pattern was non-physiologic; that he had numerous Waddell's signs and no consistent neurological abnormality; and that he failed the validity test of lumbar flexion and extension because of the inconsistency of his SLRs and the discrepancy between the SLRs and the sacral motion. Dr. FB concluded by stating that he could only rate impairment for the specific disorder of the spine, namely, 10% for a one-level fusion, and one percent for loss of lateral bending, for a total whole person IR of 11%.

The carrier introduced a Carrier's Request for Reduction of Income Benefits Due to Contribution (TWCC-33) dated February 5, 1998. This form reflects that an IR of 15% was assigned for a prior compensable injury of "(alleged date of injury)"; that an IR of 11% was assigned for the current compensable injury of "_____"; and that the Commission approved the carrier's request for a 100% reduction in impairment income benefits and supplemental income benefits (if any) for the effects of contribution. Also in evidence is the March 28, 1994, TWCC-69 signed by Dr. D, which states that claimant reached MMI for his (alleged date of injury), injury on March 24, 1993, and which assigned an IR of 15%.

Dr. RB's undated TWCC-69 certifies that claimant reached MMI on April 7, 1998, with an IR of 25%. In his narrative report of April 7, 1998, Dr. RB states that when claimant reinjured his back picking up a trash can on _____, he was noted to have a failed lumbar fusion and that he has been seen by various physicians concerning whether to proceed with an anterior/posterior fusion or just accept his pain; that claimant was wearing a TENS unit; that claimant's complaint of sensory deficit in the lower left extremity did not correspond to specific nerve root involvement and he had no paravertebral muscle spasm; that his lumbar spine range of motion (ROM) was documented; and that he has 11% impairment for specific spinal disorders and 16% for loss of ROM which combine to a 25% whole person IR.

Dr. JS's June 26, 1998, report states that she was asked to determine if Dr. RB's 25% IR was in fact related to claimant's original injury of "(alleged date of injury)" or to his more recent injury of "_____". Dr. JS reported that claimant's 1991 "workman's compensation injury" resulted in an L4-5 and L5-S1 decompression and laminectomy with fusion in 1993; that claimant thereafter returned to work and around February 1996 began to experience the gradual onset of back pain not associated with a specific injury; that tests revealed evidence of bilateral pseudoarthrosis (nonunion of the fusion) or breakdown of the fusion from repetitive stress; that this appears to be a complication from claimant's 1993 surgery related to the 1991 injury; that in _____, claimant reported the reinjury of his back picking up a trash can; and that since the failed fusion was documented prior to

_____, it should not be included as part of claimant's IR for the _____ injury.

As for Dr. RB's report and IR, Dr. JS states that she believes the 11% rating assigned by Dr. RB for the specific spinal disorder under 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) "is incorrect in as much as it is representative of his old injury but does not apply to the _____ injury," and that she would rate claimant under Table 49 "II-BC, Intervertebral disc or other soft tissue lesions; unoperated with moderate to severe degenerative changes on structural tests for 7% whole person impairment." With regard to Dr. JS's assignment of 16% for abnormal ROM, Dr. JS states that Dr. RB's lumbar ROM studies are not compatible with his physical examination because he recorded SLRs of 16 degrees on the right and 22 degrees on the left whereas his physical examination report states that claimant has a "negative" SLR bilaterally; that certain Appeals Panel decisions state that "a doctor may set aside ROM findings which are contrary to visual observation"; and that based on these contrary findings, she believes Dr. RB will either have to repeat the ROM studies or declare the lumbar flexion and extension studies invalid. Concerning the five percent assigned by Dr. RB for lateral flexion, Dr. JS states that these studies are not consistent with previous studies done by Dr. FB indicating only one percent for right lateral flexion; that one of the basic tenets of the AMA Guides is that findings should be replicable on repeated examinations; that given this data, she believes all the ROM studies must either be invalidated or repeated; and that even if they are repeated, she believes a valid argument can be made that almost all loss of ROM is related to claimant's prior fusion surgery.

Dr. JS states, in summary, that she believes claimant's current injury represents a lumbar strain injury superimposed on a back with preexisting moderate to severe degenerative changes; that claimant should receive a seven percent rating under Table 49 II C; that she is not sure that repeat ROM testing is really indicated since his ROM loss "is almost surely all related to his previous surgical procedures"; and that, using this reasoning, claimant's IR for the _____ injury is seven percent. Dr. JS further states that "another approach" would be to calculate an IR for claimant's back involving all previous surgical procedures and ROM and then determine an "apportionment/contribution factor based on this number"; and that "the end result would be pretty much the same."

In evidence is Dr. RB's August 19, 1998, letter stating that he had reviewed Dr. JS's report and that his IR remains unchanged.

Section 408.125(e) provides that the report of a Commission-selected designated doctor shall have presumptive weight and that the Commission shall base the IR on that report unless it is contrary to the great weight of the other medical evidence. 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) and has 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).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.169(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 a challenged factual determination of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it 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). We do not regard the reports of Dr. FB and Dr. JS as constituting the great weight of the medical evidence contrary to Dr. RB's report. All three doctors assigned a rating for claimant's specific spinal disorder under Table 49 of the AMA Guides and none of them found any ratable sensory or motor deficits. The fact that Dr. FB had reason to invalidate all of claimant's ROM measurements when he examined him on January 29, 1998, except for right lateral bending, and that Dr. RB apparently did not find the ROM measurements invalid on April 7, 1998, and assigned 16% for abnormal ROM, does not result in Dr. RB's report being against the great weight of the medical evidence. Also, Dr. JS made clear that she felt that all impairment of claimant's lumbar spine which could be attributed to his 1991 injury should be deducted from the IR for the _____, injury and that she did so in arriving at her seven percent IR. The Appeals Panel has long since stated that an IR must include all impairment for the compensable injury, the extent of which is determined by the Commission, and that the designated doctor is not to reduce the impairment he or she finds to account for impairment from a prior injury or condition. See, e.g., Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993; Texas Workers' Compensation Commission Appeal No. 94517, decided June 14, 1994. Rather, the remedy for a carrier in such circumstance is to seek contribution under Section 408.084 and it appears that the carrier in this case may have already done so.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge