

APPEAL NO. 990676

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 17, 1999, a contested case hearing (CCH) was held. The issues concerned the date that the appellant, who is the claimant, reached maximum medical improvement (MMI) and the amount of his impairment rating (IR).

The hearing officer gave presumptive weight to the report of the designated doctor and, based on this report, found that the claimant reached MMI with a 10% IR. He found that the great weight of the contrary medical evidence was not against this doctor's report.

The claimant has appealed and argues that the IR of the respondent's (carrier) doctor, which was 26%, should be adopted. There is no response from the carrier.

DECISION

Affirmed as reformed.

The claimant injured his back on _____, while employed as a welder by (employer). At the time of the CCH he was working four hours a day, light duty, for the same employer, who told him he could not return to welding until fully released. The claimant's treating doctor was Dr. S. Claimant underwent lumbar surgery on February 26, 1997.

Claimant was examined by a doctor for the carrier, Dr. W, who determined that the claimant had a 26% IR. In his narrative, Dr. W stated that he believed that claimant would likely require further surgery in the future. He nevertheless stated that he believed claimant had reached MMI as of November 13, 1997. Apparently, the carrier did not accept the IR of its own doctor and disputed the IR only. In late December 1997, Dr. S had indicated agreement on the bottom of Dr. W's Report of Medical Evaluation (TWCC-69). Dr. W had not invalidated the lumbar range of motion (ROM), although another consulting doctor, Dr. ST, opined that Dr. W's observations on ROM were inconsistent with his documented clinical observations.

Dr. B examined the claimant on January 15, 1998, as a designated doctor. Dr. B stated at the outset that he had not been asked to evaluate MMI and he simply used the date set out by Dr. W. (However, MMI was in issue and there was no contention that it had not been disputed.) Dr. B assigned a 10% IR for specific conditions of the spine and invalidated the entire lumbar ROM percentages, indicating his misunderstanding that the straight leg raise (SLR) invalidated all ROM rather than only flexion and extension. His report indicated that he believed that if the SLR test was not valid, the entire lumbar ROM impairment could not be used. The ROM testing had been done by a clinic other than Dr. B's. Their underlying schedules in evidence and attached to the copy of Dr. B's report, which the claimant has put into evidence, show that the person performing ROM invalidated

only flexion and extension and assessed a six percent IR for lateral ROM deficits. The percentages derived on the lateral measurements were similar to those measured by Dr. W.

On August 4, 1998, the Texas Workers' Compensation Commission (Commission) wrote to the parties that the second opinion process for spinal surgery concurred in Dr. S's recommendation that surgery was required. On September 28, 1998, Dr. S wrote that the claimant was not at MMI and would require further surgery. He indicated on the TWCC-69 that he disagreed with Dr. B's certification. Dr. B dealt with this additional information by stating that he was doubtful, based on his experience, if surgery would improve the claimant's condition and that it was his interpretation was that an MMI date could be rescinded due to further surgery only if claimant would show improvement as a result of the procedure.

We observe that the SLR test apparently used by Dr. B to invalidate the claimant's tested ROM deficits cannot be used to invalidate lateral lumbar ROM. Texas Workers' Compensation Commission Appeal No. 950472, decided May 8, 1995. Dr. B's report indicates a mistaken reading of an Appeals Panel decision led him to invalidate the entire lumbar ROM, including the lateral measurements. Therefore, the IR, which is actually arithmetically yielded by Dr. B's report, is 15% (combining the 10% specific conditions IR with the six percent ROM IR yielded on examination by the clinic that actually performed these measurements).

The report of a Commission-appointed designated doctor is given presumptive weight. Sections 408.122(c) and 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. See Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992. We cannot agree that the great weight of contrary medical evidence is against the designated doctor's report on MMI or on IR. The fact that subsequent events occurring after MMI is certified cannot, standing alone, serve to set aside that certification. For these reasons, we affirm the hearing officer's decision but correct the findings of fact, conclusions of law, and order to state that the claimant reached MMI on November 13, 1997, with a 15% IR, and the carrier is ordered to pay 45 weeks of impairment income benefits. Lump sum payment of accrued, but unpaid, impairment income benefits in accordance with this order will not affect the claimant's future entitlement to supplemental income benefits.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge