APPEAL NO. 990907

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 30, 1999, a contested case hearing (CCH) was held. With respect to the two issues before him, the hearing officer determined that appellant (claimant) reached maximum medical improvement (MMI) on June 16, 1998, in accordance with the designated doctor's report, but that the impairment rating (IR) cannot be determined because the designated doctor did not follow the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) in the assignment of impairment for loss of range of motion (ROM) and "there is no other valid IR in the claim file."

Claimant appeals, contending that the designated doctor had correctly used the AMA Guides; that Dr. C entire report had not been sent to the designated doctor; that the designated doctor's IR has presumptive weight; and that the treating doctor, Dr. B, report (with a similar IR as the designated doctor's) is valid. The MMI date has not been appealed and, therefore, has become final. Claimant requests that we reverse the hearing officer's decision and render a decision adopting either the designated doctor's 23% IR or Dr. B's 25% IR. Respondent (carrier) responds to the points raised by claimant and urges affirmance.

DECISION

Reversed and remanded.

The parties stipulated that claimant sustained a compensable (cervical and lumbar spine) injury on _____. The medical records indicate that claimant was standing in a chair when she fell, injuring her back. The parties also stipulated that Dr. CC was the Texas Workers' Compensation Commission (Commission)-appointed designated doctor. Dr. B is the treating doctor and Dr. C is carrier's peer review doctor. As indicated, MMI has not been appealed and is no longer at issue. This case revolves entirely around whether Dr. CC properly applied the AMA Guides in assessing impairment on loss of ROM, specifically, whether loss of flexion and extension ROM should have been invalidated based on the straight leg raise (SLR) test.

At some point in time, the IR had been disputed and Dr. CC was appointed as the designated doctor. In a report dated February 10, 1998, Dr. CC indicated claimant was not at MMI and no IR was given. Claimant had spondylosis at C5-6 and spondylosis at L3 through S1 with disc desiccation at L2-3 and a mild disc bulge at L3-4. Claimant received conservative treatment and no surgery. Another doctor, Dr. A, in a report dated October 20, 1997, noted some symptom magnification, stated claimant was at MMI on that date and assessed a zero percent IR. This report was apparently disputed and led to Dr. CC's appointment as the designated doctor. Dr. B, in a report dated April 2, 1998, certified MMI and assessed a 25% IR based on seven percent impairment from Table 49, "Category 2-C"

of the AMA Guides and 19% impairment based on lumbar loss of ROM. Although Dr. B mentions claimant's cervical injury, the IR is for the lumbar spine only.

Claimant was subsequently reexamined by Dr. CC, who, in a report dated June 16, 1998, certified MMI and assessed a 23% IR based on four percent impairment from Table 49, Section II-B, for the cervical spine and five percent impairment from Table 49, Section II-B, for the lumbar spine. These ratings are not disputed. Dr. CC also assessed a total five percent impairment for loss of ROM of the cervical spine "using a C-ROM." Dr. C testified that because the values for occipital and T-1 measures were not recorded, there was no way to verify that the tests were performed correctly. Dr. CC validated the lumbar ROM testing for flexion and extension and assessed a 10% impairment (nine percent for flexion and extension, one percent for right lateral flexion) for loss of ROM. Dr. CC measured lumbar extension at 21E and lumbar flexion at 16E, which Dr. C testified was physiologically impossible if claimant could walk at all.

Dr. C, in a report dated July 15, 1998, reviewed reports from Dr. B and Dr. CC's reports of February 10 and June 16, 1998, where Dr. C expressed disagreement with Dr. CC's accuracy/validity of the ROM impairments, stating that because claimant did not have a documented disc herniation, "a restricted [SLR] would be virtually impossible." Dr. C also commented that because of the absence of the occipital and T-1 measurements, he could not "certify that the [ROM] in the cervical spine was correctly calculated." Dr. C essentially repeated and expounded in some detail these conclusions at the CCH. A Commission disability determination officer summarized Dr. C's concerns and wrote Dr. CC for clarification in a letter dated September 4, 1998, asking Dr. CC how the SLR was performed and asking for the "occipital as well at T-1 motions." Dr. CC replied by letter dated September 16, 1998, indicating the "maximum [SLR] on the left was 56E" in a supine position and assessing her right "sitting [SLR] for leg pain into the calf area at 90E of hip flexion." Dr. CC made it clear the measurements were using a passive SLR, where claimant was asked to give her best effort. Dr. C testified that it was impossible to have a variance between 21E to 23E SLR in the supine position and 90E SLR in the sitting position on the right. Dr. CC also said that he had included the cervical worksheets (which did not have the occipital and T-1 values) with his original June 16th report. Dr. B, in letters or notes dated January 21 and 27, 1999, "reaffirming" her 25% IR, stated "I can say without a doubt that often patients have a [SLR] of 23% [sic, should be degrees]." Dr. B said that she did not agree with Dr. C's assessment and that the AMA Guides use a passive SLR which is "a very subjective test." Dr. B said that she "actually got fairly similar [ROM]" results as Dr. CC using dual inclinometers. Dr. C testified that it is the doctor or examiner that raises the leg in performing the SLR rather than relying on the patient to give his or her best effort.

The hearing officer summarized the various medical reports in his findings of fact, and made the appealed findings:

FINDINGS OF FACT

9. On September 16, 1998 [Dr. CC] responded to the questions posed by the commission and affirmed the IR was 23%. [Dr. CC] did not specifically address the concerns about the 23 degrees SLR, or provide cervical spine measurements showing occipital and T1 measurements.

* * * *

11. [Dr. CC's] reports do not follow the reproducibility of the [AMA] Guides for an IR, and are not entitled to presumptive weight on the [IR].

12. Claimant's IR cannot be determined as there is no other valid IR in the claim file.

CONCLUSIONS OF LAW

5. Because [Dr. CC] served as a commission designated doctor, whose report does not follow the [AMA] Guides in the assignment of impairments for loss of [ROM] in lumbar flexion and extension, and in cervical motion, his report is not presumed to be correct, and therefore is not given presumptive weight.

6. Because there is no other valid IR in the file, on which to assign an IR, the commission cannot assign an IR to Claimant.

As we have frequently noted, the hearing officer is the sole judge of the weight and credibility to be given to the evidence (Section 410.165(a)) and this is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Consequently, it was within the hearing officer's prerogative what weight to assign Dr. C's report and testimony versus that of Dr. CC. However, the hearing officer has a duty to decide the issues before him. In this case, the issue was the IR and the hearing officer cannot simply throw up his hands and say the Commission cannot assign an IR to claimant. Section 408.125(e) gives presumptive weight to the designated doctor's report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the IR in the designated doctor's report (or, as in this case, the hearing officer determines that the designated doctor's report is wrong as not being in compliance with the AMA Guides as mandated by Section 408.124(b)), "the commission shall adopt the [IR] of one of the other doctors." The hearing officer explained why he could not adopt Dr. B's IR (because it "did not assign any impairment for the cervical area and therefore did not rate the entire injury"), but makes no mention of Dr. A's report. Further, in similar situations, we have stated that the hearing officer had an option of going back to the designated doctor a second (or third) time for clarification, or to adopt the IR of another doctor which was valid as provided for in Section 408.125, or to consider the appointment of a second designated doctor if it was determined that the designated doctor was unable or unwilling to comply with the AMA Guides. *See* Texas Workers' Compensation Commission Appeal No. 93932, decided

November 29, 1993, and cases where that decision is cited. What the hearing officer may not do is simply make a "no decision," stating that the Commission cannot assign an IR to the claimant. We do note that the hearing officer in the Decision portion states that the "matter is returned to the Commission for a determination of Claimant's IR." Obviously, that was not done and, instead, the case was sent to the Appeals Panel with a Request for Review.

Accordingly, we remand this to the hearing officer for a decision regarding claimant's IR not inconsistent with our opinion herein. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge