APPEAL NO. 991073

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 March 31, 1999, with the record closing on April 30, 1999. The issues at the CCH were: (1) the impairment rating (IR) of the appellant (claimant); (2) whether the respondent (carrier) was entitled to a reduction of the claimant's income benefits due to contribution from a prior compensable injury, and if so, in what amount and from what beginning date; (3) whether the claimant is entitled to supplemental income benefits (SIBS) for the first compensable quarter from December 5, 1998, through March 5, 1999; and (4) the claimant's average weekly wage (AWW). The hearing officer determined that the claimant's IR cannot be determined at this time and it is necessary to appoint a second designated doctor, that contribution and entitlement to first quarter SIBS are not ripe for adjudication, and that the claimant's AWW is $505.50. The claimant appeals Finding of Fact No. 6, stating that he disagrees with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); that the designated doctor did not fail to respond to the Texas Workers' Compensation Commission (Commission), that his IR is 22%; and that there is no need for another IR. The claimant also appeals Finding of Fact No. 7, urging the designated doctor responded to letters of clarification and Finding of Fact No. 8, stating that the designated doctor's report has the right to presumptive weight. The carrier replies that an accurate reading of the AMA Guides, along with Appeals Panel decisions, demonstrates, as found by the hearing officer, that the designated doctor inappropriately issued impairment in two ways: (1) the award of impairment for ankylosis under Table 50, without radiographic support; and (2) the award of impairment for the non-permanent depressive condition; that a review of the designated doctor's reports shows that while he responded to requests for clarification, as opposed to simply ignoring the requests, his responses never adequately explained why he awarded some of the impairment that he did; and that the hearing officer's decision is supported by facts and evidence in the record and should be affirmed. Not appealed is the determination of the hearing officer that the AWW is $505.50 and it has become final.

DECISION

Affirmed in part, reversed and remanded in part.

The claimant testified he sustained a low back injury on _____, when he lifted a tank at work. The claimant sought medical treatment with Dr. CG who performed surgery on April 10, 1997, an anterior lumbar discectomy at L4-5 and L5-S1 and fusion at L4-5 and L5-S1 with BAK internal fixation at L4-5 and L5-S1. The claimant testified that the carrier sent him to Dr. G. Dr. G examined the claimant on October 15, 1997, and assessed a 22% IR. The Commission appointed Dr. W as the designated doctor. Dr. W examined the claimant on November 21, 1997, and assigned an IR of 11% which included two percent from Table 49 II E, one percent from Table 49 II G, two percent for a failed back operation, and six percent from Table 50 for ankylosis stating:

> Range of motion [ROM] studies . . . were not appropriate for assignment of physical impairment, therefore 0% is allowed in both cervical and lumbar spine for [ROMs].
>
> Allowance of the lumbar spine will therefore be taken from Table 50, which in the lumbar spine this allows 6% for the ankylosis of any three lumbar vertebrae. This is a total of 11% whole person impairment.

On December 16, 1997, Dr. W increased the IR to 18% without any explanation. A benefit review officer requested clarification from Dr. W on January 23, 1998; October 12, 1998; and December 8, 1998; regarding his assignment of impairment for ankylosis and depression. Dr. W responded to each of the requests for clarification and indicated that the claimant's IR is 22%. At the CCH, the carrier argued that the designated doctor's 22% IR improperly awarded impairment for ankylosis (six percent) under Table 50 of the AMA Guides, and improperly awarded impairment for a psychological condition (five percent) which was not permanent.

Following the CCH, the hearing officer sought clarification from Dr. W regarding his assignment of impairment for ankylosis. The hearing officer noted that Dr. W had assigned six percent for ankylosis, and specifically asked Dr. W whether the claimant was entitled to an IR for ankylosis, and, if so, what is the rating. The hearing officer advised Dr. W that the Appeals Panel has stated that a rating for ankylosis cannot be given to "make up for" invalid measurements of ROM and cited the definition of ankylosis as defined on page 91 of the AMA Guides. The hearing officer also stated that Table 50 can only be used when ankylosis is diagnosed by radiographic means and instructed Dr. W that if he determined ankylosis exists, to advise what radiographic evidence he relied on in making his diagnosis. Dr. W responded on April 15, 1999, in pertinent part:

> In regards to the first part of your question, please refer to Appeal 96200 [sic, Texas Workers' Compensation Commission Appeal No. 962000, decided November 25, 1996] which states, "What the Appeals Panel has been saying is that it is a matter of medical judgment whether a particular spinal fusion has resulted in an ankylosis."
>
> It was my opinion, despite the paragraph on Page 91 in the AMA Guides, that [claimant] had an ankylosis of the spine in the areas that I have rated. I feel the rating to be appropriate.

The claimant appeals the following findings of fact:

FINDINGS OF FACT

6. The Commission has requested clarification of [Dr. W's] opinions and methodology in determining that Claimant is entitled to impairment

under Table 50 on a number of occasions, but [Dr. W] has failed to adequately respond to the requests for clarification.

7. [Dr. W] has failed to apply the [AMA Guides] properly, has failed to adequately perform his function as a designated doctor in this matter, and his report, assigning impairment under Table 50, is invalid.

8. The report of [Dr. W] is not entitled to presumptive weight.

* * *

10. [Dr. G] failed to properly apply the [AMA Guides] and the [IR] assigned by [Dr. G] is invalid.

11. There is no valid [IR] and it is necessary to appoint a second designated doctor to evaluate Claimant and determine an [IR] which complies with the [AMA Guides].

The report of a Commission-selected designated doctor is generally given presumptive weight with regard to maximum medical improvement status and IR. Sections 408.122(b) and 408.125(e). The amount of evidence needed to overcome the presumption is the "great weight" of the other medical evidence. 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. 92166, decided June 8, 1992.

If a designated doctor's report shows that he is not properly applying the AMA Guides, the hearing officer should ask the designated doctor to clarify why he applied the AMA Guides in the manner that he or she did. Texas Workers' Compensation Commission Appeal No. 951922, decided December 28, 1995. A new designated doctor should not be appointed until the designated doctor has had an opportunity to clarify. If a designated doctor cannot or refuses to comply with the requirements of the 1989 Act, a second designated doctor may be appointed. Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993.

Page 91 of the AMA Guides states, "[a]nkylosis in the lumbosacral spine has significance only if immobility occurs in *both* the hips and the lumbar spine region, so that that neutral position cannot be attained in the sagittal plane." (Emphasis in original.) In Texas Workers' Compensation Commission Appeal No. 961324, decided August 16, 1996, we stated that Table 50 can only be used when ankylosis is diagnosed by radiographic means. We have also stated that a rating for ankylosis cannot be given to "make up for" invalid measurements of ROM. Texas Workers' Compensation Commission Appeal No. 970202, decided March 24, 1997; Texas Workers' Compensation Commission Appeal No. 962094, decided December 6, 1996.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The record supports the hearing officer's determination that the designated doctor has failed to apply the AMA Guides properly. The designated doctor disregarded part of the AMA Guides, page 91. None of the designated doctor's reports or letters of clarification indicate that it was impossible to attain the neutral position in the sagittal plane, nor did he indicate what radiographic evidence he relied upon to diagnose ankylosis. The only other IR assigned to claimant was that assessed by Dr. G. The hearing officer also determined that Dr. G improperly applied the AMA Guides. The hearing officer states that Dr. G assigned a percentage of impairment for ankylosis due to invalid ROM measurements and this is sufficiently supported by Dr. G's report which states "because of his low [ROMs], which I cannot substantiate by muscle spasm or contracture or x-ray changes, we use Table 50 that allows 12% for any three lumbar."

The hearing officer found that the designated doctor failed to adequately respond to requests for clarification, and that it is necessary to appoint a second designated doctor. The record indicates that in response to a letter of clarification, the designated doctor, in a letter dated October 28, 1998, offered to reexamine the claimant in an attempt to validate ROM. However, it does not appear that the designated doctor was ever instructed to reexamine the claimant. In light of this letter and the designated doctor's repeated responses to each letter of clarification written by the Commission, we reverse the hearing officer's Finding of Fact No. 11 and Conclusion of Law No. 3, and the decision and order insofar as it finds them necessary for the Commission to appoint a second designated doctor. We remand the issue to the hearing officer for further consideration and development of the evidence pertaining to the claimant's ROM and for a decision on the issue of IR. On remand, the hearing officer should advise the designated doctor: (1) that he is not to use Table 50, (2) to retest the claimant for ROM, and (3) to issue an opinion as to the claimant's IR based on ROM, incorporating what impairment he has previously determined, with the exception of Table 50.

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.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge