APPEAL NO. 991109

Following a contested case hearing held in El Paso, Texas, on April 15, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that, based on the report of the designated doctor, which she found to be entitled to presumptive weight, the appellant (claimant) reached maximum medical improvement (MMI) on March 20, 1998, with an impairment rating (IR) of two percent. Claimant's request for review sets forth a substantial amount of information, apparently from various medical reports, and, while not specifically challenging any particular findings of fact, requests that we review the sufficiency of the evidence concerning the two percent IR. The respondent (carrier) has filed a response urging, first, that we strike the appeal for untimeliness and, alternatively, that the evidence sufficiently supports the hearing officer's IR.

DECISION

Affirmed.

The records of the Texas Workers' Compensation Commission (Commission) reflect that the hearing officer's decision and order was distributed to the parties on April 21, 1999. Pursuant to the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h), claimant is presumed to have received the decision and order five days later, on April 26, 1999, a Monday. Claimant's deadline to file her appeal was 15 days later, May 11, 1999, a Tuesday, and her appeal must have been received by the Commission by the 20th day after her receipt of the decision and order. Section 410.202(a). Claimant's appeal was mailed on May 11, 1999, and received by the Commission on May 17, 1999, and, thus, was timely filed. On May 19, 1999, claimant mailed another, more legible, copy with some corrections of dates. This document was not timely as an appeal and will not be considered.

The parties stipulated that claimant sustained a compensable injury on _____; that on May 15, 1997, Dr. C, claimant's treating doctor, certified that claimant reached MMI on May 15, 1997, and assigned a 16% IR; that the Commission-selected designated doctor is Dr. H; that on August 11, 1997, Dr. H certified that claimant reached MMI on May 15, 1997, and assigned a four percent IR; and that on December 7, 1998, Dr. H amended his report, certifying that claimant reached MMI on March 20, 1998, and assigned a two percent IR.

Claimant, who declined the assistance of a Commission ombudsman, testified that she sustained a prior low back injury on (prior date of injury), and that on _____, she slipped and fell at work, reinjuring her low back and also injuring her hands. Concerning her IR, claimant stated that a carrier-selected doctor, Dr. V, assigned a 16% IR for her low back injury (no report of Dr. V was introduced into evidence); that her former treating doctor, Dr. C, who performed the lumbar laminectomy and fusion surgery after her August 1993 injury, also assigned a 16% IR for her low back; and that, because these ratings did

not include impairment for her right hand, she requested a benefit review conference to consider a disputed issue concerning the compensability of her right hand injury. In evidence is a Benefit Dispute Agreement (TWCC-24), signed by the parties on August 20, 1997, stating the parties' agreement that claimant's compensable injury extends to her right wrist carpal tunnel syndrome (CTS) only and not to her left wrist CTS. Claimant said that Dr. W, who was originally selected as the designated doctor, evaluated her right hand and assigned a two percent IR but did not rate her low back and that after Dr. W went on medical leave, Dr. H was substituted as the designated doctor.

Claimant further testified that Dr. H's evaluation was "haphazard" and took no more than 15 minutes, that she did not see Dr. H review any films, and that he seemed uninterested in the medical records she gave him; that Dr. H did not have her disrobe and don a gown; and that she saw no measuring instruments during the exam. She said that Dr. H first assigned ratings of one percent for her low back injury, one percent for her right upper extremity injury, and two percent for her left upper extremity; and that, after being advised that her left upper extremity was not part of the compensable injury, Dr. H amended his report to subtract the two percent for the left extremity. She characterized Dr. H's ratings of one percent for her low back injury and one percent for her right hand as "a total misjustice."

In his narrative report of August 11, 1998, which accompanied his first Report of Medical Evaluation (TWCC-69) dated August 11, 1998, certifying to MMI on "5-15-97" with an IR of "4%," Dr. H stated the diagnoses as "bilateral upper extremity pain associated with epicondylitis and tendinitis; mild right ulnar neuropathy without residual motor loss and with mild sensory deficit; mild lumbar strain without evidence of structural derangement directly related to this injury; left lower extremity contusion, resolved; unrelated to this injury the patient has had a prior two-level lumbar fusion which does not appear to be markedly structurally altered or aggravated by this injury; and chronic pain syndrome with associated depression and anxiety." Dr. H further reported that claimant has mildly abnormal range of motion (ROM) warranting a one percent rating but no 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). Dr. H further stated that claimant's abnormal right wrist ROM was assigned a one percent rating. In evidence is a March 20, 1998, report stating the impression, "Normal EMG and NCV, right upper extremity." Dr. H's amended TWCC-69 dated December 7, 1998, certifies that claimant reached MMI on "3/20/98" with an IR of "2%." In his narrative report of December 7, 1998, Dr. H states that, since he was now being asked to address the MMI date as well as the fact that the compensable injury does not include the left upper extremity, he felt that the date of the EMG report (March 20, 1998) was a reasonable date to use for MMI since the EMG completed the work-up that Dr. W had recommended.

Dr. M, a chiropractor who was one of claimant's treating doctors, stated in his Initial Medical Report (TWCC-61) dated "09/24/98" that he saw claimant on "09/15/98" and diagnosed failed back syndrome--lumbar spine, and right upper extremity CTS. In his narrative report dated October 14, 1998, Dr. M assigned claimant a 20% rating for her

lumbar spine impairment and two percent for her right upper extremity and also stated that he felt that, because of her prior injury, the 20% lumbar spine rating should be decreased to 12% which, combined with the two percent for her right upper extremity, yields a whole person IR of 14%.

Claimant indicated that she was dissatisfied with Dr. M and sought treatment at the (medical center) where, in December 1998, she was given an injection in her right shoulder, which helped. The medical center's March 26, 1999, treatment notes of Dr. B state that claimant does not desire physical therapy, surgery, or acupuncture and that the abnormal lumbar spine electrodiagnostic study findings can also be explained by claimant's previous surgery.

With respect to the determination of an injured employee's IR, Section 408.125(e) of the 1989 Act provides that the report of the designated doctor selected by the Commission shall have presumptive weight and that the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. 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. 92555, decided December 2, 1992; Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have 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 opinion of a designated doctor must be weighed according to its "thoroughness, accuracy, and credibility with consideration given to the basis it provides for opinions asserted." Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993.

The hearing officer found that Dr. H prepared his report after examining claimant, reviewing medical records, and utilizing the proper version of the AMA Guides; that Dr. H adequately addressed the questions posed and properly amended his report when he became aware that claimant's left upper extremity was not part of the compensable injury and that he was to also opine on the MMI date; and that the great weight and preponderance of the other medical evidence is not contrary to the determination of MMI and IR as certified by the designated doctor and his findings are entitled to presumptive weight.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them 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). As noted, no report from

Dr. V was introduced into evidence. We do not view the report of Dr. C, who did not rate claimant's right upper extremity, nor the report of Dr. M, as constituting the great weight of the medical evidence contrary to the amended report of Dr. H.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge