APPEAL NO. 991166

Following a contested case hearing (CCH) held on April 19, 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 by determining that, based on the report of the designated doctor, which she found entitled to presumptive weight, the appellant's (claimant) impairment rating (IR) is eight percent. Claimant has requested review. She seeks a remand for reexamination by the designated doctor and further development of the evidence pertaining to her impairment because, since her previous reexamination in May 1998 by the designated doctor and his amendment of his report to increase her IR from seven percent to eight percent to account for her initial lumbar spine surgery, she had a second spinal operation in February 1999. The respondent (carrier) urges, in response, that the evidence is sufficient to affirm the hearing officer's determination and that claimant has not established a basis to revisit the designated doctor's amended IR over three years beyond statutory maximum medical improvement (MMI) simply because she has undergone further surgery.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable lumbar spine injury while in the course and scope of employment with (employer). The parties agreed at the hearing that claimant reached statutory MMI on March 4, 1996, and that the disputed issue of whether she had disability beginning on or after May 1, 1996, is moot.

No witnesses testified and the case was submitted to the hearing officer on documentary evidence and argument of the parties. Dr. F, the designated doctor selected by the Texas Workers' Compensation Commission (Commission), signed a Report of Medical Evaluation (TWCC-69) on September 23, 1996, certifying that claimant reached MMI on April 10, 1996, with an IR of seven percent. Dr. F's narrative report of the same date reflects that claimant hurt her back at work on _____, while moving and stacking some large boxes of office supplies from one side of an office to another; that an MRI in August 1995 showed a ruptured disc at L5-S1; that all of claimant's range of motion (ROM) testing was invalid; and that claimant was assigned an IR of seven percent based on Table 49 II 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. G, claimant's current treating doctor, stated in his report of his February 27, 1998, examination of claimant that the diagnosis is post-laminectomy syndrome and herniated nucleus pulposus (HNP) of the lumbar spine. Dr. G further writes that claimant underwent a lumbar laminectomy at L5-S1 on August 5, 1997, by Dr. K; that she has had persistent complaints of pain and radicular-type symptoms since that surgery; that she has had several IRs assigned with one physician having assigned five percent and another

seven percent, both having been assigned prior to the August 1997 surgery; and that further diagnostic studies indicate that claimant has a herniation of the disc at L5-S1 and bilateral S1 radiculopathies. In this report, Dr. G assigned claimant an 18% IR consisting of 10% for the specific spinal disorder under Table 49 of the AMA Guides, four percent for abnormal lumbar spine ROM, and four percent for motor and sensory disorders.

On June 7, 1998, Dr. F signed a TWCC-69 certifying that claimant reached MMI on April 10, 1996, and assigning claimant an IR of eight percent; Dr. G indicated on this form his disagreement with both the MMI date and the IR. In his accompanying narrative report, Dr. F states that he reexamined claimant on May 15, 1998; that claimant underwent lumbar disk surgery in August 1997 by Dr. K; that claimant is also under the care of Dr. G; that claimant says Dr. G has recommended spinal fusion surgery which has been approved; and that she is planning to undergo the surgery by Dr. G sometime in June. Dr. F's diagnosis was "status postoperative lumbar disk surgery for HNP, L5-S1, August 1997; recurrent disk herniation, L5-S1; facet arthritis; and lateral recess stenosis, mild." Dr. F further stated that claimant related that her benefit review conference (BRC) needed an IR at this time and that Dr. G has assigned an 18% IR. Dr. F stated that he assigned an IR of eight percent based on Table 49 II E; that he found no strength or sensory deficits; that, in his clinical office exam, he was convinced that claimant was not giving valid bending efforts; and that the examiner at an evaluation center where claimant's ROM was tested with computerized equipment, Ms. S, felt that claimant was not giving a valid effort. A May 27, 1998, letter to Dr. F from the evaluation center states that on May 15, 1998, claimant's lumbar spine ROM was measured using computerized dual inclinometers, that tests were performed on two separate occasions, and that claimant qualified for a 13% IR. Accompanying the letter are worksheets indicating IRs for ROM of 15% and 13%. Dr. F also stated that he felt claimant reached statutory MMI on February 1, 1996. Dr. G wrote on July 10, 1998, that Dr. F's report was incorrect because he recognized that claimant is going to be undergoing surgery but did not use the statutory MMI date and because he failed to use either the 13% or 15% IRs for ROM reported by the evaluation center.

Dr. G wrote on July 10,1998, concerning Dr. F's IR that Dr. F gave claimant a 13% IR and then combined it with eight percent "and somehow the 13% was obviously mislaid"; that Dr. F should have assigned a 20% IR instead of eight percent; and that another reason to review Dr. F's IR is that claimant has submitted a request for spinal surgery via the Recommendation for Spinal Surgery (TWCC-63) process and is obviously not at MMI since she is going to have further surgery and will not be at MMI for nine months. Also in evidence is the July 29, 1998, letter from Dr. G stating that claimant has a post-laminectomy syndrome with failed discectomy, that she is not at MMI, and that she "will be going ahead with her fusion procedure" which has been approved.

Claimant contends on appeal that Dr. G "opted for surgery before the date of statutory [MMI]"; that claimant finally underwent the surgery in February 1999 "which resulted in a substantial change of medical condition"; that when claimant underwent her fusion, "she considerably became more impaired as a natural flowing consequence of the severe surgery that she underwent"; that her "[ROMs] by the very nature of a 360 global fusion were inhibited, and required a new evaluation"; and that "therefore the hearing was

not ripe until the Designated Doctor performs the [IR] again." Claimant concludes that the hearing was premature and that the only available remedy is to remand to another CCH for claimant to be reevaluated by the designated doctor for a final and proper IR after she has stabilized. The carrier responds that claimant is requesting another IR over three years after statutory MMI and over five years after the injury which the carrier asserts is unreasonable, that claimant failed to even request another examination by the designated doctor before addressing the matter at the hearing, that claimant's two prior ROM exams by the designated doctor were invalid, that claimant has not shown a substantial change in condition, and that the hearing officer's resolution of the issue is not against the great weight of the evidence.

The hearing officer found that when Dr. F assigned the seven percent IR, he did not include impairment for abnormal ROM because he opined that the testing was invalid; that in August 1997 claimant had a lumbar laminectomy at L5-S1 by Dr. K; that on May 14, 1998, Dr. F reexamined claimant, noted the intervening surgery, and amended the IR to eight percent for the one-level lumbar surgery and again opined that claimant's ROM values were invalid based of her voluntary restriction of effort; that claimant informed Dr. F on May 15, 1998, that Dr. G recommended fusion surgery and that Dr. B concurred, and that claimant had a global fusion in February 1999; that at the BRC on March 20, 1999, apparently neither party requested any further examination by Dr. F and that the first request was apparently made at the CCH; that Dr. G disagreed with Dr. F's assigned MMI date and IR prior to the February 1999 surgery and that Dr. G disagreed with the IR because he felt that Dr. F should have included a rating for abnormal lumbar ROM; and that the great weight of the medical evidence is not contrary to Dr. F's reports. Based on these findings, the hearing officer concluded that claimant reached statutory MMI on March 4, 1996, per the parties' agreement, and that claimant's IR is eight percent per Dr. F's report.

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. Whether the great weight of the other medical evidence is contrary to the report of the designated doctor is, generally, a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. The Appeals Panel has frequently noted the important and unique position occupied by the designated doctor under the 1989 Act and that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also stated 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.

Claimant has not assigned error to any specific finding or findings but basically seeks a remand so that she can be reevaluated by the designated doctor because she had the additional surgery in February 1999. The BRC report in evidence reflects that the disputed issue was stated to be: "What is the claimant's [IR]?" and that claimant's position was that the Commission should adopt the 18% IR certified by Dr. G, while the carrier's position was that the Commission should give presumptive weight to the report of Dr. F certifying eight percent. There was no issue concerning claimant's being examined by Dr. F for still a third time, subsequent to the second surgery performed after statutory MMI. We are satisfied that the hearing officer's findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. 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 affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge