

APPEAL NO. 991329

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 24, 1999, a contested case hearing was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) had disability from May 5, 1997, to January 22, 1998; that claimant reached maximum medical improvement (MMI) on July 8, 1998; and that claimant has a 15% impairment rating (IR) as assessed by the designated doctor in an amended report.

Claimant appeals, contending that the functional capacity evaluation (FCE) which stated that he could return to his preinjury job was "not valid as able to return to work" because it was not issued by a doctor, that his date of MMI should be February 18, 1999, with a 21% IR as assessed by his treating doctor and that the designated doctor's report was wrong. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, stating the difference in ratings is a disagreement between the treating doctor and the designated doctor on the neurological deficit and extent of range of motion (ROM). Carrier urges affirmance.

DECISION

Affirmed.

Claimant was employed as a "gas line locator" by the employer energy corporation. The parties stipulated that claimant sustained a compensable low back injury on \_\_\_\_\_. (Claimant testified that he was bending over to mark a gas line when the ground gave way and he fell on his buttocks, sustaining the compensable injury.) Claimant testified that he continued working his regular duties for about a week, then worked some light duty and has been off work since May 5, 1997. Claimant had spinal surgery in the form of a "laminectomy and diskectomy at L4-5 and L5-S1 on 08-14-97." Claimant's treating doctor was Dr. L.

Dr. L prescribed an FCE which was performed on January 22, 1998. Claimant's history included that he has had only "marginal improvement" and that he complains of "severe pain" in his low back and neck. The FCE noted claimant's job duties (in which both claimant and employer were in agreement) and concluded:

Today, he has demonstrated the necessary functional capacities to safely perform the job that he has described to me. He has expressed a desire to return to his job, but he is concerned that the pain in his back is indicative of ongoing progressive deterioration. It is my opinion that [claimant] should resume his previous position as a gas line locator. I also recommend that the employer provide a 24-inch extended handle for the gas line locating device, so that this man may stand erect while walking, thereby relieving unnecessary stresses to his lumbar spine, and helping to avoid future injury.

The report was signed by a physical therapist. Claimant was subsequently examined by Dr. F, carrier's required medical examination doctor, who in a report dated May 20, 1998, was of the opinion that surgery had been unnecessary and that claimant had been at MMI on April 14, 1997 (a month after the date of injury) but because of the surgery claimant now had a 13% IR based on Table 49, Section IV C of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. Dr. F assessed zero percent impairment for neurological deficit and loss of ROM. Dr. F's assessment was challenged and (Dr. N) was appointed as a Texas Workers' Compensation Commission (Commission)-selected designated doctor.

Dr. N, in a report dated July 8, 1998, after noting the MRI showed an L4-5 disc on the right and the laminectomy at L4-5 was left, assessed claimant at MMI on July 8, 1998, with a 14% IR, based on 10 % impairment from Table 49 (apparently Section II E) and four percent impairment for loss of ROM. Dr. N specifically noted "no loss of neurological function." Dr. N's report was sent to Dr. L, who in a report dated August 13, 1998, expressing disagreement, comments that, using Dr. N's figures, loss of ROM should be five percent not four percent and that there should be a two percent impairment for loss of neurological function and therefore claimant's IR should be 17% (10% from Table 49 plus the additional seven percent). Dr. F also faulted Dr. N for not using the "dual inclinometer method for the [ROM]." By letter dated November 9, 1998, the Commission sent Dr. L's August 13th letter to Dr. N for comment. Dr. N responded by letter dated December 15, 1998, stating that he, Dr. N, had "found no sensory deficit and . . . no motor deficit" and that "the dual inclinometer was used" (emphasis in the original) and sending figures of measurements. In a letter dated January 19, 1999, the Commission requested additional clarification from Dr. N regarding the imaging studies, Dr. N's opinion on additional surgery and an explanation of Dr. N's 10% IR from Table 49. Dr. N replied by letter dated January 28, 1999, stated there was no discrepancies in MRIs Dr. N had reviewed and noted that additional surgery was not contemplated until some five months after his original report. Dr. N did note that he had failed to add one percent for "the additional level in as much as two discs had been excised," and, using Table 49, Section II E, amended his IR, adding one percent for a total of a 15% IR. Dr. N enclosed an amended Report of Medical Evaluation (TWCC-69) showing a 15% IR.

Dr. L released claimant to return to work on February 18, 1999, and claimant returned to his preinjury job on March 1, 1999. In a report dated April 29, 1999, Dr. L assessed a 21% IR based on 11% impairment from Table 49, Sections II E and F (same as Dr. N), nine percent impairment for loss of ROM (five percent more than Dr. N) and two percent for neurological deficit.

The hearing officer found that claimant had disability from May 5, 1997, to January 22, 1998, when the FCE indicated claimant could return to his preinjury job; that the MMI date is July 8, 1998; and that the amended IR is 15% as assessed by the designated doctor. In his discussion, the hearing officer commented on the nature of claimant's preinjury job as being "relatively light" and concluded:

Although the evidence is sparse, it is a reasonable inference that the Claimant's injury made him unable to perform his normal job duties from May 5, 1997 until he was reported to be able to resume his duties on January 22, 1998, per a [FCE] performed on that date. There was insufficient persuasive evidence of any significant change in the Claimant's condition to establish disability beyond that date.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). As the hearing officer notes, most of the medical evidence revolves around the attempts to overcome the designated doctor's July 1998 assessment of MMI and the IR. While the treating doctor mentioned the possibility of additional surgery, claimant made it clear he does not want additional surgery and carrier speculated that additional surgery was just brought up to extend the disability period. There appears to be some misunderstanding by claimant that disability and MMI are not the same thing and that a person can have one without the other. Dr. L does continue claimant off work in notes dated September 17, October 22, and December 28, 1998, but there is little indication that his condition changed between those dates and when claimant was released to return to work on February 18, 1999. Although disability can be established by a claimant's testimony alone, the testimony of claimant, as an interested party, only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Disability is a factual issue for the hearing officer, who is the sole judge of the weight and credibility of the evidence, to resolve. Section 410.165(a). Although another fact finder may have reached a different conclusion, the hearing officer's decision on this issue is supported by the evidence and we decline to reverse that decision.

On the issues of MMI and IR, under the 1989 Act, a report of a designated doctor is to be given presumptive weight, unless the great weight of other medical evidence is contrary thereto. Sections 408.122(b) and 408.125(e). We have consistently noted the unique position that a designated doctor's report occupies under the 1989 Act. See Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992, and Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Further, we have stated that "it is not just equally balancing evidence or a preponderance of the evidence that can outweigh [a designated doctor's] report but only the 'great weight' of the other medical evidence that can overcome it." *Id.*

The correct MMI date and IR are questions of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence offered. Section 410.165(a). As the finder of fact, the hearing officer is required to resolve the conflicts in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In this instance, the difference in opinions of Dr. L and Dr. N is attributable to the fact that Dr. L assigns an impairment for neurological deficit while Dr. N does not, and that Dr. L assigns five percent more for loss of ROM than does Dr. N. This divergence of assessments only represents a

medical difference of opinion and the statute gives presumptive weight to the designated doctor's reconciliation of such differences. We find that the hearing officer's decision is supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Judy L. Stephens  
Appeals Judge