

APPEAL NO. 991382

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 2, 1999. With respect to the single issue before her, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 19% as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission) in his initial report. In its appeal, the appellant (carrier) asserts error in the hearing officer's determination that the claimant's IR is 19%, contending that the hearing officer should have given presumptive weight to the 13% IR certified by the designated doctor in an amended report and asking that we render a new decision that the claimant's IR is 13%. In his response, the claimant urges affirmance.

DECISION

Reversed and a new decision rendered that the claimant's IR is 13%.

The parties stipulated that the claimant sustained a compensable low back injury on _____, and that he reached maximum medical improvement by operation of law on November 16, 1997. The claimant underwent two spinal surgeries on March 11, 1996, and July 29, 1997, respectively, as a result of his compensable injury. On January 20, 1998, the claimant was ordered to attend a required medical examination with Dr. M for the purposes of determining his IR. In a Report of Medical Evaluation (TWCC-69) dated February 3, 1998, Dr. M certified an IR of 14%, which was comprised of 13% for specific disorders of the lumbar spine and one percent for sensory deficit. Dr. M did not assign any rating for loss of range of motion (ROM). Dr. M's rating was disputed and Dr. K was selected by the Commission to serve as the designated doctor.

In a TWCC-69 of March 16, 1998, Dr. K assessed an IR of 19%, which was comprised of 13% for specific disorders of the lumbar spine, one percent for sensory loss, and six percent for loss of right and left lateral flexion ROM. In the narrative report accompanying his TWCC-69, Dr. K explained that he invalidated flexion and extension ROM because the "straight leg raise test was invalid in view of the marked discrepancy between its value measured during the physical examination as compared to the value obtained during the inclinometer measurements." Dr. K also noted in his narrative that the claimant "exhibits marked pain behavior" and that the "Waddell's test is positive for trunk rotation and axial compression." The carrier forwarded the ratings of both Dr. M and Dr. K to Dr. T for review and commentary. In a letter of July 21, 1998, Dr. T noted that the primary difference between the ratings of Drs. M and K was attributable to Dr. K's inclusion of a six percent rating for loss of lateral flexion ROM. Dr. T stated that he thought that there were serious questions about the validity of Dr. K's ROM measurements because of the claimant's "non-organic presentation that included pain behavior." Dr. T recommended that Dr. K be asked "his opinion as to whether he feels measurements recorded at his evaluation for bilateral flexion are representative of reasonable patient effort."

On August 4, 1998, a Commission Dispute Resolution Officer (DRO) forwarded a copy of Dr. T's report to Dr. K, asking that he review the narrative. The DRO also asked Dr. K to "address the attached questions number 1-4," which state:

1. Per attached peer review there are discrepancies that raise serious questions as to the validity of range of motion measurements obtained.
1. Please have [Dr. K] review his calculations for nerve root sensory deficit and respond accordingly.
2. In [Dr. K's] opinion does he feel measurements recorded at the evaluation for bilateral flexion represent a reasonable patient effort.
3. After review of the attached does he feel there is a change of impairment or possibly is another evaluation necessary.

In a letter of August 7, 1998, Dr. K filed his response to the DRO's letter, stating that his lateral flexion ROM measurements were "performed with strict adherence" to the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and that the measurements "met the validity criteria of the [AMA Guides], and from a formal point of view it has to be accepted as such." Dr. K noted that the claimant "exhibited marked pain behavior, symptom magnification, and nonorganic presentation, which also made me concerned about reasonable effort on his part" and that he invalidated flexion and extension "in view of the marked discrepancy between the clinical straight-leg raising testing in sitting and the straight-leg raising measurement obtained in supine." However, he reaffirmed that the claimant met the validity criteria with respect to the lateral flexion measurements; thus, he accepted those measurements and assigned a rating for that element "based on the instructions in the [AMA Guides]." Dr. K concluded his response by stating that he would not object to the idea of performing new ROM testing "in order to settle the concerns regarding submaximal effort," but, he referenced an Appeals Panel decision and indicated that he did not think such testing was required.

The carrier sent Dr. K's response to Dr. T for review. In a September 3, 1998, letter, Dr. T stated that he did not believe Dr. K had addressed the issue he raised relating to the validity of the lateral flexion ROM measurements. Dr. T clarified that the question he had for Dr. K was "whether in his clinical judgment the motions as measured represented reasonable patient effort." On October 2, 1998, a Commission DRO forwarded that letter to Dr. K and asked him "whether the additional information would cause you to amend your original determination, require a second evaluation, or not affect your 3-16-98 findings." The record does not contain a response to that letter from Dr. K; however, the Commission sent a notice to the parties on November 18, 1998, stating that "[i]n response to our clarification letter, the designated doctor has indicated that a re-evaluation is warranted in this specific case" On December 8, 1998, Dr. K reexamined the claimant. In a TWCC-69 of December 20, 1998, Dr. K assigned a 13% IR to the claimant. In the narrative

report accompanying his TWCC-69, Dr. K noted that he had previously assigned a 19% IR to the claimant and that "[t]his was apparently disputed, and I suggested that the inclinometric measurements of the lumbar spine be repeated, with very close scrutiny being given to the level of effort exerted by the patient during the evaluation." After completing repeat ROM testing, Dr. K concluded:

As for the [ROM], this was repeated to use an electronic inclinometer. Both the physical therapist who performed the measurements and I felt that the patient was not putting forth the maximum level of effort during the measurements. This went along with the rest of the physical examination in which he exhibited prominent pain behavior and marked nonorganic findings including five positive Waddell's signs. In view of the above clinical observations, I am now convinced that [ROM] measurements in this case are too unreliable to have any meaningful value, as they are most likely affected by less than maximal efforts produced by the patient. I will therefore revise my previous determination and reassign a 0% rating due to abnormal [ROM].

The hearing officer gave presumptive weight to Dr. K's 19% IR as certified in his initial report. In so doing, she determined that the "evidence did not support the assertion that a re-evaluation was warranted"; that the designated doctor's "3-16-98 IR evaluation was performed and an IR was obtained in accordance with the [AMA Guides]"; and that "[t]here was not a great weight of medical evidence contrary to the opinion of the [designated doctor's] 3-16-98 IR determination." We have previously recognized that for a proper reason and within a reasonable period of time, a designated doctor can amend his IR. Texas Workers' Compensation Commission Appeal No. 970252, decided March 31, 1997. In essence, in finding that a reevaluation was not warranted in this case, the hearing officer determined that the designated doctor did not have a proper reason for revising his IR and reducing his assignment of a rating for loss of lateral flexion ROM from six percent to zero percent.

In Texas Workers' Compensation Commission Appeal No. 951142, decided August 28, 1995, the designated doctor initially certified that the claimant's IR was 11%, which was comprised of a five percent specific disorder rating and six percent for loss of lumbar ROM. Thereafter, the designated doctor reexamined the claimant and the repeat ROM testing yielded a one percent rating for loss of ROM, as opposed to the previously measured six percent. The Appeals Panel stated :

Once valid ROM test results are achieved consistent with the AMA Guides, there is no mandate under the AMA Guides or otherwise to continue the ROM testing until invalid or different test results are achieved that would negate or change the valid results. Thus, we conclude that [the designated doctor's] second testing of ROM was not necessary as valid ROM testing had already been achieved and was thus not a proper basis to amend his first certification."

Appeal No. 951142 reversed the hearing officer's decision which had given presumptive weight to the six percent IR and rendered a new decision that the claimant's IR was 11% as the designated doctor initially certified. In Texas Workers' Compensation Commission Appeal No. 960687, decided June 28, 1996, the Appeals Panel likewise reversed a hearing officer's decision giving presumptive weight to the designated doctor's amended 14% rating and rendered a new decision that the claimant's IR was 18%, as the designated doctor had initially certified. In that case, as in Appeal No. 951142, the first ROM measurements were valid and ROM was later retested. Appeal No. 960687 concluded:

[O]nce the hearing officer was convinced that the initial ROM testing was valid, under the reasoning of Appeal No. 951142, he should have accepted the 18% IR assessed in the first report in that no basis existed for retesting ROM. Since the hearing officer determined that valid ROM testing had been achieved in the designated doctor's first report, by implication he determined that there was not a proper basis for the designated doctor to amend his first certification and it should have prevailed.

The hearing officer determined that the designated doctor's initial ROM testing was valid and that, as a result, his 19% IR should be given presumptive weight. However, we cannot agree with the hearing officer's determination that the initial ROM measurements were valid in this instance. In his first response to a request for clarification, the designated doctor stood by his certification, reasserting that the lateral flexion ROM measurements were valid. However, when he received the second request for clarification, the designated doctor, through the exercise of his professional judgment, determined that sufficient question existed as to the effort exerted by the claimant in the initial examination to warrant retesting. In that sense, this case is more akin to Appeal No. 970252, *supra*, where we distinguished Appeal Nos. 951142 and 960687, and affirmed a hearing officer's decision giving presumptive weight to a designated doctor's amended certification. That certification had been reduced to eliminate the ROM component based upon the doctor's observation that actual movement was inconsistent with tested movement. Appeal No. 970252 concluded that under those circumstances, a proper basis existed for amending the certification and that, as such, the hearing officer did not err in according presumptive weight to the amended report of the designated doctor. In the case before us, Dr. K determined that he needed to retest ROM because a question existed as to the accuracy of his rating related to concerns about the claimant's level of effort in ROM testing. When he retested the claimant's ROM, Dr. K concluded that those measurements were "too unreliable to have any meaningful value, as they are most likely affected by less than maximal effort produced by the patient" and he reassigned a zero percent rating for loss of ROM. Under these circumstances, we believe that the hearing officer erred in determining that the reexamination was unwarranted and that the designated doctor did not have a proper basis for amending his IR. Thus, she likewise erred in giving presumptive weight to the initial 19% IR.

The hearing officer's determination that the claimant's IR is 19% is reversed and a new decision is rendered that the claimant's IR is 13%, as certified by the designated doctor in his amended report.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge