

APPEAL NO. 991464

On June 10, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the CCH was the impairment rating (IR) of appellant (claimant). Claimant requests that the hearing officer's decision that claimant's IR is nine percent as reported by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission) be reversed and that a new decision be rendered. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____. Claimant was injured when a vehicle backed into the employer's vehicle he was driving in the employer's parking lot. Claimant initially treated with Dr. S. Dr. B, a radiologist, reported that an MRI of claimant's cervical spine done in October 1997 showed a left paracentral disc herniation at C5-6 with moderate displacement and compression of the spinal cord; that an MRI of claimant's lumbar spine done in October 1997 showed a disc protrusion at L5-S1, slightly contacting the S1 nerve root sleeves; and that an MRI of claimant's thoracic spine done in October 1997 showed minimal disc bulges at T10-11 and T11-12. Dr. Y reported that EMG and nerve conduction studies he performed on claimant in November 1997 showed evidence of mild bilateral C5-6 nerve root irritation and evidence of mild bilateral L5-S1 nerve root irritation. Dr. S wrote in April 1998 that claimant may require surgery in the future. Claimant said that Dr. S told him that he is a surgical candidate. Claimant said he has not had surgery.

Dr. T examined claimant at carrier's request on May 11, 1998, and Dr. T reported in a Report of Medical Evaluation (TWCC-69) dated May 15, 1998, that claimant reached maximum medical improvement (MMI) on May 11, 1998, with a 20% IR. Dr. T wrote that the MRI reports of October 1997 showed potentially significant disc herniations at C5-6 and L5-S1, but without objective evidence of radiculopathy on examination. Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, lists impairments due to specific disorders of the lumbar spine. Dr. T assigned six percent impairment for a specific disorder of the cervical spine under Table 49 Section IIC and seven percent impairment for a specific disorder of the lumbar spine under that same section.

With regard to range of motion (ROM), Dr. T wrote that cervical ROM testing showed nine percent impairment, but that the five percent impairment for abnormal cervical rotation ROM was invalid and should be discarded because, on physical examination, claimant rotated his neck so that it came close to his shoulders. Thus, Dr. T assigned only four percent impairment for loss of cervical flexion and extension ROM. Dr. T also wrote that lumbar ROM testing showed eight percent impairment, but that he deleted the four percent

impairment for lumbar flexion because, on physical examination, claimant was capable of significantly greater flexion than he showed on ROM testing. Thus, Dr. T assigned only four percent impairment for loss of lumbar extension ROM and loss of lateral flexion ROM. Dr. T combined the 10 % cervical spine impairment with the 11% lumbar spine impairment under the Combined Values Chart to arrive at a 20% whole person IR. Dr. T noted that sensory deficits were insufficient to generate any impairment.

Dr. T noted that he was submitting the 20% IR with reservations because he had not seen the cervical and lumbar MRI films himself and had to rely on the interpretation of others as to the significance of disc herniations at both levels, and because he questioned whether a low impact collision could cause disc herniations at two levels of the spine. He also noted that he questioned claimant's effort while measuring ROM and that physical examination was unimpressive. Carrier disputed the 20% IR assigned by Dr. T and made an assessment of a 12% IR.

The parties stipulated that the Commission chose Dr. G as the designated doctor. In a TWCC-69 dated July 6, 1998, which notes a date of visit of July 1, 1998, Dr. G reported that claimant reached MMI on July 1, 1998, with a nine percent IR. The parties stipulated that claimant's date of MMI is July 1, 1998, as reported by Dr. G. In an attached narrative report dated July 7, 1998, Dr. G thanked the Commission for allowing "us" to interview and examine the claimant. Dr. G wrote that claimant was seen on July 6, 1998, for the purpose of determining MMI and IR. Dr. G noted the history of claimant's injury, that claimant had been treated by Dr. S, and that claimant had physical therapy, lumbar injections, and oral medications. In the history section of his report, Dr. G wrote that surgery had been suggested but claimant had refused it and that surgery would be directed at the excision of herniated discs in the lumbar spine and possibly the cervical spine. Dr. G also noted Dr. T's findings of MMI and IR and claimant's complaints at the time of examination. Dr. G's report contains a section on physical examination of the claimant which sets forth findings on examination of the lumbar and cervical spine and also contains a section in which he states that the thoracic spine MRI is within normal limits with minimal degenerative changes, the lumbar spine MRI shows a disc protrusion at L5-S1, and the cervical spine MRI shows a disc herniation at C5-6. Dr. G's impression was spondylosis of the cervical and lumbar spine with single level disc disease in the cervical and lumbar spine.

Dr. G wrote that ROM values are included for the sake of completeness but that they are invalid because claimant exhibited much more motion on physical examination than he did on ROM testing of the cervical and lumbar spine. Dr. G then wrote that claimant has "evidence of disc degeneration and bulging in both the lumbar and cervical areas and therefore has a 4% impairment to the whole person due to the cervical spine according to Table 49, II-B and 5% impairment from the lumbar spine, again using Table 49, II-B." Dr. G combined the impairments for the specific disorders to arrive at a nine percent whole person impairment. Dr. G noted in the physical examination section of his report that claimant had normal sensation on testing during physical examination, that upper extremity strength appeared to be within normal limits, and that there was no atrophy of the upper or lower extremity muscles.

Claimant testified that he thinks he saw Dr. G on July 1, 1998; that when Dr. G shook his hand, Dr. G told him that he did not agree with the 20% IR; that he asked Dr. G how Dr. G could determine that from a handshake; that there was tension in the air after that; that Dr. G told him that he would have to deal with his pain; that Dr. G did not ask him any questions about his weight loss, loss of strength, or about any of his leg, arm, or back problems; that Dr. G asked him to sit on a table and then hit his knee with a rubber hammer; that that was the extent of Dr. G's examination; that that was the last time he saw Dr. G; that a few days later he had a second appointment in Dr. G's offices; that at the second appointment a physician's assistant conducted ROM testing on him; and that he gave his best effort during testing.

Claimant changed treating doctors to Dr. O and Dr. O saw claimant on November 23, 1998, and reported that cervical and lumbar ROM was limited and that there was no evidence of motor or sensory loss. Dr. O's impression was intervertebral disc injury of the cervical spine, intervertebral disc injury of the lumbar spine, intervertebral disc disorder of the thoracic spine, muscle spasm, and radiculopathy. Dr. O recommended pain management.

Dr. A examined claimant on December 30, 1998, and wrote that claimant wanted to know if surgery would help him. Dr. A noted that the cervical MRI had shown a disc herniation at C5-6 and that the lumbar MRI had shown a left disc protrusion at L5-S1 and that the EMG and nerve conduction studies had shown mild bilateral C5-6 and L5-S1 nerve root irritation. Dr. A noted that claimant's chief complaint was neck pain radiating to his left upper extremity and back pain radiating to the left lower extremity. Dr. A wrote that claimant has findings compatible with a herniated cervical disc at C5-6, a chronic lumbar sprain, and left lumbar radiculopathy and recommended myelograms and CT scans.

On January 6, 1999, Dr. O wrote that claimant has intervertebral disc injuries to the cervical, thoracic, and lumbar spine documented by MRIs and that he has cervical and lumbar radiculopathies documented by EMG and nerve conduction studies. Dr. O noted the findings of Dr. T and Dr. G regarding MMI and IR. Dr. O wrote that it is his opinion that claimant has not reached MMI and that additional treatment may include surgery, work conditioning, and pain management. He noted that the myelogram requested by Dr. A will determine if surgery is indicated. Claimant said that Dr. O told him he needs surgery but that Dr. O is trying to have him seen by another doctor about that.

On February 23, 1999, a benefit review officer (BRO) wrote to Dr. G, asking him if he had performed cervical and lumbar ROM testing and, if so, to provide the worksheets; and asking him to review Dr. T's report of May 15, 1998, and reports of Dr. A and Dr. O, and to address Dr. O's concerns. The BRO noted that the medical reports were attached to his letter.

On March 5, 1999, Dr. G wrote that he had reviewed the medical reports sent to him by the BRO, noting that Dr. T's report was available at his original evaluation; that ROM

testing was performed for the cervical and lumbar regions; that the test results were included with his reply; that "the patient obviously had a much larger [ROM] than this during the examination . . ."; and that "with regard to [Dr. O's] and [Dr. A's] concerns, it certainly is evident that the patient has cervical and lumbar pathology and was given [IRs] for both of these areas related to the objective findings on the MRI examination." Dr. G then stated, "[i]t remains my opinion that these findings, coupled with the patient's complaints and physical examination do not suggest a surgical pathology and I do not feel that surgery is indicated in this case and I also do not feel compelled to change the [IR] for this patient." Dr. G attached to his letter of March 5, 1999, the ROM worksheets for cervical and lumbar ROM dated July 2, 1998, which recorded cervical ROM impairment of seven percent and lumbar ROM impairment of nine percent.

Section 408.125(e) provides that, if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the medical evidence is to the contrary, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor, the Commission shall adopt the IR of one of the other doctors.

Contrary to claimant's assertion, there is evidence in Dr. G's report of July 7th from which the hearing officer could reasonably conclude that Dr. G did conduct a physical examination of claimant. There is also evidence in Dr. G's report that Dr. G reviewed the ROM test results and determined that the measurements were invalid based on his own observations of claimant's ROM during physical examination.

The Appeals Panel has held that "a doctor may through observation and his clinical experience determine either a normal ROM, or that measured limitations are invalid." Texas Workers' Compensation Commission Appeal No. 970499, decided May 1, 1997, and Appeals Panel decisions cited therein. We note that Dr. T found portions of ROM testing to be invalid based on his observation of claimant's motions during examination. Neither Dr. T nor Dr. G assigned claimant impairment for neurological deficits. Claimant asserts that he should be awarded greater impairment for specific disorders of the spine than was assigned by Dr. G. In actually assigning the specific disorder impairment, Dr. G referred to claimant as having bulging discs, although in other parts of his report he referred to herniations. Dr. G was provided with additional medical reports, including the reports of Drs. O and A, and after review of those reports did not feel compelled to change his opinion.

Essentially, there are two IRs in evidence, the nine percent from Dr. G and the 20% from Dr. T. Whether the great weight of the medical evidence is contrary to the IR assigned by Dr. G is a factual question to be determined by the hearing officer. The Appeals Panel has noted the unique position occupied by the designated doctor in the resolution of MMI and IR disputes and has stated that a great weight determination amounts to more than a mere balancing or preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established. An appellate level body is not a fact finder and does not normally pass upon the credibility of the witness or substitute its opinion for that of the trier of fact, even if the evidence would support a different result. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 165 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge