

APPEAL NO. 991702

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 June 24, 1999. He (hearing officer) determined that the respondent's (claimant) correct impairment rating (IR) was 16% as certified by the current treating doctor, Dr. M, D.C., and not 13% as certified by Dr. A, a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (carrier) appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence and otherwise wrong as a matter of law. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Reversed and remanded.

The claimant sustained a compensable injury which, for purposes of this opinion, included the left knee and lower back. On December 10, 1997, Dr. A completed a Report of Medical Evaluation (TWCC-69) in which he assigned a 13% IR and certified a date of maximum medical improvement (MMI) of October 27, 1997. He noted in his report that the claimant was walking with crutches and could not bear weight on his left knee. Of the 13% IR assigned by Dr. A, four percent was for loss of lumbar flexion. Other range of motion (ROM) measurements of the lumbar spine were normal. No IR was assigned for a specific disorder of the lumbar spine 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. A also assigned a left lower extremity IR of 23%, consisting of a rating for the torn meniscus, arthritis/chondromalacia, and anterior cruciate ligament loss. The 23% converted to a nine percent whole body IR, which when combined with the four percent yielded the 13% whole body IR. This examination and report were completed approximately three weeks after left knee surgery on November 21, 1997.

On April 1, 1998, the Commission wrote a letter to Dr. A with questions about his IR.¹ Dr. A described the letter as raising questions "regarding the presence of spondylolisthesis of lumbar spine." Dr. A responded that there was no evidence of spondylolisthesis and that the records showed spondylosis, which he did not consider related to the current injury. For this reason, he "did not take into consideration any presence of any spondylolisthesis" in assigning a lumbar IR. On June 10, 1998, Dr. A, responding to another letter from the Commission (this time apparently dealing exclusively with the date of MMI), examined the claimant and completed a new TWCC-69 in which he changed the date of MMI to May 28, 1998, but maintained the 13% IR.²

¹None of the four letters from the Commission to Dr. A were in evidence.

²The parties stipulated that the date of MMI was May 28, 1998, and this was not a disputed issue.

On August 13, 1998, Dr. A again responded to the Commission with a "Clarification Letter." He confirmed his earlier letter that there was no evidence of spondylolisthesis and additionally noted that an "MRI done on August 8, 1997," reflected "a suggestion of mild underlying Grade-1 anterolisthesis *Based on this MRI report, I am unable to say the patient really had anterolisthesis or spondylolisthesis and therefore I did not consider this in my calculations.*" (Emphasis in original.) He again declined to change the claimant's IR. The Commission again wrote Dr. A on October 12, 1998. Dr. A responded with a letter of November 10, 1998, in which he stated that he conducted "a detailed re-review of available medical records" and addressed questions regarding spondylolisthesis or "anterolisthesis" at L5-S1. He enclosed four reports (three radiographic and one nerve conduction study) and commented that the reports were "self-explanatory." He, nonetheless, once again concluded that "S1 radiculopathy was present prior to the injury and remains unchanged on the subsequent examination after the injury. Objective findings of the lumbar spine were present prior to the injury and subsequent reports did not convince me of any new findings Therefore, the present injury, in my opinion, did not cause any specific disorders of lumbar spine." He also wrote that ROM of the knee was "not performed since [ROM] cannot be combined with chondromalacia" under Table 36 of the AMA Guides. He did not explain why he did not add a ROM element to his other knee diagnoses, which, under Table 36, could be combined with ROM.

On February 22, 1999, Dr. M completed a TWCC-69 in which he assigned a 16% IR, which consisted of 10% whole body IR for the left knee. The left knee IR constituents were loss of ROM in connection with anterior cruciate ligament loss and chondromalacia. The lumbar IR constituents included a specific disorder (unoperated disc lesion with six months of medically documented pain) and loss of ROM. In an undated letter to the Commission (which does not appear to be a complete copy), Dr. M challenged Dr. A's IR for the following reasons:

1. Dr. A "could have" but did not give the lumbar specific disorder rating that Dr. M did.
2. Dr. A did not assign any IR for radiculopathy (nerve loss). (It must be noted that Dr. M did not give an IR in this category either.)
3. Anterior cruciate ligament loss and meniscal tears can be combined with loss of ROM.

Dr. M appeared to conclude this letter with the simple question: Why did Dr. A not include these additional ratings?

Section 408.125(e) provides that the Commission shall base its determination of IR on the report of a Commission-selected designated doctor, unless the great weight of the other medical evidence is to the contrary. We have pointed out that "great weight" means more than a mere balancing or a simple preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. An IR must, in all cases, be determined using the AMA Guides (Section 408.124) and a hearing officer

may consider the designated doctor's compliance with the AMA Guides in arriving at the great weight determination. Texas Workers' Compensation Commission Appeal No. 951969, decided January 4, 1996. Whether the great weight of the other medical evidence is contrary to the report of the designated doctor is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93469, decided July 23, 1993. This determination is in turn subject to reversal on appeal only if contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We assume that the hearing officer impliedly found that the great weight of the other medical evidence was contrary to the report of Dr. A when he determined that the claimant's correct IR was 16% as certified by Dr. M. The finding in support of this implied determination was that Dr. A, after repeated correspondence with the Commission, "failed to adequately address" the following "four concerns":

1. Dr. A found a back sprain on examination eight months after the injury, with continuing problems, yet he did not provide a specific disorder rating under Table 49 or explain why not.
2. Claimant's IR was not reevaluated after he reached MMI.
3. The medical evaluation was done without the benefit of "all" of the medical records.
4. Dr. A did not explain why he did not add an ROM element for the anterior cruciate ligament and torn meniscus injuries under Table 36.

The carrier appeals the IR determination, contending that it was generally contrary to the great weight of the evidence and reflected erroneous interpretations of the AMA Guides. The claimant requests that Dr. M's IR be adopted.

To the extent that the hearing officer found the great weight of the other medical evidence contrary to Dr. A's report in the determination that Dr. A did not comply with the AMA Guides, we refer to Appeal No. 951969, *supra*, where we said:

Noting that the hearing officer's recited basis for invalidity had to do with the substance of how the designated doctor applied the pertinent portions of the AMA Guides, we would emphasize that whether the AMA Guides have been properly used by the designated doctor in arriving at his calculations is a matter to consider as part of the great weight analysis, not as an alternative to it. The necessity of evaluating the great weight of medical evidence is not met by a finding, unassisted by medical evidence, that the designated doctor has not properly used the AMA Guides. (Emphasis in original.)

See *also*, Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992.

The decision of the hearing officer is reversed and the case remanded for the following reasons, directed to the specific rationale given by the hearing officer for his decision:

1. The hearing officer does not specifically find that the AMA Guides require in all cases that, if an IR is given for loss of ROM of the spine, an IR must also be given for a specific disorder of the spine. In Texas Workers' Compensation Commission Appeal No. 951921, decided December 11, 1995, we reversed the decision of the hearing officer that declined to give presumptive weight to the report of the designated doctor because the designated doctor assigned an IR only for cervical and lumbar loss of ROM, but not for a specific disorder of the lumbar or cervical spine. The designated doctor explained why he did this. The opinion of the treating doctor that the claimant was also entitled to a specific disorder IR was considered to be no more than a difference of opinion and not the great weight of the other medical evidence contrary to the report of the designated doctor. To the extent that the hearing officer in the case we now consider has determined that the AMA Guides require in all cases that if an IR is assigned for loss of ROM, there must also be an IR for a specific disorder, we reject that conclusion. Dr. A explained why he did not give a specific disorder ROM. What was required was that the claimant produce medical evidence of why Dr. A was wrong in this case.

To the extent that the hearing officer's decision is based on a determination that the claimant has sustained a lumbar injury with permanent impairment regardless of ROM considerations, we note that Dr. A accepts a lumbar injury. He does not, however, believe that this lumbar injury has caused permanent impairment related to the specific disorder of the lumbar spine. Dr. M believes otherwise. The Appeals Panel wrote in Texas Workers' Compensation Commission Appeal No. 94570, decided June 15, 1994, that a spinal abnormality (in that case, a bulging) "is not necessarily in itself evidence of a compensable injury but can be simply a deviation from a norm, or ideal condition, that may or may not constitute damage or harm to the physical structure of the body produced by a compensable injury," and that to be the basis of an IR under Table 49, the bulging "must rise to the level of a pathology or lesion caused by the compensable injury. [Citation omitted.]" It seems clear that Dr. A did not consider that claimant's low back injury resulted in a disc or soft tissue injury warranting a rating under Table 49 of the AMA Guides. In Appeal No.951921, *supra*, we wrote that the "decision to include or not to include a rating for a specific disorder represents a medical difference of opinion as to whether claimant's compensable injury resulted in permanent impairment in claimant's cervical discs or soft

tissue." The contrary opinions of Dr. A and Dr. M amount to a professional disagreement. The designated doctor provisions of the 1989 Act were intended to resolve such disagreements in favor of the opinion of the designated doctor except in very limited circumstances. The key question is whether Dr. M's opinion constituted the great weight of the other medical evidence or was simply a different opinion. We believe that it does not constitute the great weight of the other medical evidence and the hearing officer's implied finding that it does is itself against the great weight and preponderance of the evidence. Cain v. Bain, *supra*; Pool v. Ford Motor Company, *supra*.

2. While the initial evaluation by Dr. A was done before the claimant was at MMI, it is fair to point out that Dr. A reported the claimant at MMI at the time of the initial examination and later changed this after he again examined the claimant. The hearing officer found that Dr. A did not reevaluate the IR after his reexamination. The evidence is to the contrary as clearly expressed by Dr. A in his letters of August 13, 1998, and November 10, 1998. To the extent that the hearing officer is suggesting that Dr. A should have reexamined the claimant's lumbar injury after he certified the later date of MMI, we find no evidence that Dr. A considered such a reexamination necessary. Such a conclusion is consistent with the essentially radiographic basis for his conclusion that no specific disorder IR was indicated and the lack of any challenge to the ROM portion of the lumbar IR.
3. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.6(h) (Rule 130.6(h)) provides, in part, that the treating doctor and insurance carrier are both responsible for sending to the designated doctor all the employee's medical records relating to the medical condition to be evaluated by the designated doctor that are in their possession and that such records must be received by the designated doctor at least three days prior to the date of the appointment specified in the Commission order. This rule also provides for an administrative penalty for violations. Rule 130.6(j) provides, in part, that the designated doctor must evaluate the complete clinical and non-clinical history of the medical condition, perform an examination of the employee, analyze the medical history with the clinical and laboratory findings, and assess and certify an IR according to the AMA Guides. Neither the claimant nor the hearing officer identified which medical records should have been but were not made available to Dr. A. Absent medical evidence mandating a review of a particular medical record, there is no requirement that a designated doctor (or any doctor performing an evaluation) look literally at "all" medical records. See Texas Workers' Compensation Commission Appeal No. 990228, decided March 22, 1999 (Unpublished), where we affirmed a finding that the great weight of the other medical evidence was not contrary to

the report of the designated doctor because the doctor reviewed "relevant medical reports, albeit after he examined the claimant." Absent a finding of what medical record was essential, but not made available to Dr. A, we find error in the decision of the hearing officer to the extent that it was premised on Dr. A's failure to review "all" the medical records.

4. The hearing officer also faulted Dr. A for not assigning a knee loss of ROM in connection with the cruciate ligament and meniscus injuries. Again, he simply states that Dr. A did not explain why he did this. The claimant appears to only ask why, but does not provide medical evidence of why ROM is required in this case. In Texas Workers' Compensation Commission Appeal No. 971056, decided July 21, 1997, we wrote:

Of the 10 disorders listed in Table 36 with an accompanying range of possible IRs, seven may be combined with an additional rating for loss of ROM and three may not. The table does not direct that only one diagnosis-based IR may be assigned, nor does it indicate how ROM is to be accounted for in the whole body IR when one diagnosis-based impairment permits a ROM additive and one does not. See Texas Workers' Compensation Commission Appeal No. 951224, decided September 11, 1995.

Given this ambiguity in Table 36, we cannot conclude that as a matter of law Dr. A failed to comply with the AMA Guides with regard to the knee portion of the claimant's IR. What concerns us, however, is Dr. A's apparent failure to do any ROM examination of the knee. It is not clear from Dr. A's TWCC-69 or his letter of November 10, 1998, whether Dr. A declined to do knee ROM testing at all, or did it and disregarded it in light of the chondromalacia diagnosis. Because Dr. A combined several knee disorders in arriving at the knee IR, two of which could be combined with an IR for loss of ROM, we believe it appropriate to remand this case for yet another inquiry of Dr. A about whether he performed knee ROM and to insure that he was aware he could add, if medically indicated, knee ROM, even if one of the diagnoses is chondromalacia. A reexamination of the left knee should be done if no ROM measurements have been made or if otherwise indicated in Dr. A's opinion.

It should be made clear that the purpose of the remand is to address only the knee portion of the IR, not the lumbar portion. With regard to the lumbar portion of the IR, we conclude that the claimant failed to establish either noncompliance with the AMA Guides or that the great weight of the other medical evidence was contrary to this aspect of Dr. A's report.

After further inquiry of Dr. A, the hearing officer should make an express finding that the great weight of the other medical evidence was or was not contrary to Dr. A's IR for the knee. If the great weight is found to be to the contrary, the hearing officer should further identify the medical evidence and state how it constitutes the great weight, *e.g.*, the opinion of another doctor alone or in combination with Dr. A's failure to correctly apply the AMA Guides. Texas Workers' Compensation Commission Appeal No. 93538, decided August 12, 1993. Generally speaking, findings that Dr. A did not explain something should be disfavored and an explanation should be sought.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge