

APPEAL NO. 991750

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 5, 1999, a contested case hearing (CCH) was held. With respect to the only disputed issue before him, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 23% as assessed by a Texas Workers' Compensation Commission (Commission)-selected designated doctor whose rating was entitled to presumptive weight, and that the designated doctor's report was not contrary to the great weight of other medical evidence.

Appellant (carrier) appeals, citing the reports of Dr. O and the report and testimony of Dr. H. Carrier contends that the designated doctor's IR for cervical range of motion (ROM) is incorrect because he failed to do cross-validation (such as Waddell signs and "Jaymer Grip Strength Dynamometer") testing under which Dr. O invalidated otherwise consistent ROM testing and that the designated doctor (and hearing officer) incorrectly combined impairment for both ROM and joint crepitation. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

The medical records indicate that claimant, an electrical engineer, slipped and fell on _____, injuring his neck and right upper extremity. (The parties stipulated that claimant sustained a compensable injury on that date.) Claimant had an anterior cervical discectomy and fusion at C4-5 on May 1, 1996, and an "arthroscopy, acromioplasty excision of the distal clavicle of the right shoulder in July of 1997." One of claimant's early treating doctors apparently assessed an IR (not in evidence) and carrier sent claimant to Dr. O for a required medical examination. The parties stipulated that Dr. E was the Commission-selected designated doctor and that claimant reached maximum medical improvement (MMI) on November 12, 1997, as certified by both Dr. O and Dr. E.

Dr. O, in a report dated November 12, 1997, certified MMI and assessed a 14% IR based on nine percent impairment from Table 49 (presumably Section II E) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Although claimant met "the consistency rules of cervical extension," at least once, Dr. O invalidated cervical ROM because he "could not get good test-retest for liability [*sic*, reliability?]." Dr. O did assess a two percent impairment from Table 50 (impairment of cervical ankylosis) due to "two vertebra being fused together." Dr. O found no shoulder crepitation but did assess three percent whole person impairment for shoulder loss of ROM.

Dr. E was appointed the designated doctor and, in a Report of Medical Evaluation (TWCC-69) and narrative dated January 15, 1998, certified MMI and assessed a 22% IR,

based on eight percent impairment from Table 49 (no section given), nine percent for loss of cervical ROM, with no neurological deficit, and five percent impairment for right shoulder loss of ROM which "was combined with specific disorder for [shoulder] joint crepitation." Dr. E assessed 10% impairment for the crepitation from a table on page 44 of the AMA Guides, entitled "Joint Crepitation Severity," which, combined with the shoulder ROM, gives a seven percent upper extremity impairment. Dr. E assesses 16% impairment for the cervical spine and seven percent impairment for the shoulder, to arrive at 22% IR.

Dr. E's report was sent to Dr. O, who, in a letter dated February 27, 1998, comments that Dr. E's impairment from Table 49 should be nine percent instead of eight percent (Section II E). Dr. O comments regarding the shoulder rating:

[Dr. E] gives the patient a rating for a loss of [ROM] and for joint crepitation. This crepitation is generally secondary to arthritic changes and . . . you do not give [ROM] and crepitus from arthritic changes because that would be double rating. It even states under the crepitus information for the upper extremity, that the evaluator must use appropriate judgment to avoid duplication of impairment, and with the description of what is wrong with this patient's shoulder, I do not think he can use both crepitation and [ROM].

The medical records and reports were also sent to Dr. H, who did a record review. In a report, also dated February 27, 1998, Dr. H agrees with Dr. O. Concerning the nine percent impairment for cervical ROM, Dr. H writes that Dr. E's "figures are 'valid' but to me they seem overly 'neat.'" Dr. H suggests that "validity effort criteria" such as "the Jaymer grip strength dynamometer," Waddell signs and "Hoover's test" should have been used. Dr. H also thinks the crepitation rating is incorrect (for other reasons than Dr. O found). Dr. H would have given claimant a 19% IR if he had been rating him.

By letter dated August 12, 1998, the Commission sent Dr. O's and Dr. H's reports to Dr. E for comment. Dr. E replies with a new TWCC-69, certifying MMI and assessing a 23% IR. In his narrative, Dr. E agrees that claimant should have been assessed a nine percent impairment from Table 49. Dr. E commented that he "did not feel that it was appropriate to do validity testing" as he believed claimant's complaints were legitimate, and that claimant had had "significant surgery as well as fusion." With regard to the right shoulder, Dr. E comments:

I do not see in the [AMA Guides] in the section on Bone and Joint Deformities, Joint Crepitation with Motion, that you cannot specifically combine joint crepitation with [ROM] if deemed appropriate. I do believe it is appropriate and I do believe that his crepitation is related to his accident and postsurgical changes. Should [Dr. O] show me where this is specifically stated in the [AMA Guides], that you cannot combine crepitation with [ROM], I will be happy to rescind the impairment given for crepitation.

Dr. H testified at the CCH. The hearing officer, in his discussion, comments on Dr. H's testimony:

He first questions the designated doctor as to the validity of the [ROM] figures, and that they seem overly "neat." This argument I find specious, for obvious reasons. [Dr. H] also questions the designated doctor's lack of validity effort criteria. He views this as "suspect." However, after reviewing the designated doctor's two reports, I find [Dr. H's] argument unpersuasive.

The hearing officer also cites other reasons why he found Dr. H's testimony and reliance on certain sections of the AMA Guides "as extremely unpersuasive." The hearing officer, and to some extent Dr. H and carrier, rely on the language on pages 43 and 44 of the AMA Guides, which state:

Bone and Joint Deformities
Joint Crepitation with Motion

Joint crepitation with motion can reflect synovitis or cartilage degeneration. The impairment degree is multiplied by the relative value of the joint.

The evaluator must use appropriate judgment to avoid duplication of impairments when other findings, such as synovial hypertrophy or carpal collapse with arthritic changes, are present. The latter findings could indicate a greater severity of the same underlying pathological process and take precedence over joint crepitation, which should not be rated in these instances.

<u>Joint Crepitation Severity</u>	<u>% Joint Impairment</u>
Mild: Inconstant during active ROM*	10
Moderate: Constant during active ROM	20
Severe: Constant during passive ROM	30

*ROM = Range of Motion

The hearing officer states that this section has motion in the title and that he believes the section "does allow combining loss of [ROM] and Joint Crepitation in the shoulder" and this is buttressed by language on page 45 which specifically provides that "[w]hen persistent joint subluxation or dislocation results in restricted motion, impairment percentages for lack of motion *only* are given to avoid duplication in the rating." (Emphasis in the original.)

First, addressing carrier's appeal regarding the cervical ROM, Dr. O was unable to duplicate his first consistent ROM testing and that Dr. E did not use cross-validation testing. We will note that ROM testing can change from test to test and, on occasion, have stated that doctors need not continue ROM testing just to find an invalid test. Further, we find no provision in the 1989 Act, Commission rules, Appeals Panel decisions or the AMA Guides which requires cross-validation testing, with failure to do cross-validation itself invalidating the doctor's IR. While the Appeals Panel has recognized that otherwise valid ROM impairment may be invalidated based on visual observation and/or clinical judgment based

on symptom magnification, we have not held that the failure to test for such symptom magnification will result in invalidating otherwise consistent and valid ROM measurements.

In any event, this point was clearly made to the hearing officer and, equally clearly, the hearing officer rejected that premise. We do not find merit in carrier's appeal on this point.

Carrier also believes that joint crepitation impairment cannot be combined with ROM deficits. Carrier cites Dr. O's and Dr. H's opinions on this point. The fact that Dr. O did not find any crepitation and that Dr. E, the designated doctor, did find crepitation is insufficient to overcome the presumptive weight accorded the designated doctor's report. See Section 408.125(e). Carrier cites at length Dr. H's testimony that "crepitus must come from the glenohumeral joint," which would mean arthritis, and "we know that [claimant] does not have any documented arthritis," and, therefore, the crepitus must come from outside the joint and it would be improper to rate the crepitus. Carrier, and Dr. H, attempt to draw an analogy between claimant's shoulder condition and Table 36 (Impairment Ratings of the Lower Extremity For Other Disorders of the Knee), citing Texas Workers' Compensation Commission Appeal No. 971056, decided July 21, 1997, a case involving arthritis of the knees in which the designated doctor "declined to answer" the basic question regarding his diagnosis. That case only held that in some circumstances it is improper to combine ROM impairment with a specific disorder rating pursuant to Table 36. The hearing officer was not persuaded by that argument and neither are we.

The hearing officer cites Texas Workers' Compensation Commission Appeal No. 982093, decided October 14, 1998 (Unpublished). That case includes a survey of some of the cases where we have previously addressed this issue. In Texas Workers' Compensation Commission Appeal No. 951647, decided November 17, 1995, the Appeals Panel affirmed a decision giving presumptive weight to the designated doctor's report, noting that the claimant was not entitled to a rating for both crepitus and loss of ROM in the shoulders relying on the "Persistent Joint Subluxation and Dislocation" paragraph on page 45 of the AMA Guides. Based on that case, the Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 960279, decided March 28, 1996, remanded the case back to the hearing officer to obtain clarification from the designated doctor why he believes both crepitus and ROM of the shoulders could be rated and to address the language on page 45 of the AMA Guides. That case came back in Texas Workers' Compensation Commission Appeal No. 961947, decided November 15, 1996, where the designated doctor did not change his assessment subsequent to the remand and responded that "[t]he nature and severity of the injuries that [the employee] has suffered and undergone are much more severe than a simple subluxation." Appeal No. 961947 stated that we were satisfied with his response and affirmed the decision because:

From the language in the designated doctor's response, the hearing officer could reasonably infer that, despite [the designated doctor's] use of the term "subluxation" in his narrative report and on the shoulder ROM worksheet, the 12% rating for the claimant's left shoulder was in the nature of a diagnosis-based rating which was assigned for the physical damage to the claimant's left shoulder and that it is separate and distinct from the rating assigned for the ROM impairment. Accordingly, the hearing officer could determine that

the designated doctor's IR was calculated in accordance with the AMA Guides. *Id.*

We have also reviewed a case where the designated doctor found crepitus in the shoulder and also assessed impairment for loss of ROM. In Texas Workers' Compensation Commission Appeal No. 970494, decided May 1, 1997, we wrote that "the AMA Guides appear to state that this is improper," citing Appeal No. 951647, *supra*. The Appeals Panel reversed and remanded the case for the hearing officer to obtain clarification from the designated doctor as to whether duplicative impairment percentages were assessed. However, the Appeals Panel noted that "impairment for both crepitus and loss of ROM has been given by other doctors in other cases," Appeal No. 970494, *supra*, citing Texas Workers' Compensation Commission Appeal No. 952190, decided February 7, 1996. However, in Appeal No. 952190 (and other cases where doctors rated for both crepitus and loss of ROM) that was not the issue addressed. Appeal No. 952190 was a 90-day, Rule 130.5(e) case. Carrier cites Appeal No. 971056, *supra*, in support of its position. Although that case does touch on the rating of both arthritis in the knees, and loss of ROM under Table 36 of the AMA Guides, the designated doctor declined to address "the very basic question of what was the diagnosis on which he based his IR." In that case, we remanded either for the doctor to clarify his report by stating what diagnosis he relied on to assign a rating under Table 36 or the appointment of a second designated doctor.

The hearing officer does a credible job in discussing what he believes the law is and his interpretation of the AMA Guides in this area. The hearing officer goes on to state:

The Appeals Panel has consistently held that they are not "inclined to select one interpretation over another for the sake of resolving medical professionals' disagreements." See Appeals Panel Decision 982093, *supra*. They basically leave it up to the Hearing Officer to determine whether the designated doctor properly gave impairment with loss of ROM and for Crepitation, giving difference [sic, deference] to the designated doctor's position. See Appeals Panel Decision 970494, *supra*. Also see Appeals Panel Decision 951647, *supra*.

After some further discussion, the hearing officer comments:

Ultimately, the Appeals Panel will have to determine the legal answer to this question, rather than leaving it up to [the] discretion of the designated doctor. A designated doctor's discretion does not allow him to do something prohibited by the [AMA] Guides, no matter what "contradictory interpretations of the AMA [Guides]" may exist.

While there is some merit in what the hearing officer says, nonetheless, in interpretation of medical matters (as opposed to interpretation of statutes and rules) we must rely heavily on what the medical experts, particularly objective medical experts such as designated doctors, tell us. As we stated in Appeal No. 982093, *supra*, "we are not inclined to select

one interpretation over another for the sake of resolving medical professionals' disagreements."

The report of the designated doctor has presumptive weight, and the Commission shall base its determinations as to the IR on that report "unless the great weight of the other medical evidence is to the contrary." Section 408.125(e). In this case, and generally, the party challenging the report of a designated doctor has the burden of proving that the great weight of other medical evidence is to the contrary. In this case, carrier is challenging the designated doctor's report through the testimony (and report) of Dr. H and Dr. O's report. The hearing officer explained in some detail why he found that testimony and those reports unpersuasive. In addition, Dr. E stated that if Dr. O could show him where in the AMA Guides it specifically states "that you cannot combine crepitation with [ROM]" he would be happy to change his rating. Dr. H and carrier rely on a circuitous argument that crepitation is really arthritis and then attempt to draw an analogy between Table 36 dealing with arthritis of the knees and the language on page 45 of the AMA Guides specifically dealing with "joint crepitation with motion." The hearing officer did not find that persuasive and we are unable to say, either as a matter of law or that the hearing officer's decision is against the great weight and preponderance of the evidence. We decline to establish as a matter of law, one way or the other, that impairment for crepitation and loss of ROM of the shoulder may or may not be combined. Rather, we go back to our standard of review where we review the hearing officer's decision on whether it is 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 do not so find.

Accordingly, the hearing officer's decision and order are affirmed for the reasons stated.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge