APPEAL NO. 991769

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was convened on June 29, 1999. The hearing officer closed the CCH on that date; wrote to Dr. DW, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, on July 1, 1999, and sent copies of the letter to the respondent (claimant) and the attorney representing the appellant (carrier); asked Dr. DW three questions in that letter; received a response from Dr. DW dated July 16, 1999; sent copies of Dr. DW's response to the claimant and the attorney representing the carrier; provided them the opportunity to respond to it; and rendered a Decision and Order dated August 3, 1999. In that Decision and Order, she determined that the claimant's impairment rating (IR) is 16% as certified by the designated doctor; that during the filing period for the first quarter for supplemental income benefits (SIBS) that began on January 27, 1999, and ended on April 27, 1999, the claimant had some ability to work; that during that filing period the claimant attempted in good faith to seek employment commensurate with his ability to work and his underemployment was a direct result of his impairment from the compensable injury; and that he is entitled to SIBS for the first quarter. The carrier appealed; contended that the designated doctor did not properly apply the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) in assigning the 16% IR and that the great weight of the other medical evidence is contrary to the report of the designated doctor concerning IR; urged that the hearing officer's determinations that the claimant's underemployment during the filing period was a direct result of his impairment from the compensable injury and that he is entitled to SIBS for the first quarter are against the great weight of the evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant's IR is six percent as assigned by Dr. (Dr. M) or seven percent as assigned by Dr. P and that the claimant is not entitled to SIBS for the first quarter. A response from the claimant has not been received.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. Only a brief summary of the evidence related to the appealed determinations will be repeated in this decision.

We first address the determination that the claimant's IR is 16%. The 1989 Act sets forth a mechanism to help resolve conflicts concerning IR by according presumptive weight to the report of a doctor referred to as the designated doctor. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. If the Commission selects the designated doctor and the validity of the report of the designated doctor is challenged as was done in this case, the Commission must determine whether the report of the designated doctor is valid and is entitled to presumptive weight. Texas

Workers' Compensation Commission Appeal No. 950387, decided April 26, 1995. If it is determined that the report of the designated doctor is valid and entitled to presumptive weight, the Commission shall base its determination of the claimant's IR on the report of the designated doctor unless the great weight of the other medical evidence is to the contrary. Section 408.125(e). We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report is accorded the special presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. The hearing officer resolves conflicts in expert evidence and assesses the weight to be given to expert evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The claimant injured his left shoulder on _____, and had surgery on that shoulder on July 17, 1997, because of a rotator cuff tear with impingement syndrome. He had previous injuries to his right shoulder and low back. In a Report of Medical Evaluation (TWCC-69) dated May 26, 1998, Dr. P assigned an 11% upper extremity impairment and a seven percent IR. The 11% was based on six percent for crepitation, two percent for loss of range of motion (ROM), and three percent for peripheral nervous system impairment. On June 1, 1998, Dr. M assigned six percent for crepitation, one percent for loss of ROM and three percent for loss of strength for a 10% upper extremity impairment and a six percent IR. In a narrative attached to a TWCC-69 dated July 15, 1998, Dr. DW, the designated doctor, assigned 18% for crepitation, two percent for loss of ROM, and 10% because of weakness, for a 27% impairment of the upper extremity that was reduced to 26% because it was the nondominant upper extremity and certified that the claimant's IR is 16%. At the request of the carrier, Dr. RW examined the claimant's medical records. In a letter dated May 25, 1999, he said that he did not agree with Dr. DW that the claimant had maximum crepitation and that it was not appropriate to combine shoulder crepitation impairment with impairment for loss of ROM.

In her letter to Dr. DW dated July 1, 1999, the hearing officer asked him three questions. The first was why he used "Bone and Joint Deformities Joint Crepitation With Motion" rather than "Persistent Joint Subluxation and Dislocation." He responded in a letter dated July 16, 1999, stating that he did so because the claimant does not have joint subluxation or dislocation. The hearing officer also asked whether he believed that it was right to assign impairment for crepitation and loss of ROM and the reasons why he believed that the duplication problem was avoided in rating both crepitus and loss of ROM. Dr. DW answered:

> Yes, I believe it is perfectly appropriate to give this patient an impairment for both loss of [ROM] and crepitus. First, if you look under the subsection that I utilized, there is no prohibition against doing what I did, i.e., awarding an impairment for both crepitance and for loss of [ROM]. It specifically states that joint crepitation with motion can reflect synovitis or cartilage

> degeneration. It does say that I should use appropriate judgment to avoid duplication of impairments when other findings such as synovial hypertrophy or carpal collapse with arthritic changes are present. I believe I have done so. I feel I have utilized the correct subsection. This man had significant and constant joint crepitation with motion of his shoulder both actively and passively on physical examination, and at that time I categorized this as a severe joint crepitation. What I did was entirely proper to give him both the impairment for loss of [ROM] and for crepitance.

Dr. DW also said that in response to the last question there was no duplication.

The hearing officer should have made determinations to resolve the questions of whether the report of Dr. DW was made in compliance with the AMA Guides and whether it is entitled to presumptive weight on the issue of what is the claimant's IR. She did not do so, but in the statement of the evidence in her Decision and Order commented on the letter of Dr. DW dated July 16, 1999. Under the circumstances of the case before us, we are able to imply or infer that the hearing officer determined that the report of Dr. DW dated July 15, 1998, was rendered in compliance with the provisions of the AMA Guides and is entitled to presumptive weight. In Texas Workers' Compensation Commission Appeal No. 991750, decided September 27, 1999, the designated doctor combined impairment for crepitation and loss of ROM, that hearing officer awarded the IR assigned by the designated doctor, and the Appeals Panel affirmed the decision of the hearing officer and stated:

> 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.

The hearing officer determined that the great weight of the other medical evidence is not contrary to the report of the designated doctor and that the claimant's IR is 16%. The inferred or implied and the explicit determinations of the hearing officer concerning the report of the designated doctor and that the claimant's IR is 16% are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We now consider the determinations that during the filing period the claimant's underemployment was the direct result of the impairment from the compensable injury and that he is entitled to SIBS for the first quarter. The claimant testified that he had to lift parts weighing up to 150 pounds and hold things away from his body in his job as a heavy equipment mechanic. He said that he can lift items with his right hand and steady them with his left hand, but that he could not lift items weighing 150 pounds and that he cannot hold even lighter items away from his body like he had to do in the job he was performing

when he was injured. A functional capacity evaluation report dated May 22, 1998, states that the claimant could occasionally lift 75 pounds, frequently lift 35 pounds, and constantly lift 15 pounds. The claimant stated that he worked on a ranch; that he was paid $50.00 a day for working on the ranch; that he was also provided a place to park his travel trailer and five vehicles that he has, utilities, and food; that he attempted to do heavy mechanic work, but was not able to do so; that he does what he is able to do on the ranch; and that with his salary and benefits, he thought that he would have to be paid about $12.00 an hour to receive the same benefits package. Texas Workers' Compensation Commission Appeal No. 981257, decided July 17, 1998, contains citations to cases concerning the direct result criterion and contains the statement that a finding that the claimant's underemployment may be sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. The evidence is sufficient to support the determinations that during the filing period the claimant's underemployment was a direct result of his impairment from the compensable injury and that he is entitled to SIBS for the first quarter.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge