APPEAL NO. 991832

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 28, 1999. With regard to the only issue before him, the hearing officer determined that appellant's (claimant) impairment rating (IR) was seven percent as assessed by the designated doctor whose opinion was not contrary to the great weight of the other medical evidence.

Claimant appeals, contending that the designated doctor did not follow the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) in failing to assess an impairment under Table 49; and that the designated doctor's IR "should be found invalid," attacking the designated doctor's "poor credibility." Claimant requests that we reverse the hearing officer's decision and render a decision that he has a 16% IR. Respondent (carrier) responds to claimant's points, citing authority, and requests affirmance.

DECISION

Affirmed.

The medical records and claimant's testimony establish that claimant sustained a compensable low back and left knee injury while lifting a heavy part on _____. Claimant's treating doctor was Dr. NW. MRI testing showed disc bulges at L4-5 and L3-4 and left knee chondromalacia. Dr. NW performed a knee arthroscopy on May 7, 1998. Claimant has not had spinal surgery. The parties stipulated that claimant reached maximum medical improvement (MMI) on October 6, 1998. Dr. NW referred claimant to Dr. RW for evaluation. Dr. RW, on a Report of Medical Evaluation (TWCC-69) dated October 12, 1998, and narrative dated October 6, 1998, certified MMI and assessed a 16% IR. The 16% IR is based on a seven percent impairment from Table 49, Section IIC of the AMA Guides (unoperated on lumbar lesion with six months of documented pain, etc.), three percent impairment for loss of lumbar range of motion (ROM), 10% of the left lower extremity (LE) for specific disorder (Table 36) for the meniscal tear, and 11% of the LE for loss of ROM which is combined for 14% of the LE and converted to six percent whole person rating and combined with the three percent loss lumbar ROM and seven percent lumbar specific disorder to arrive at the 16% IR.

Claimant, in his appeal, states that an MRI of the lumbar spine performed on January 27, 1998, showed, among other things, a "contained herniation at L4-5" referencing Claimant's Exhibit No. 4, "treatment note dated 3/27/98"). We found no such reference in Claimant's Exhibit No. 4; however, we did find a progress note dated "3/27/98" from Dr. NW in Claimant's Exhibit No. 2 which states that claimant has a "para-central contained herniation at L4-5." However, the lumbar MRI report of January 27, 1998, has an impression:

1. Minimal right paracentral contained disc protrusion at L4-5.

2. Moderate, generalized bulging of the annulus at L3-L4 without evidence of frank disc herniation or spinal stenosis.

Carrier disputed Dr. NW's IR and Dr. R was appointed as a Texas Workers' Compensation Commission (Commission)-selected designated doctor. In a TWCC-69 and narrative, both dated December 9, 1998, Dr. R certified MMI and assessed a three percent IR, base on one percent impairment for loss of ROM of the left LE and two percent loss of lumbar ROM. Dr. R commented that claimant's "back pain comes, at least in part, from sacroiliitis which does not feature in Table 49 of the AMA Guides." It is undisputed that Dr. R did not have claimant's medical records available at this examination. Claimant testified that Dr. R said that he Dr. R would "do what he could without them." Dr. R's report states: "This incomplete report is being submitted at this time in order to comply with [TWCC] timeliness regulations." Subsequently, the medical records were made available to Dr. R and on another TWCC-69, Dr. R assessed a seven percent IR. In the narrative dated February 18, 1999, Dr. R explained that he had received the medical records and that he "assessed 1% impairment based on [ROM] of his injured knee compared with that of the uninjured knee," assessed 12% impairment of the LE or five percent whole person impairment for a meniscal tear, and assessed a two percent impairment for loss of ROM of the lumbar spine. Regarding the lumbar spine, Dr. R wrote:

> His records describe degenerative changes in his lumbar spine. It is recorded that his therapist noticed improvement in [ROM] of his lumbar spine whilst [claimant] was complaining to his doctor of deterioration. Specifically, his neck had begun to give him pain. There is no evidence that significant trauma occurred at the time of his accident. I do no think that additional impairment for his back is valid. His permanent Whole Person Impairment is 7%.

In a letter dated May 28, 1999, a Commission benefit review officer asked Dr. R whether he was saying that claimant did not have a back injury and asked for clarification why Dr. R had not used Table 49 of the AMA Guides and on what report Dr. R bases his diagnosis of sacroiliitis. Dr. R responded by letter dated June 2, 1999, stating:

> In my reports I do not intend to indicate that there was no injury to this man's back. I have noted that the carrier accepted liability for a back injury, which is compensable and should be considered when assessing an [IR]. I have reviewed the medical records kindly submitted by the Commission. They are lacking objective evidence to support a specific disorder rating from Table 49 of the *AMA Guides*. I would refer you to the worksheets which accompanied the report of my examination of [claimant] on December 9, 1998, for the diagnosis "*sacroliitis*." This diagnosis was made based on my clinical examination and the patient's history.

In a somewhat unusual move at the CCH, claimant's attorney called himself and was allowed to testify. The attorney testified that it was "financially impossible for [him] to hire an investigator . . . so [he] got on the internet" and proceeded to do a cyberspace investigation of Dr. R, the designated doctor. Based on his "investigation," the attorney concluded that there were discrepancies in Dr. R's birth date, telephone numbers, and addresses. The attorney testified that he has reported his findings to the Commission and has made a "formal complaint requesting that [Dr. R] be investigated for taking designated doctor appointments in violation of the rules." The attorney does not specify to which rule is referring but the carrier speculates it is the rule that requires a designated doctor to be in active practice (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 126.10 (Rule 126.10)).

The hearing officer adopted Dr. R's seven percent IR as not being contrary to the great weight of other medical evidence. Claimant appealed, contending that Dr. RW and Dr. NW described claimant's "back injury as a herniation" but Dr. R refused to assess a rating from Table 49 of the AMA Guides. First, we note that while Dr. NW referred to a "contained herniation," the MRI report itself called the condition a "contained disc protrusion." Carrier has accepted a compensable back injury, contrary to claimant's assertion it has not "accepted the "contained herniation' as compensable." Dr. R commented he did not find objective evidence to support a specific disorder rating from Table 49. In Texas Workers' Compensation Commission Appeal No. 991702, decided September 24, 1999, in remanding the case, *citing* Texas Workers' Compensation Commission Appeal No. 94570, decided June 15, 1994, we noted that a spinal abnormality (in that case a bulging disc) "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. R 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 Texas Workers' Compensation Commission Appeal No. 951921, decided December 11, 1995, 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. NW and Dr. RW 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.

Claimant contends that the great weight of other medical evidence is contrary to the designated doctor's IR (Section 408.125(e)) and, while recognizing the presumptive weight of the designated doctor's opinion, contends that "does not mean that the hearing officer must rubber-stamp the designated doctor's report." Claimant also correctly points out that "medical opinions should be weighed according to their thoroughness, accuracy and credibility. . . ." Claimant contends that there is no basis for Dr. R's diagnosis of sacroiliitis, that claimant should have an impairment from Table 49 and cited "the poor credibility of the designated doctor," based on the attorney's investigation. All of this information was available to the hearing officer and our review does not disclose that the hearing officer

failed to thoroughly and accurately weight that information. Further, pursuant to Section 410.165(a), it is the hearing officer, not the Appeals Panel, that is the sole judge of the weight and credibility that is to be given to the evidence. We cannot agree that the great weight of the medical evidence was contrary to the assessment of Dr. R and we will reverse a factual determination of a hearing officer only if that determination is so against 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). We do not so find.

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge