APPEAL NO. 991943

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 17, 1999. The issues at the CCH were the date of maximum medical improvement (MMI) and the impairment rating (IR) of the respondent (claimant). The hearing officer determined that the claimant reached MMI on September 28, 1998, with a 17% IR as certified by the designated doctor. The appellant (carrier) appeals, urging that the great weight of the other medical evidence is contrary to the designated doctor's date of MMI and IR and that the claimant reached MMI on July 31, 1998, with a five percent IR as certified by Dr. R. Dr. C. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____, and sought medical treatment with Dr. M. A lumbar MRI performed on December 19, 1997, indicates a bulging-protrusion of the disc at the central posterior aspect of L5-S1. On July 31, 1998, the carrier had the claimant examined by Dr. C. Dr. C certified that the claimant reached MMI on July 31, 1998, with a five percent IR. Dr. C assigned five percent impairment based on specific disorders but did not assign any impairment for range of motion (ROM). Dr. C states that the claimant exhibited significant subjective symptoms, that his 10° straight leg raising (SLR) was incompatible with an ambulating patient, and that the medical records reflect that the claimant had exhibited a negative SLR test on more than one occasion. Dr. C concluded that ROM was invalid because it was his impression that the claimant was not putting forth a "full effort." In response to Dr. C's certification, Dr. M indicated Al do agree that 5% is fair for this patient" and certified that the claimant reached MMI on August 25, 1998, with a five percent IR.

The Texas Workers' Compensation Commission (Commission) appointed Dr. P as the designated doctor. He examined the claimant on September 28, 1998, and certified that the claimant reached MMI on September 28, 1998, with a 17% IR. Dr. P assigned a six percent impairment based on specific disorders and an 11% impairment based on ROM. The 11% included four percent for lumbar flexion, three percent for lumbar extension, one percent for right lateral flexion, and three percent for left lateral flexion. The carrier had Dr. P's report reviewed by Dr. D. Dr. D indicates that the discrepancy in this case is the ROM deficit and that if a claimant does not give a full effort, the ROM would become invalid. He states ". . . I would recommend the [ROM] to be completely thrown out or have the claimant be subject to reevaluation of the [ROM] since, according to the AMA Guide [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association], with a 30° [SLR] this man should be in a wheelchair and unable to walk which is not possible with only a minimum lumbar disk bulge. An [IR] of five percent WP for minimum bulge, based on the

review of all the medical records and clinical examination is a clinically reasonable assessment for the date of injury on _____." The Commission sent Dr. D's peer review report to Dr. P requesting clarification. In response, Dr. P indicates that his original assessment is correct and he does not need to make corrections or reexamine the claimant. Dr. P states in pertinent part:

> On going through the said report, I agree that the discrepancies in the [IR] were mainly due to ROM measurements done in my office and one done earlier, enclosed along with the report.
>
> The ROM evaluation in my office was done by a qualified person, and in accordance with the workshop conducted by the Texas Medical Association. The discrepancy in SLR is because during clinical examination I measure the passive SLR and during ROM, active SLR is measured. The lack of effort by the patient is one of the limitations recognized while doing ROM. It is difficult to find out whether the reduced ROM during active SLR is due to lack of effort or due to pain. However, if lumbar flexion and extension meet the validity criteria set by AMA Guide, III edn (tightest SLR =< 10% of sum of sacral flexion and sacral extension), the patient should be given [an IR] for those measurements.
>
> I would appreciate it very much if [Dr. D] could quote the reference in AMA Guide in support of his statement that >with a 30E SLR this man should be in a wheel chair and unable to walk.'

Section 408.122(c) provides in part that the report of the designated doctor has presumptive weight and that the Commission shall base its determination of whether the employee has reached MMI on the report unless the great weight of the other medical evidence is to the contrary. Section 408.125(e) provides in part 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 other medical evidence is to the contrary. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92166, decided June 8, 1992.

The carrier asserts that Dr. P incorrectly assessed IR because he states that the validity criteria is met if the tightest SLR '< 10% of sum of sacral flexion and sacral extension. We agree with the carrier that in Texas Workers' Compensation Commission Appeal No. 94131, decided March 16, 1994, the Appeals Panel noted that the reference to 10% in Figure 83c was inconsistent with the written text of the AMA Guides and that the comparison factor should be 10°. Despite Dr. P's statement, applying the correct comparison factor of 10° to the figures provided by Dr. P reveals that the sum of sacral flexion (31°) and extension (7°) is within 10° of the tightest SLR angle (35); thus, the measurements are valid.

The carrier also asserts that the claimant did not exert full effort during testing and that his ROM testing should have been invalidated. We have previously stated that a designated doctor may invalidate ROM based on observations of suboptimal effort on the part of the claimant in testing. Texas Workers' Compensation Commission Appeal No. 981596, decided August 20, 1998; Texas Workers' Compensation Commission Appeal No. 951283, decided September 19, 1995. Dr. P responded to Dr. C's criticisms and declined to invalidate the claimant's ROM based on suboptimal effort. Whether the claimant exerted full effort during testing was a matter of professional opinion.

The hearing officer considered all of the medical evidence presented and did not find that the other medical evidence rose to the level of great weight against the MMI date and IR assigned by Dr. P. The report of the designated doctor indicates that he used the proper AMA Guides and properly applied them to the compensable injury. While the hearing officer did not make a specific finding that the designated doctor's report was given presumptive weight, we can infer that the hearing officer found that the report of Dr. P is valid and is entitled to presumptive weight. The determination of the hearing officer that the claimant reached MMI on September 28, 1998, with a 17% IR is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge