

APPEAL NO. 992046

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 was held on August 16, 1999. He (the hearing officer) determined that on September 17, 1998, Dr. E, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, assigned five percent impairment for the appellant's (claimant) temporomandibular joint (TMJ), twelve percent for a specific disorder of the lumbar spine, and zero percent for major depressive disorder; deferred assigning impairment for loss of lumbar range of motion (ROM); and used the combined values chart to assign a 16% impairment rating (IR). The hearing officer also determined that on June 3, 1999, Dr. E issued an amended report in which he assigned the same impairments for the TMJ and the specific disorder of the lumbar spine; assigned a zero percent impairment for loss of lumbar ROM because the test results were not validated; and assigned a five percent impairment for the major depressive disorder. In addition, the hearing officer determined that there was no proper reason nor appropriate circumstance to permit Dr. E to change the zero percent impairment assigned for the major depressive disorder on September 17, 1998, to five percent on June 3, 1999; that Dr. E's report of September 17, 1998, as amended to include a rating for loss of lumbar ROM is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to Dr. E's report of September 17, 1998, as amended to include a rating for loss of lumbar ROM; and that the claimant's IR is 16%. The claimant appealed; urged that his IR is 20% as certified by the designated doctor in his amended report dated June 3, 1999; and requested that the decision of the hearing officer be reversed. The respondent (carrier) replied, urged that the hearing officer correctly determined that the designated doctor had no legal basis to change the impairment for the claimant's psychological component from zero percent to five percent, contended that the decision of the hearing officer is supported by sufficient evidence, and requested that it be affirmed.

DECISION

We reverse and render in part and reverse and remand in part.

The claimant and the carrier stipulated that the claimant sustained a compensable injury to his face, head, neck, and low back on _____, and that he reached maximum medical improvement (MMI) by operation of law on March 9, 1998. In a Report of Medical Evaluation (TWCC-69) dated October 24, 1996, Dr. E certified that the claimant had not reached MMI. On July 31, 1997, Dr. E noted that the claimant had declined spinal surgery; certified that the claimant reached MMI on June 4, 1997; assigned zero percent impairment for the closed head injury; assigned eight percent for a specific disorder of the lumbar spine; stated that the claimant was not entitled to impairment for loss of lumbar ROM because he failed to meet the straight leg raise validity criteria; reported that the claimant's IR was eight percent; and said that six months was a reasonable time for the claimant to decide whether he wanted to proceed with spinal surgery. On February 17,

1998, the claimant had spinal surgery that included a fusion at L5-S1. In a report dated May 4, 1998, Dr. E noted that the claimant had been recommended for pain management and stress management programs; that he was undergoing continued psychotherapy; that the claimant was being treated for a TMJ disorder; that he rescinded his previous report with an eight percent IR; and that the claimant should again be evaluated. In a TWCC-69 dated September 17, 1998, Dr. E certified that the claimant reached MMI on March 9, 1998, and that his preliminary IR was 16% subject to modification once lumbar ROM was completed. In a narrative attached to the TWCC-69, Dr. E stated that he assigned zero percent impairment for the mental behavioral category, five percent impairment for the TMJ, and twelve percent impairment for a specific disorder of the spine based on the lumbar surgery. Dr. E said that ROM was deferred to a later date, that he would be happy to reevaluate ROM after x-rays show complete fusion and no spasm is present, and that the findings that day resulted in a 16% IR. In a TWCC-69 dated June 3, 1999, Dr. E certified that the claimant reached MMI on March 9, 1998, with a 20% IR. In a narrative attached to the TWCC-69, Dr. E indicated that the claimant failed to meet the straight leg raise validity criteria; included in his impression “[p]ostconcussive syndrome, with some continued anxiety sequelae noted on today’s examination”; and wrote:

Under mental/behavioral disorders, although previously rated at zero on my last evaluation, the patient has shown and relates ongoing problems with anxiety under these stressors. Therefore, based on my understanding of Chapters 14 and 4 of the AMA Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association], and under page 97, emotional disturbances which ranges from 5 to 15 percent, the patient is assigned a 5 percent whole person [IR] taking this into account.

These are the regions that have been well-documented as being involved causally related to the work injury, therefore, the whole person impairment can now be determined. This is done by combining the 12 percent lumbar regional impairment with the 5 percent mental/behavioral impairments and combining that with the 5 percent [TMJ] disorder impairment. This then equals, by utilizing the Combined Values Chart, a 20 percent total whole person impairment.

The next contention was the behavioral problems. I would agree that the patient does have continued problems and therefore they were taken into account for today’s evaluation. However, I should like to note, I never stated that this patient had no psychological problems. I was only applying this diagnosis as to how they are listed in the AMA Guidebook. I was not discounting the diagnosis or that the patient needed treatment. I was interpreting the diagnosis as applied to the AMA Guides. I am not a psychiatrist and certainly never stated that the diagnosis was wrong and that the patient did not have these problems.

In a psychiatric evaluation dated July 19, 1997, Dr. J said that the claimant's chief complaint was that he was very depressed because he was always in pain; that his, Dr. J's, impression included (1) major depressive disorder, single episode, non-psychotic, (2) dysthymic disorder, (3) chronic pain disorder, and (4) rule out post traumatic stress disorder, chronic; and that his recommendations included antidepressant medication, stress management, pain management, and individual psychotherapy to help deal with the crisis; and that the claimant's psychiatric difficulties had obviously become the most significant disabling factors for the claimant.

It is clear that the June 3, 1999, report by Dr. E is an amended report. In Texas Workers' Compensation Commission Appeal No. 94646, decided July 5, 1994, the Appeals Panel held that there is no provision for picking and choosing parts of a designated doctor's report. In Texas Workers' Compensation Commission Appeal No. 990552, decided April 29, 1999, the designated doctor assigned two percent impairment for the shoulder and ten percent for the lumbar spine; the claimant had shoulder surgery; and the designated doctor issued an amended report assigning one percent impairment for the shoulder and sixteen percent for the lumbar spine. The Appeals Panel reversed the decision of the hearing officer and held that under the circumstances of that case the designated doctor was correct in assigning an IR for the complete injury at the time of the reexamination even though after the first report of the designated doctor there had been surgery only on the shoulder and not on the lumbar spine. In the case before us, neither party has contended that the designated doctor did not act properly in rendering the part of the June 3, 1999, amendment concerning loss of ROM. The hearing officer erred in choosing to accept the part of the June 3, 1999, amended report concerning loss of ROM and rejecting the part of the amended report concerning depression. The Appeals Panel has approved a designated doctor's looking to Chapter 4 of the AMA Guides for guidance in assigning an impairment under Chapter 14 of the AMA Guides. Texas Workers' Compensation Commission Appeal No. 951447, decided October 9, 1995. The emphasis in Chapter 4 is on organic deficits of the central nervous system as demonstrated by loss of function. Chapter 14 concerns mental disorders and does not address organic deficits. Dr. E assigned a five percent impairment under Chapter 14. Considering the comments of Dr. E in his reports dated May 4, 1998, and June 3, 1999, and the report of Dr. J dated July 19, 1997, the comment by the hearing officer in his Decision and Order that Dr. E did not base his five percent rating for depression on objective findings is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We reverse the decision of the hearing officer and render findings of fact that the amended report of Dr. E dated June 3, 1999, was rendered in accordance with the provisions of the AMA Guides and that it is entitled to presumptive weight. We remand for the hearing officer to determine whether the great weight of the other medical evidence is contrary to that amended report of Dr. E and to assign an IR.

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.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge