APPEAL NO. 992054

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 18, 1999. At issue was the correct impairment rating (IR) to be assigned to the appellant, who is the claimant, for his compensable back injury of (1st date of injury).

The hearing officer held that the claimant's IR was one percent, in accordance with the report of the designated doctor, and that the great weight of other medical evidence was not contrary to this report.

The claimant has appealed, arguing the aspect in which he believes his treating doctor's assessment of IR was a much more accurate assessment of his medical condition than that of the designated doctor. He argues in favor of a rating for a specific spinal condition from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. The respondent (carrier) responds by arguing facts in favor of the designated doctor's opinion.

DECISION

Affirmed.

The claimant was employed by (employer) when he slipped after tripping over a hose on (1st date of injury). He did not fall. The claimant was treated for a lumbar strain by Dr. S, D.C. Claimant had an MRI on February 23, 1998, which identified a bulge at L4-5. Medical records indicate that the claimant subsequently twisted his ankle on (2nd date of injury). Dr. S referred the claimant to Dr. D, M.D., who reviewed objective testing that was performed on the claimant and found that an MRI was "reportedly consistent with" a herniated disc. Dr. D said that claimant's injured right ankle was "related to" his previous back injury, although the basis for this conclusion is not explained. Dr. D diagnosed a severe ankle sprain secondary to right lumbar radiculopathy. Dr. S released the claimant back to work with restrictions on August 24, 1998. The restrictions were lifting limited to 50 pounds and flexibility in frequently shifting positions.

Dr. S evaluated claimant for an IR, and certified that he had an 11% IR on September 14, 1998. This was derived from Table 49, for a specific condition relating to a protrusion at L4-5, sensory loss and pain, and range of motion (ROM) deficits. Claimant was examined by Dr. B, D.C., on October 22, 1998. Dr. B certified that the claimant had a one percent IR. Dr. B stated that the MRI showed a "questionable" small disc herniation that did not compress the nerve roots. He noted that a March 11, 1998, myelogram was negative, showing minimal disc protrusion without extrusion. Dr. B did not assign a rating from Table 49, because he did not agree that the claimant had a documented disc

herniation. Noting that the claimant weighed 300 pounds and was 5'11" tall, he said that the protrusion observed on the MRI would be accounted for by his weight, and not due to any work-related injury. Dr. B found no sensory loss, and he found that most of claimant's ROM testing was invalidated. The one percent he assigned was for a loss of right lateral flexion.

Dr. S responded to this report by questioning the omission of a Table 49 rating, and by noting that he was able to obtain valid ROM measurements when he performed his own examination. He noted that if an EMG were performed and could document radiculopathy, he would change his report. He stood behind his one percent rating. On March 9, 1999, claimant had an EMG. The results were forwarded to Dr. B by the Texas Workers' Compensation Commission (Commission). Dr. B responded on April 19, 1999, that he had reviewed the EMG report and sought confirmation of his impressions from a physiatrist with whom he worked on a regular basis. Dr. B stated that nerve conduction velocity was normal. He said that while some mild irritability was found suggestive of L5 radiculopathy, he did not view the report as conclusive on this matter sufficient to warrant a change. Dr. B said that the results of the test verified his impression that there was no motor or sensory loss in the lower extremities to warrant an increased IR.

Dr. S testified at the CCH as to why he believed his IR was more accurate. He also agreed that a significant amount of weight could cause a disc protrusion.

The report of a Commission-appointed designated doctor is given presumptive weight. Sections 408.122(c) and 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992. However, presumptive weight does not mean a "rubber stamp" adoption of the designated doctor's report where the hearing officer weighs the evidence and determines that the great weight of other medical evidence proves that the claimant is not at maximum medical improvement, or that the percentage of impairment is not accurate. *See* Texas Workers' Compensation Commission Appeal No. 94053, decided February 23, 1994. However, a mere difference of medical opinion as to what testing shows will not constitute a great weight against a designated doctor's report. Texas Workers' Compensation Commission Appeal No. 960034, decided February 5, 1996.

In reviewing the record, we cannot agree that the hearing officer erred by giving presumptive weight to Dr. B's report, and we affirm her decision and order.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Dorian E. Ramirez
Appeals Judge