

APPEAL NO. 992161

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 991343, decided August 10, 1999, the Appeals Panel affirmed so much of the decision and order of the hearing officer which awarded contribution for a specific disorder of the cervical spine, but no contribution for a prior knee injury. We reversed that part of the decision and order which denied contribution for loss of cervical range of motion (ROM) and remanded this matter for further consideration in light of the applicable law and facts of this case. A hearing on remand was not held. On August 25, 1999, the hearing officer issued a decision and order on remand in which he again found no contribution for loss of cervical ROM. The appellant (carrier) appeals this determination, contending that it is against the great weight and preponderance of the evidence and, specifically, that the lay testimony of the respondent (claimant) could not overcome the medical testimony supporting contribution. The appeals file contains no response from the claimant to this appeal.

DECISION

Reversed and a new decision rendered.

This case was remanded on a very narrow issue of contribution from a prior work-related cervical spine injury on _____, for loss of cervical ROM. The background facts and applicable law are contained in Appeal No. 991343, *supra*, and will be repeated only as necessary for purposes of this decision.

In a report of December 17, 1990, dealing with the _____, cervical injury, Dr. R, then and now the treating doctor, measured cervical ROM as follows: flexion 40°, extension 30°, and rotation to the left and right 60°. These figures remained the same on subsequent examinations by Dr. R on January 14 and August 6, 1991. The claimant testified that after this injury, he passed two Department of Transportation physicals and was able to resume his truck driving job in 1992. The actual reports of the physical examinations were not in evidence. Although Dr. R reported continuing complaints of neck pain after fusion surgery on August 6, 1991, the claimant said he disagreed with this and asserted that he was essentially fully recovered, or at least was able to continue working until his current injury on _____.¹

On September 4, 1998, Dr. N, the designated doctor, as part of the impairment rating for the current injury, assigned 10% for loss of cervical ROM. His ROM measurements reflected: flexion 36°; extension 24°; right lateral flexion 22°; left lateral flexion 26°; right rotation 80°; and left rotation 60°. Prior to this, on October 27, 1998, a Dr. T, found cervical ROM as follows: flexion 12°; extension 30°; left flexion 28°; right flexion 20°; left rotation 30°; and right rotation 30°.

¹He testified "I felt great I went back to work a hundred percent."

Dr. P examined the claimant and presumably reviewed his records at the request of the carrier to provide, among other things, an opinion on contribution. In a report of November 7, 1998, Dr. P found cervical ROM measurements invalid, and expressed disagreement with Dr. N's 10% for cervical ROM as "somewhat high for an otherwise uncomplicated cervical fusion procedure." She then commented that "we have no previous [ROM] measurements to go on. Thus, I cannot objectively make any apportionment for [cervical ROM]." This last comment is somewhat puzzling in light of the fact that Dr. R had recorded cervical ROM measurements. In any case, Dr. P testified at the original contested case hearing and referred to the prior cervical ROM measurements of Dr. R. In Dr. P's opinion, the cervical ROM measurements taken by Dr. R in December 1990 and January and August 1991 "all would have amounted to seven percent whole person impairment" and that "if that was an accurate reading in August of '91, after having problems for over a year, it's improbable that [ROM] would have drastically improved over a two, three, four month period." Dr. P further testified that these assessments were reasonable. On cross-examination, Dr. R stated that "[i]n clinical practice in the real world, patients that work on it may B can easily get 90, 95% of their [ROM] back of what's normal. The two levels are taken out, but the other levels can become slightly hyper-mobile and one can get their [ROM] back. It's never complete."

In his decision and order on remand, the hearing officer mentioned the claimant's testimony that he had completely recovered his cervical ROM by the time he went back to work in 1992, and that Dr. P testified that "a person with Claimant's problems could recover his functional [ROM], that even with a two-level fusion (which Claimant did not have prior to the latest injury) patients can recover 90-95% of their [ROM]." He then found that there was "no clearly overlapping loss of [ROM] from the current and prior cervical injury such that there is a cumulative effect of the prior injuries on the cervical ROM limitations for the compensable injury." Finding of Fact No. 2.

The carrier had the burden of proving contribution. Texas Workers' Compensation Commission Appeal No. 92610, decided December 30, 1992. Whether there has been a cumulative effect from a prior injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94578, decided June 20, 1994. 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). The purpose of the remand was for the hearing officer to focus on the question of cumulative impact on the loss of cervical ROM. We have stated that contribution "must be determined with reference to the medical evidence." Appeal No. 94578. Only medical evidence of no cumulative effect can refute or rebut medical evidence of cumulative effect. Texas Workers' Compensation Commission Appeal No. 950898, decided July 17, 1995. A claimant's testimony of full recovery or no cumulative effect is a factor the hearing officer may consider regarding contribution when there is medical evidence for and against contribution. See Texas Workers' Compensation Commission Appeal No. 941170, decided October 17, 1994; Texas Workers' Compensation

Commission Appeal No. 950450, decided May 10, 1995; Appeal No. 950898, *supra*; Texas Workers' Compensation Commission Appeal No. 990631, decided May 10, 1999.

In the case we now consider, we agree with the carrier that all the medical evidence which dealt with the question of contribution supported a finding of cumulative impact. Under these circumstances, the testimony of the claimant that he was fully recovered could not in itself defeat contribution. The proper resolution of this case ultimately depended on what in fact the medical evidence showed. The hearing officer used Dr. P's comments about the general possibility of 90-95% recovery along with the claimant's testimony of full recovery to conclude that the claimant had actually recovered from the 1990 cervical injury at the time the claimant returned to work in 1992. This comment of the hearing officer has the effect of equating a potential 90-95% recovery of normal ROM to an actual 100% recovery and establishes the complete recovery as of the date of return to work. Such a conclusion is, we believe, against the great weight and preponderance of Dr. P's evidence.

Dr. P did not place the claimant in the category of 90-95% recovered. On the contrary, she concluded that the claimant's ROM deficit from the 1999 injury endured through the 1997 injury and accounted for seven percent of the 10% cervical ROM found by Dr. N. In Texas Workers' Compensation Commission Appeal No. 971368, decided September 2, 1997, we commented that "where there is sufficient evidence, as here, for a determination of a percentage of contribution that is reasonably supportable, contribution should be awarded."

See *also* Texas Workers' Compensation Commission Appeal No. 980211, decided March 20, 1998; Texas Workers' Compensation Commission Appeal No. 950735, decided June 22, 1995; and Texas Workers' Compensation Commission Appeal No. 952019, decided January 12, 1996, where we rendered decisions in favor of contribution in a specific amount.

Based on Dr. P's testimony that seven percent of the assigned 10% impairment for cervical ROM deficit reflected the cumulative or overlapping effect of the prior injury, we reverse the determination of the hearing officer against contribution and render a decision that contribution has been established for cervical ROM in the ratio of 7/10. The overall contribution is raised from 6/23 to 13/23, or 57%.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCUR IN RESULT:

Judy L. Stephens
Appeals Judge