

APPEAL NO. 000082

Following a contested case hearing held on December 21, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by finding that the 12% impairment rating (IR) assigned by the designated doctor is not contrary to the great weight of the other medical evidence and by concluding that appellant's (claimant) IR is 12%. Claimant requests our review, asserting that the designated doctor erred in failing to assign a rating for her major depressive disorder. The response filed by the respondent (carrier) urges the sufficiency of the evidence to warrant our affirmance, stressing that the designated doctor did not regard claimant's psychological condition as permanent.

DECISION

Affirmed.

Claimant introduced the Decision and Order of another hearing officer, signed on May 21, 1997, which determined that claimant's \_\_\_\_\_, injury "includes a compensable follow-on psychological or depressive disorder." According to the hearing officer's recitation of the evidence, claimant and a large coworker rushed to exit the hotel kitchen where they were working because a large spark was created during the repair of a gas leak; claimant fell and the coworker stepped on her right thigh; and she thereafter has had pain in her neck, right shoulder and upper extremity, back, and right hip and thigh which caused her depression.

The parties stipulated that on \_\_\_\_\_, claimant sustained a compensable injury; that claimant reached statutory maximum medical improvement (MMI) on November 19, 1997; and that Dr. S is the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The finding that Dr. S assigned a 12% IR which did not include a rating for claimant's compensable psychological component is not appealed.

Claimant's testimony and the medical records in evidence indicate that in April 1996 an earlier treating doctor, Dr. T, assigned her an eight percent IR which she disputed (report not in evidence); that the first designated doctor in her case, Dr. H, examined her in August 1996 and determined that she had not reached MMI; that she changed treating doctors to Dr. K, whom she first saw on December 31, 1996; that Dr. K referred her to Dr. SB, for treatment of her psychological condition; that the carrier's independent medical examination doctor, Dr. EB, examined her on January 6, 1997, and assigned a nine percent IR for lumbar and cervical spine impairment which she disputed; that because Dr. H was no longer available, Dr. S became the designated doctor; that Dr. S examined her in April 1998 and assigned a 12% IR with which she disagreed; and that she later returned to Dr. S for a second examination after which Dr. S refused to change his 12% IR. Claimant further states that the depression keeps her from working and socializing and that she disagrees

with Dr. S's refusal to increase his IR to account for her depression. Claimant said that her current treating doctor is Dr. E and that she is also being treated by Dr. A and a counselor, both with (agency).

Dr. S's Report of Medical Evaluation (TWCC-69) dated "4/24/98" certifies that claimant reached MMI on "11/19/1997" with an IR of 12%. In his narrative report of the same date, Dr. S states that his determinations were made based on the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and summarizes claimant's treatment and testing. Dr. S states that the 12% IR he assigned claimant consisted of four percent for the cervical spine disorder under Table 49 of the AMA Guides, five percent for the lumbar spine disorder, two percent for upper extremity loss of range of motion (ROM), and one percent for loss of lumbar ROM.

The Commission wrote Dr. S on June 3, 1998, asking that he review the enclosed May 27, 1998, report of Dr. K and determine if any revision of his IR was necessary and whether reexamination of claimant was needed. The Commission wrote claimant on June 15, 1998, advising that repeat ROM studies with Dr. S were scheduled for July 3, 1998. Claimant testified that Dr. S seemed upset to have her back for reexamination.

Dr. S's July 3, 1998, TWCC-69 certifies that claimant reached MMI on "11/19/97 Statutorily" with an IR of 12%. In his narrative report of the same date, Dr. S states that all of the medical records were reviewed, that claimant was surprised to see the bulk of her medical records there for review, and that she wanted to know why three medical examiners determined an IR less the 50% when a physical therapist had determined an IR of 24%. After stating the statutory definition of impairment, as found in Section 401.011(23), Dr. S reported that claimant was assigned four percent for her cervical spine disorder under Table 49 of the AMA Guides, one percent for cervical spine ROM loss, five percent for her lumbar spine disorder under Table 49, and two percent for upper extremity ROM loss and that her total whole person IR remains at 12%.

A Commission benefit review officer wrote Dr. S on November 16, 1998, advising that claimant's follow-on psychological or depressive disorder had been determined to be compensable and that an issue was raised at a benefit review conference that day as to whether that injury should be included in claimant's IR. This letter enclosed reports of Dr. SB regarding claimant's depressive disorder. Dr. SB's December 17, 1996, report included the diagnosis of major depressive episode, severe, single episode, non-psychotic.

Dr. S responded on November 19, 1998, stating that claimant did not present depressed affect during his two extended examinations; that while depression was noted and documented by treating and referral doctors, it best fits an Adjustment Disorder Depression which is quite reversible and is eligible for treatment only for a limited duration under the Commission's Mental Health Treatment Guidelines Rule 134.1000 J; that there is no indication of permanent impairment for injury related to psychological disorder; and that there is "0% attributable for permanent impairment according to the AMA Guides, in my

interpretation and judgement." Dr. S concluded that "[t]he previous finding of 12% whole person is confirmed for the injury of \_\_\_\_\_."

On March 15, 1999, the Commission once again wrote Dr. S asking him to review enclosed reports of Dr. SB and advise if revision of his IR would be appropriate. Dr. SB's February 11, 1999, report continues the diagnosis and indicates that the treatment goal includes improving claimant's tolerance for pain so that she can reestablish employment.

Dr. S responded on March 23, 1999, noting that he had examined claimant twice and had responded to previous Commission inquiries; that he carefully reviewed Dr. SB's letters; that there is no substantial change of an injury-related medical condition and no new IRs from other doctors; and that he has not changed his opinion that claimant's IR is 12%, as previously established. Dr. S further stated that, in his medical opinion, the psychological conditions are not producing permanent impairment points and that his 12% IR is very close to the IRs of two other medical doctors who also saw claimant. Dr. S went on to comment as follows: "At this point, the Commission is repeatedly querying the same item, and it seems intimidating. The question of additional impairment has been asked and answered. 12 % is permanent and final in my medical opinion."

In a June 22, 1999, report, Dr. SB states that claimant's IR, based on Chapter 14 of the AMA Guides, is "estimated to be 17%" and he sets out the various components of that rating. Dr. SB also states that this IR "is a reflection of current status, not a projection of permanent impairment," and that "[w]hile it is expected that a major depressive disorder will respond to treatment, and thus is not a permanently disabling condition, it is also clear that not every case of major depression recovers to a non-impaired status."

Dr. SB wrote on October 5, 1999, that claimant asked him to write a letter concerning the permanence of her injury-related depression. He stated that while one does not usually think of a major depression as a permanent condition, chronic medical conditions increase the risk for more persistent episodes and that it is his impression that claimant's depression should be considered permanent.

Dr. E's TWCC-69 of "10/11/99" certifies that claimant reached MMI on that date with an IR of 27%. In his narrative report, Dr. E states that claimant has completed her counseling program under Dr. SB; that Dr. SB considers her depression to be permanent; and that Dr. SB now feels that claimant has completed her counseling program, her mental status is permanent and stable, and her whole person IR due to mental and behavioral disorder is 17%. Dr. E further states that combining this 17% with claimant's previous 12% IR yields a 27% whole person IR and that he is submitting this report to the Commission to include the mental and behavioral disorder IR to her previous IR.

Dr. A wrote on December 10, 1999, that claimant has a diagnosis of major depressive disorder and Panic Disorder with agoraphobia which developed after an accident several years earlier; that her illnesses are expected to be permanent; and that even with treatment she will be unable to work.

Section 408.125(e) provides that the report of the Commission-selected 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. It is well-settled that it is not just equally balancing evidence or even a preponderance of the evidence that can outweigh the designated doctor's report but rather a "great weight" of other medical evidence is required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Further, the Appeals Panel has emphasized the unique position that a designated doctor occupies under the 1989 Act in resolving disputes concerning MMI dates and IR issues and that no other doctor's report, including that of a treating doctor, is accorded this special, presumptive status. Appeal No. 92412. We have also said that the report of the designated doctor should not be rejected "absent a substantial basis" for doing so. Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill  
Appeals Judge

CONCUR:

Alan C. Ernst  
Appeals Judge

Judy L. Stephens  
Appeals Judge