

APPEAL NO. 000238

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 2, 1999, a hearing was held. At the conclusion of that hearing, the hearing officer ordered that the respondent (claimant) return to the designated doctor for another examination. The hearing then reconvened on January 18, 2000, and the hearing officer determined that claimant's impairment rating (IR) is 18% as found by the designated doctor, Dr. M. Appellant (carrier) asserts that the determination that claimant's IR is 18% is not supported by credible evidence, that there was no basis for a dispute or modification of Dr. M's first IR of 10%, and that the IR of 10% should be given presumptive weight; carrier also says that claimant has not cooperated with his doctors and has been inconsistent. Claimant replied that the decision should be upheld.

DECISION

We affirm.

Claimant worked for (employer) on _____. At the time of the injury, claimant was riding in a truck that collided with another vehicle. There was no issue as to compensable injury. At the hearing in November 1999 carrier stipulated that claimant's injury included his neck, right shoulder, right arm, ribs, and low back. The parties also stipulated that maximum medical improvement was reached on March 10, 1999. Claimant at that time presented evidence that Dr. M had not performed three repetitions of range of motion (ROM) testing, having done only one. Dr. M's report also did not show that cervical ROM testing included three repetitions. The hearing officer considered returning claimant to Dr. M for reexamination based on no indication in the record that clarification had ever been sought from Dr. M.

Claimant argued against a reexamination by Dr. M, proposing that another designated doctor should be appointed or that the IR of 39% of Dr. F be used to determine IR. The hearing officer indicated that the evidence did not warrant appointment of another designated doctor at that time. Carrier at the November hearing said that it did not object to one reexamination. The hearing officer then invited questions that might be provided to Dr. M to assure that a proper IR was assigned.

The hearing officer's letter to Dr. M concerning a reexamination of claimant included the defined injuries as stipulated to by the parties.

Dr. M reexamined claimant; he did not change that part of his IR which included four percent for a specific disorder of the cervical spine; and he did not change his IR which included 10% for the right upper extremity (which is six percent whole body IR). Dr. M did add nine percent for ROM deficiencies of the cervical spine, and his report included a form showing three repetitions of ROM testing of the cervical spine, which met consistency

standards. These figures combined to result in 18% IR. (Dr. M invalidated lumbar ROM testing on both occasions.)

Carrier states that claimant did not dispute the designated doctor's first IR. The initial IR assigned, however, was the 39% IR of Dr. F provided in March 1999. There is no question that Dr. M's 10% IR (subsequent to Dr. F's) could not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) even though not disputed within a certain time, and there was no issue to that effect. With no time limit set for disputing the first IR of the designated doctor and with an issue of IR being presented through the dispute resolution process, any question about disputing the designated doctor's IR does not control the outcome of this case.

Carrier also states that claimant was inconsistent and did not cooperate with doctors. Dr. M mentioned poor results on Waddell tests and also invalidated lumbar ROM testing. Dr. M found claimant's testing in regard to cervical ROM to meet consistency standards and duly awarded an IR for such limitations. Dr. M's amended report shows that he considered whether claimant acted consistently or not and assigned IR accordingly. Whether claimant had cooperated with prior physicians is not really an issue included in the issue of IR. If claimant's past record of cooperation indicated some problem with credibility, credibility is a matter for the hearing officer to consider in reaching his decision; claimant's credibility is not generally an appellate issue, particularly where the only issue is IR, significantly affected by medical evidence.

While carrier also says there was no basis for modification of Dr. M's initial IR, there is no assertion that Dr. M was not queried, or that claimant was not reexamined, within a reasonable time. We may imply that carrier is saying claimant was not reexamined for a proper purpose, but the purpose stated, Dr. M's failure to follow the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association at the first examination, is a proper purpose; as stated, carrier at the November 1999 hearing did not object to such reexamination. In this regard, it should be noted that Dr. M first examined claimant in April 1999, but stated that he could not perform an IR because of claimant's neck spasms. Dr. M's 10% IR resulted from a May 25, 1999, examination. As stated, the initial hearing session was on November 2, 1999, at which time the hearing officer returned claimant to Dr. M. Dr. M then examined claimant again on November 30, 1999, and provided his 18% IR. This sequence of events, along with a 1997 compensable injury, does not indicate a prolongation of proceedings by either party such as to compromise the process of determining IR.

The hearing officer gave presumptive weight to the report of Dr. M. Presumptive weight is to be accorded the designated doctor's report of IR according to Section 408.125, and that IR will be used by the hearing officer unless it is contrary to the great weight of other medical evidence. The hearing officer found that Dr. M's report was not contrary to the great weight of other medical evidence, indicating by a conclusion of law that the IR of 18% of Dr. M was accepted as the correct IR. Having reviewed the three reports of Dr. M

and all the other medical evidence, we do not find that the hearing officer's determination is against the great weight and preponderance of the evidence.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge