

APPEAL NO. 000474

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 10, 2000. The hearing officer closed the record on February 8, 2000. With regard to the only issue before him, the hearing officer determined that the appellant's (claimant) impairment rating (IR) was 13% as assessed by the designated doctor. The claimant appeals, contending that his IR should be 23% as assigned by his treating doctor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The medical records indicate that claimant was employed as a laborer and sustained a compensable low back lifting injury on \_\_\_\_\_. Claimant's treating doctor is Dr. S, who has seen claimant for "several years." Claimant had spinal surgery in April 1997, in the form of a laminectomy with spinal discectomy at L4-5; laminectomy with bone graft at L5-S1; and bilateral fusion with internal fixation at L4-L5-S1. Claimant had additional surgery of bilateral fusion with fixation at L4-L5-S1 in February 1999. Dr. S, in a Report of Medical Evaluation (TWCC-69) dated January 25, 1999 (before claimant's second surgery), certified maximum medical improvement (MMI) (not at issue in that claimant reached MMI by operation of law on December 14, 1998) with a 23% IR based on 13% impairment from Table 49, Section IV C of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); three percent impairment for pain and loss of sensation; and nine percent impairment for "other," referencing "T. 50 p. 79" which we presume to be "Table 50, Impairment of . . . Lumbar Regions Due to Ankylosis, Determined by Radiographic Methods," apparently for "Any 4 lumbar."

Carrier disputed Dr. S's IR and the parties stipulated that Dr. C was the Texas Workers' Compensation Commission (Commission)-appointed designated doctor. Dr. C, in a TWCC-69 and narrative, both dated August 6, 1999, certified MMI and assessed a 13% IR based on Table 49, Sections II E, F and G1 of the AMA Guides. Dr. C measured for range of motion (ROM) and invalidated the results "based on the straight leg validation rule [SLR]." Dr. C also noted that claimant "shows no objective sensory deficit and no objective motor deficit of the lumbar spine or lower extremity."

Dr. C's report was sent to Dr. S, who, in a letter dated August 14, 1999, disagrees with Dr. C because Dr. S thinks the rating is "excessively low." Dr. S believes Dr. C's report incorrectly

omits evaluation with regard to the fusion of the lumbar spine and is not assigning any impairment with regard to table 50, page 79. The patient qualifies for at least 6% body impairment secondary to 2 levels lumbar

fusion. . . . The fusion was in non-union at one level and it still may be. Therefore, one would assign additional 3% of impairment according to table 50, page 79.

In addition, Dr. S writes:

This patient has had 2 larger scale operative procedures on the lumbar spine and, in my opinion merits additional [IR] with regard to the residual pain and 3% adequately reflects his status. This according to Table 3, page 104 in the [AMA] Guides.

Dr. S does not explain how he arrived at the three percent using Table 3, and other tables referenced in that section.

In any event, Dr. S's letter and opinions were made available to Dr. C for comment. Dr. C responded by letter dated October 6, 1999, stating:

In regards to using Table 50 of the [AMA Guides], it is not appropriate to use this table unless an individual has just undergone spinal surgery or if there is lumbar fusion along with bilateral hip fusion.

The hearing officer, in his Statement of the Evidence, commented:

that if the claimant's spinal surgery actually resulted in ankylosis, then it would have been error for the designated doctor not to use Table 50; but that whether or not this claimant's fusion resulted in ankylosis is a medical judgment. The designated doctor was contacted concerning whether or not he found ankylosis present during his examination of the claimant, and he responded that it was not. Accordingly, I find that the great weight of the other medical evidence is not contrary to the designated doctor's opinions because it only represents a difference in medical judgment, and as such, does not rise to the "great weight" standard.

Claimant's appeal is predicated on the contention that Dr. C erroneously did not award an impairment from Table 50 for ankylosis as assessed by Dr. S, and therefore, Dr. C had not properly used the AMA Guides.

The Appeals Panel has addressed this problem in a number of cases, including Texas Workers' Compensation Commission Appeal No. 970202, decided March 24, 1997, in which we reviewed several cases. We noted that "[a]s should be evident, throughout the years different doctors have given different interpretations of the use or nonuse of Table 50 and . . . apparently different theories have been, or perhaps are being, taught." In a number of cases we have rejected the use of Table 50 as a means of apportioning a lesser degree of loss of ROM (Texas Workers' Compensation Commission Appeal No. 992450, decided December 16, 1999, and cases cited therein). We would agree that awarding

concurrent impairment from Table 49 and Table 50 would be double rating and would be permissible only in those cases where there is no ROM and where there is in fact ankylosis.

Ankylosis, with reference to the lumbosacral spine is discussed on page 91 of the AMA Guides which states that it has significance "only if immobility occurs in *both* the hips and the lumbar spine region, so that that neutral position cannot be attained in the sagittal plane." We agree with Dr. S, and in fact the AMA Guides go on to state, that such immobility "is a very rare event." In this case, Dr. C considered Table 50; referenced the quoted definition of ankylosis; measured and invalidated ROM based on the SLR; and in effect found no ankylosis, notwithstanding that claimant had a three-level fusion.

As we have frequently noted Section 408.125(e) provides that with respect to an IR the report of the designated doctor is entitled to presumptive weight and that the Commission shall adopt such report unless it is contrary to the great weight of the other medical evidence. The Appeals Panel has long since stated 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, we have 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.

Thomas A. Knapp  
Appeals Judge

CONCUR:

Robert W. Potts  
Appeals Judge

Susan M. Kelley  
Appeals Judge