

APPEAL NO. 000530

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 January 25, 2000. The issues at the CCH were the appellant-s (claimant) date of maximum medical improvement (MMI) and the impairment rating (IR). The hearing officer determined that the claimant reached MMI on December 8, 1998 (statutory), with a 14% IR. The claimant appeals the IR, urging that the designated doctor should have assessed an impairment for neurological deficits and that the benefit review officer (BRO) failed to present questions concerning neurological deficits to the designated doctor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant sustained a compensable injury to his low back on _____, when he lifted a floor jack. On May 15, 1997, the claimant had a laminectomy at L5-S1 and on October 11, 1997, the claimant had a laminectomy and fusion with pedical screws and plates at L5-S1. Both spinal surgeries were performed by Dr. P. The claimant said that following the second surgery, he had increasing pain in his back and weakness in his left leg.

The carrier had the claimant examined by Dr. S on August 20, 1998. Dr. S stated that the claimant has severe chronic back pain with two failed operative procedures and probably pseudoarthrosis. Dr. S assessed a 14% IR based on a 12% impairment from Table 49, IV.B of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and a two percent impairment from Table 49, IV.D. The claimant disputed Dr. S-s report and the Texas Workers= Compensation Commission (Commission) appointed Dr. G as the designated doctor. Dr. G examined the claimant on December 9, 1998, and assessed a 14% IR based on a two percent impairment for loss of range of motion and a 12% impairment from Table 49, II.G of the AMA Guides.

Dr. P performed a nerve conduction/EMG test of the claimant-s lower extremities on January 22, 1999, which showed S1 and possible L5 nerve root compression on the left side. In 1999, the claimant changed treating doctors to Dr. M. Dr. M-s medical records in July 1999 indicate that the claimant has a failed fusion, mechanical back pain, and left L5 and/or S1 radiculitis. On August 20, 1999, following a benefit review conference (BRC), the BRO wrote a letter of clarification to Dr. G concerning his use of Table 49, II instead of Table 49, IV. On September 14, 1999, Dr. G responded, *Al see no reason to change by findings of T.49 iig since this claimant-s disorder is intervertebral disc disease.*@ In a letter to the claimant dated August 13, 1999, Dr. M states that he disagrees with the IR assessed by Dr. G because the

claimant's current condition reflects the presence of chronic radiculitis/radiculopathy, which would support the addition of impairment due to neurologic changes.

The claimant asserts that the 14% IR assigned by Dr. G is incorrect because he should have used Table 49, IV of the AMA Guides instead of Table 49, II and should have assessed an impairment for neurological deficits. The claimant asserted in closing argument that the hearing officer should contact the designated doctor to address neurological deficits. The hearing officer asked the ombudsman if the issue was pursued at the BRC and she replied that the claimant's neurological problems were discussed at the BRC.

Section 408.125(e) provides that the report of the designated doctor selected by the Commission is entitled to presumptive weight and that the Commission shall base the IR on such report unless it is contrary to the great weight of the other medical evidence. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

The hearing officer determined that the claimant has a 14% IR and that the great weight of other medical evidence does not overcome the presumptive weight to be accorded the determination of Dr. G. The hearing officer declined to contact the designated doctor, stating that the claimant did not file a response to the BRC report; was aware of the questions posed to Dr. G on August 20, 1999, which did not include inquiries about the doctor's failure to include an impairment for neurological deficits; was aware of Dr. G's response; and evidently did not ask the [BRO] to seek further clarification, although a [BRC] was conducted on December 8, 1999. If the claimant thought clarification was warranted, a request should have been made prior to the CCH. Texas Workers' Compensation Commission Appeal No. 960352, decided April 8, 1996. The hearing officer did not err in refusing to seek additional clarification from the designated doctor.

The decisions of whether to assign a rating for neurological deficits and the use of Table 49 of the AMA Guides represent differences of medical opinion. By giving presumptive weight to the designated doctor's report under Section 408.125(e), the legislature has established a procedure where the designated doctor's resolution of such differences is to be accepted. Dr. S and Dr. G have both assessed a 14% IR and no other impairment ratings have been assigned. The determination of the hearing officer that the claimant has a 14% IR is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge