APPEAL NO. 000573

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 November 8, 1999. The record closed on February 28, 2000. The hearing officer determined that appellant (claimant herein) reached maximum medical improvement (MMI) on December 6, 1997, with an impairment rating (IR) of 13%. He determined that claimant is entitled to 39 weeks of impairment income benefits beginning on December 7, 1997, but is not entitled to any supplemental income benefits (SIBs). The claimant appeals and argues that the hearing officer should have adopted the third IR of the second designated doctor which was 16%. The claimant argues in the alternative that the hearing officer could have adopted this rating removing the one percent impairment given for the third surgery, giving the claimant an IR of 15%. The respondent (carrier herein) replies that we should affirm the decision of the hearing officer.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

It was undisputed that the claimant sustained a work-related injury on _____. The parties stipulated that the claimant reached MMI on December 6, 1997. Medical records show that the claimant underwent three surgeries as a result of his injury--on September 26, 1997, on November 20, 1997, and on January 28, 1999.

There are a number of opinions in the record concerning the claimant's IR. Dr. B, the first designated doctor chosen by the Texas Workers' Compensation Commission (Commission), initially certified on a Report of Medical Evaluation (TWCC-69) dated July 14, 1997, that the claimant was not at MMI. Dr. B stated in a report dated August 4, 1998, that the claimant had a 31% IR--which he arrived at by combining a 14% IR for specific disorders of the spine along with a 22% IR for loss of range of motion (ROM). The parties agreed to the appointment of a second designated doctor and Dr. G was appointed by the Commission. Dr. G certified on a TWCC-69 dated November 6, 1998, that the claimant had a 13% IR. Clarification of Dr. G's opinion was sought and after re-examination of the claimant Dr. G certified on a TWCC-69 dated June 30, 1999, that the claimant had a 16% IR. The primary difference between this IR and Dr. G's earlier IR was that Dr. G assessed an additional one percent IR due to the claimant's surgery of January 28, 1999, and an additional two percent for loss of motion due to right lateral flexion. After the CCH, the hearing officer sought clarification from Dr. G, who again retested the claimant, and certified on a TWCC-69 dated January 26, 2000, that the claimant had a 17% IR. The difference between Dr. G's second and third IR certification was that in his third certification he assessed three percent, rather than two percent, for loss of ROM due to right lateral flexion. Dr. C stated in a letter dated January 26, 1999, that the claimant had an IR of 24%.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

2. [Dr. B] was appointed as a Commission selected designated doctor to determine Claimant's date of MMI and [IR].

3. [Dr. B] failed to properly apply the [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)] and [Dr. G] was appointed as the second designated doctor.

4. Both parties agreed to the appointment of a second designated doctor in this matter.

5. Claimant underwent spinal surgery on November 20, 1997.

6. Claimant was examined by [Dr. G], the Commission selected designated doctor, on November 5, 1998.

7. On November 6, 1998, [Dr. G] issued a [TWCC-69] assigning an [IR] of 13%.

8. On November 11, 1998, Claimant, by and through his attorney, complained that [Dr. G] had improperly failed to award 6% impairment for lateral flexion, right and left, and failed to affirmatively state that he had used the proper version of the [AMA] Guides.

9. Claimant underwent a second spinal surgery on January 28, 1999.

10. On June 30, 1999, [Dr. G] reexamined Claimant and awarded a 16% [IR], including impairment for the surgery of January 28, 1999 and validating one [ROM] measurement for lateral flexion while again invalidating the other lateral flexion [ROM] due to test/retest inconsistency.

11. Invalidation of [ROM] measurements due to inconsistency is a determination properly made by the exercise of the professional medical opinion of a designated doctor.

12. Claimant disputed the validity of the test/retest invalidation in order to bootstrap impairment for his pending surgery and to obtain impairment for [ROM] deficits which had been properly invalidated.

13. At the time of MMI, Claimant's surgery of January 28, 1999 was not under active consideration.

14. [Dr. G-s] amendment of his November 11, 1998 [IR] was done within a reasonable time, but was not done for a proper purpose.

15. [Dr. G], after having been asked for clarification by the Hearing Officer, again retested Claimant and awarded impairment for the January 28, 1999 surgery and some deficits for lateral flexion.

16. [Dr. G-s] third [IR] was done within a reasonable time, but was not done for a proper purpose.

17. [Dr. C] examined the Claimant on January 29, 1999 and assigned an [IR] of 24%.

18. The primary difference between [Dr. G-s] [IR] and [Dr. C-s] [IR] is the invalidation of Claimant's lumbar extension and flexion measurements by [Dr. G] in his report of November 11, 1998.

19. The great weight of the other medical evidence is not contrary to [Dr. G-s] [IR] report of November 11, 1998 and it is entitled to presumptive weight.

CONCLUSIONS OF LAW

3. Claimant's [IR] is 13%.

4. Claimant does not have an [IR] of at least 15% and Claimant is not entitled to [SIBs].

Section 408.125(e) provides:

If the designated doctor is chosen by the commission, the report of the 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. If the great weight of the medical evidence contradicts the [IR] contained in the report of the designated doctor chosen by the commission, the commission shall adopt the [IR] of one of the other doctors.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. 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 designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

The relatively simple method described above for resolving IR disputes becomes far less simple when there are multiple designated doctors and/or multiple reports from a designated doctor certifying differing ratings. In the present case, we are not concerned with the fact there were multiple designated doctors. The parties apparently agreed to this and no party complains of this on appeal. The hearing officer chose to give presumptive weight to the first report of Dr. G, the second designated doctor. We are not completely satisfied with all the reasons he provides for doing so. We find it somewhat incongruous that the hearing officer finds that the second amendment of the designated doctor was not done for a proper reason when it was done in response to his own request for clarification.

However, we have held on many occasions that the decision of a hearing officer may be affirmed on any grounds supported by the evidence, citing Daylin, Inc. v. Juarez, 766

S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied). In the present case, we do not find error in the hearing officer's not giving presumptive weight to the second and third reports of Dr. G. Both reports included impairment for the claimant' third surgery performed on January 28, 1999, which the hearing officer found was not under active consideration at the time of MMI. We note that in the present case, the parties stipulated a date of MMI which it was agreed was the date of statutory MMI. The claimant argues that the hearing officer could have corrected this by merely subtracting out the one percent impairment Dr. G assessed for the January 28, 1999, surgery. We have held that a hearing officer may make a mathematical correction to an IR assessed by a designated doctor such as when a designated doctor fails to properly use the combining tables of the AMA Guides. However, to do what the claimant suggests would involve more than making a mathematical correction. It would in fact be creating a new IR not certified by any doctor. *See* Texas Workers= Compensation Commission Appeal No. 94732, decided July 20, 1994. We find no error in the hearing officer not doing this.

Under the circumstances of this case, we find no error in the hearing officer giving presumptive weight to the first IR assessment of the second designated doctor. We also find sufficient evidence to support his factual finding that the great weight of the other medical evidence was not contrary to this assessment.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O=Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge