APPEAL NO. 000930

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 March 27, 2000. With respect to the issues before her, the hearing officer determined that the appellant's (claimant) date of maximum medical improvement (MMI) is September 18, 1998; that the claimant's impairment rating (IR) is 22%; and that the first certification of MMI and IR assigned by Dr. R did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In his appeal, the claimant essentially argues that the hearing officer erred in giving presumptive weight to the designated doctor's 22% IR and requests that we reverse the hearing officer's decision and render a new decision that his IR is 40% as certified by his treating doctor. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determination that the initial certification of MMI and IR did not become final pursuant to Rule 130.5(e) and neither party appealed the determination that the claimant reached MMI on September 18, 1998, as certified by the designated doctor in his amended report. Accordingly, each of those determinations has become final pursuant to Section 410.169.

DECISION

Affirmed.

Because only the issue of the claimant's IR is before us on appeal, our factual recitation will be limited to those facts most germane to that issue. The parties stipulated that the claimant sustained a compensable injury on September 9, 1996, and that Dr. G was selected by the Texas Workers' Compensation Commission (Commission) to serve as the designated doctor in this case. In an unchallenged finding of fact, the hearing officer determined that the claimant's compensable injury includes a psychological component.

On January 19, 1998, Dr. R, the claimant's then treating doctor, certified that the claimant reached MMI as of that date with an IR of 15%. In a progress note accompanying his Report of Medical Evaluation (TWCC-69), Dr. R noted that the claimant had missed several appointments and stated "[t]herefore, I believe the patient need to have a [TWCC-69] with [IR] imposed." Dr. R's certification was disputed and Dr. G was selected by the Commission to serve as the designated doctor. On March 11, 1998, Dr. G examined the claimant and in a TWCC-69 dated March 12, 1998, Dr. G certified that the claimant reached MMI on January 19, 1998, with an eight percent IR for impairment in both knees. On July 22, 1998, a Commission disability determination officer asked Dr. G why he had not assigned a rating for the claimant's psychological injury. In his August 4, 1998, response, Dr. G stated that he agreed that the claimant had clinical depression and that it would be appropriate to combine a rating for the claimant's psychological impairment with the eight percent rating Dr. G had already assigned for the claimant's bilateral knee injuries. Dr. G stated that he had reviewed the 14% rating that Dr. DS, the psychiatrist to whom the claimant was referred by his treating doctor for treatment of his depression and

for pain management, assigned in an April 27, 1998, report. On September 3, 1998, Dr. G responded to a letter from a Commission benefit review officer (BRO) advising him that the claimant had undergone additional knee surgery in July 1998. Dr. G opined that the claimant was not at MMI in January 1998 as he had previously certified because he had additional surgery after that date.

In an October 20, 1998, letter, which responded to another letter from the BRO, Dr. G stated that he had reexamined the claimant and reviewed his surgical records. Dr. G concluded that "[u]pon re-examination of this patient, I can find no additional impairment from repeat surgery" and that he "continue[d] to stand by the original [IR]" for the knees. In his appeal, the claimant asserts that Dr. G did not reexamine him in October 1998; however, he did not so argue at the hearing and, as such, he did not preserve error related to this assertion. Nonetheless, we note that Dr. G stated in his report that he had performed an examination of the claimant in October 1998 and specifically noted that the claimant "has a normal range of motion, mild crepitus, and no effusion." On January 28, 1999, Dr. G completed a second TWCC-69, certifying that the claimant reached MMI on September 18, 1998, with an IR of 22%.

In a TWCC-69 dated May 29, 1999, Dr. TS, the claimant's current treating doctor, assigned a 40% IR, which is comprised of 26% for the claimant's bilateral knee injuries and 14% for the claimant's depression. Dr. TS assigned the 14% IR for the psychological impairment, which Dr. DS had assigned as did Dr. G, the designated doctor. Dr. TS testified at the hearing that the 26% rating had been assigned for the claimant's bilateral knee injuries and that his rating was based on the effects of four knee surgeries and not just the two surgeries Dr. G had considered. On January 13, 2000, Dr. G responded to a January 7, 2000, letter from a Commission BRO, asking him to review additional information from Dr. TS. Dr. G concluded that he found "no indication to change the original [IR]."

The claimant argues that the hearing officer erred in giving presumptive weight to the designated doctor's 22% IR, asserting that Dr. TS's 40% rating should be adopted. The difference in the ratings of Dr. G and Dr. TS is attributable to their respective determinations of what rating to assign for the claimant's bilateral knee injuries. The decision of what rating to assign represents a difference of medical opinion. By giving presumptive weight to the designated doctor's report under Sections 408.122(c) and 408.125(e), the legislature has established a procedure where the designated doctor's resolution of such differences is to be accepted unless the great weight of the other medical evidence is contrary to his opinion. The opinion of Dr. TS simply does not rise to the level of the great weight of the other medical evidence contrary to Dr. G's report. Accordingly, we cannot agree that the hearing officer erred in giving presumptive weight to Dr. G's amended report and, thus, determining that the claimant's IR is 22%.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge