

APPEAL NO. 000938

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 March 30, 2000. The hearing officer determined that the respondent's (claimant) correct impairment rating (IR) was 30% as certified by Dr. H, the Texas Workers' Compensation Commission (Commission)-selected designated doctor in this case.¹ The appellant (carrier) appealed, expressing its disagreement with the determination. The claimant replied that the decision is correct and should be affirmed.

DECISION

Affirmed.

Section 408.125(e) gives presumptive weight to the report of a Commission-selected designated doctor, such as Dr. H, and the Commission is to base its determination of IR on this report unless the great weight of the other medical evidence is to the contrary.

The claimant fell at work on _____. Dr. H considered her resulting compensable injuries to extend to the lumbar and cervical spine, the right arm, and the right shoulder. Carrier does not take issue with this. In a Report of Medical Evaluation (TWCC-69) of March 24, 1999, Dr. H listed the elements of the claimant's IR as 6% for a specific disorder of the cervical spine based on herniation; 16% for loss of cervical range of motion (ROM); 0% for the lumbar spine (based on invalid ROM); 7% for loss of right shoulder ROM, apparently due to a sprain; and 5% for right wrist loss of ROM, apparently due to a sprain. Waddell's signs were negative.²

Dr. T, reviewed Dr. H's report and testified at the CCH. He did not personally examine the claimant or review any radiographs. To the extent that the claimant's cervical injury involved herniation, he did not object to the assignment of six percent IR for a specific disorder of the cervical spine. His major disagreement with Dr. H was in the assignment of IR for loss of shoulder and wrist ROM, specifically because there was no statement by Dr. H that he compared this ROM to the unaffected side and because other medical reports consistently reflected positive Waddell's signs. He also generally questioned why Dr. H found so much limitation of ROM without more objective evidence of underlying pathology. In his opinion, the proper IR was six percent.

Other evidence of the claimant's IR included a TWCC-69 completed by Dr. L, apparently at the carrier's request. Dr. L assigned a four percent IR solely for a specific

¹The parties agreed that the claimant reached maximum medical improvement (MMI) on March 24, 1999, as certified by Dr. H.

²Dr. H originally assigned a 31% whole person IR, but revised this to a 30% IR based on an initial error in combining individual components of the rating.

disorder of the cervical spine. He reviewed the radiographic tests and concluded that the claimant had cervical herniation at one level and slight bulging at two additional levels. He invalidated cervical and shoulder ROM because he believed it was "voluntarily restricted." He did not address a wrist injury and noted that the claimant's complaints at the time of his examination were limited to neck and right shoulder pain. Dr. HE examined the claimant, apparently at the request of the carrier, on April 17, 1998. He found at this time that she was not yet at MMI but, nonetheless, commented that she showed "markedly limited cervical motion." He also noted that the left, unaffected shoulder had full mobility while the right shoulder was limited. He also concluded that the claimant had a small, multi-level cervical herniation. Upper extremity nerve conduction studies were normal. Functional capacity evaluation testing on May 11, 1998, revealed three out of five positive Waddell's signs.

The hearing officer found that great weight of the other medical evidence was not contrary to Dr. H's report. In doing so, she found that Dr. H's findings of his examination of the claimant "greatly mirrored" those of Dr. L and Dr. HE. We interpret this to mean, essentially, that all three doctors agreed that the claimant's cervical injury involved herniation. The text of the carrier's appeal is, in essential part, as follows:

It is absolutely ridiculous to allow a chiropractor to award over 20% whole body impairment for loss of cervical [ROM] when the Claimant does not have a cervical lesion and is not a candidate for cervical spinal surgery. It is interesting to note that the Hearing officer failed to discuss the significance of the Waddell signs documented by both [Dr. L and Dr. HE], and explained by [Dr. T] as extremely significant with respect to the award of any impairment for loss of [ROM].

We construe this appeal to attack the cervical ROM portion of Dr. H's IR on two grounds: first, that the claimant did not have cervical herniation and, second, that the claimant did not give a true effort in demonstrating cervical ROM to Dr. H. With regard to the first point, as the hearing officer pointed out, there was other medical evidence that the claimant did sustain cervical herniation. With regard to the second point, we observe that it is largely a question of medical opinion and judgment as to whether or not a claimant's effort is true as reflected in the various Waddell's signs. We have held that the question of whether the other medical evidence is contrary to the report of a designated doctor is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. This determination is, in turn, subject to reversal by the Appeals Panel only if it is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Differing conclusions about whether the claimant made a true effort at her examination by Dr. H were, in the opinion of the hearing officer, no more than professional differences of opinion. The same is true for the diagnosis of herniation. Given the presumptive weight afforded the report of the designated doctor and our standard of

appellate review, we find the evidence sufficient to support the award of a 30% IR as certified by Dr. H.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge