

APPEAL NO. 000960

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 April 4, 2000. The hearing officer determined that the appellant's (claimant) correct impairment rating (IR) was four percent as certified by Dr. G, a designated doctor selected by the Texas Workers' Compensation Commission (Commission), and that the compensable injury of _____, did not include a lumbar spine injury. The claimant appealed the IR determination only, contending that it was contrary to the great weight and preponderance of the evidence and requesting that a new IR be issued. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The determination that the compensable injury did not include the lumbar spine has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant testified that he sustained a compensable cervical spine and left shoulder, elbow, and hand injury on _____. He was subsequently incarcerated in 1992 and released on January 27, 1997. The parties stipulated that he reached maximum medical improvement (MMI) on October 13, 1993. On March 25, 1999, he underwent a discectomy and fusion with instrumentation.

Section 408.125(e) provides that the report of a designated doctor selected by the Commission, as was Dr. G, is entitled to 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." Whether the great weight of the other medical evidence is contrary to the designated doctor's report is, in turn, a question of fact for the hearing officer to decide and is subject to reversal on appeal only if the hearing officer's decision 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).

Dr. G completed a Report of Medical Evaluation (TWCC-69) on September 10, 1997, in which he assigned a four percent IR solely for a specific disorder of the cervical spine under Section II, subsection B of Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The provision applies essentially to unoperated disc lesions. He assigned a zero percent IR for loss of cervical range of motion (ROM), even though objective measurements were consistent and valid. He did this based on his examination of the claimant and clinical judgment that the claimant was self-limiting and "should be able to do much more than the [ROM] shown in these measurements." Dr. G also commented that previous ROM measurements by Dr. M, the claimant's then treating doctor, "were almost twice the present values." Dr. G also found no objective

motor or sensory deficits. For the same reasons, he declined to assign an IR for the shoulder or elbow injury. Consistent with the claimant's testimony, surgery had not been contemplated at the time of statutory MMI.

Dr. B, became the claimant's treating doctor. He completed a TWCC-69 on February 1, 2000, and assigned a 38% IR, including the lumbar spine (13%), and 26% IR excluding the lumbar spine. Dr. B used Section II, subsection F of Table 49 in arriving at a 10% IR for a specific disorder of the lumbar spine (operated lesion at two levels). He also validated cervical ROM testing of 16% and 2% for upper extremity motor loss. Dr. B challenged the correctness of Dr. G's report both in writing and in testimony at the CCH. Specifically, he correctly observed that the cervical ROM figures used by Dr. G, if taken at face value, are consistent and show an appreciable loss of cervical ROM. He added that Dr. G should have used a different part of Table 49 to reflect the operated lesions and that Dr. G should have assigned a rating for sensory or motor loss of the upper extremity. Dr. G responded to this criticism by reaffirming his belief that the claimant was not giving a true effort in any of the ROM testing and that surgical intervention was not under consideration at the time of his multiple examinations. He declined to change his IR.

Other medical evidence included the report of Dr. M in which he disagreed with Dr. G's opinion of the validity of the ROM testing and felt that the claimant was giving full effort in his evaluation on March 11, 1997. Dr. M assigned a 25% IR in a TWCC-69 of March 11, 1997, which included ratings for loss of cervical and left shoulder ROM as well as for upper extremity nerve and motor loss.

The hearing officer considered this evidence and concluded that the great weight of the other medical evidence was not contrary to Dr. G's report. In doing so, she specifically noted that she found Dr. B's testimony "not persuasive." We have held that a doctor must apply medical judgment to the raw data of ROM testing in arriving at an IR and that clinical judgment may overrule such test results. Texas Workers' Compensation Commission Appeal No. 981384, decided August 10, 1998; Texas Workers' Compensation Commission Appeal No. 970499, decided May 1, 1997. Thus, regardless of whether Dr. G's ROM data were valid and consistent on their face, he could still conclude from his examination that the claimant did not demonstrate loss of ROM. This is what Dr. G did in this case and gave a reason for his conclusions. Similarly, what category of Table 49 is appropriate for a given injury is a matter of professional judgment. In this case, Dr. B used the category for operated lesion. Dr. G and Dr. M used a category of unoperated lesion because at the time of their evaluation the claimant had not undergone surgery. We have held that it may be appropriate to return the claimant to a designated doctor in those cases where surgery is under active consideration at the time a claimant reaches statutory MMI. Texas Workers' Compensation Commission Appeal No. 992951, decided February 14, 2000. In this case, the dates of injury and MMI long preceded the examinations of the various doctors certifying IR and the surgery. Under these circumstances, we do not believe that the surgery required a re-look at the question of IR. Finally, the claimant argues that Dr. G is the only doctor to find ROM invalid based on clinical observation. While this is true, the great weight determination is not simply a matter of counting

opinions. See Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Based on our examination of the record in this case, we cannot conclude that the hearing officer's determination that Dr. G's report is not contrary to the great weight of the other medical evidence is itself against the great weight and preponderance of the evidence.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge