

APPEAL NO. 000962

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 originally held on October 7, 1999. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 992450, decided December 16, 1999, remanded the case to the hearing officer. The hearing officer on remand determined that the appellant (claimant) reached statutory maximum medical improvement (MMI) on November 30, 1993, with a 10% impairment rating (IR) for the compensable injury of _____. This represented the hearing officer's recomputation of the designated doctor's report, and his conclusion that that report indicated a lack of any organic basis for an impairment percentage for loss of range of motion (ROM).

The claimant appealed and argues that the IR by the hearing officer failed to account for cervical impairment or lumbar lateral ROM. The claimant also argues that the report of Dr. P was not entitled to presumptive weight and that even if the hearing officer determined that the report should have that weight, he should not have ignored the Appeals Panel decision as to a suggested recomputation. The claimant also speculates that the designated doctor and the respondent (carrier) had influential contact with each other, and that the decision of the hearing officer should be disallowed as it was late. The carrier responded that the hearing officer's actions in recomputing the IR were proper and that the designated doctor should have invalidated all lumbar ROM IR.

DECISION

We affirm the hearing officer's decision.

On _____, the claimant slipped and fell on a tile floor, catching herself partially against the wall on the way down. She was thereafter treated for persistent low back pain and right upper extremity problems. An MRI showed degenerative changes in the low back but no nerve root impingement. She reached "statutory MMI" on November 30, 1993. She was treated conservatively and it must be frankly stated that reports of some doctors are concerned with some psychological overlay and magnification of the effects of her injury.

As we stated in our first decision, the claimant had back surgery well after the date of statutory MMI and the matter of her IR or MMI was not held open, or able to be held open, under provisions of the 1989 Act in effect at that time. Although her treating doctor, Dr. J, has certified a post-surgical IR of 21%, this cannot be used, as explained in our previous decision.

As also stated in our first decision, attempts at earlier clarification of Dr. P's IR was muddled by the benefit review officer's insistence on attempting to nail down a cervical ROM figure although there was no objective evidence of impairment. The important questions presented by Dr. P's report as to lumbar ROM IR were somewhat overlooked.

However, after Dr. P had done an intervening 14% IR, awarding only specific impairments for the cervical and lumbar area, but not ROM for either region, he was questioned as to the basis for this report. He responded on April 6, 1999, that he found claimant's measured ROM in both regions to be grossly incompatible with her physical condition (as reflected on objective testing, in this case an MRI showing only some degenerative disease).

"Impairment" is defined in the 1989 Act as "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Further, impairment must be based upon an "objective clinical or laboratory finding" which may be confirmed by the designated doctor. Section 408.122(a). As we noted in our earlier decision, the claimant did not meet the burden of proving, in accordance with Section 408.125(e), that the great weight of contrary medical evidence was against the report of Dr. P with respect to her upper extremity or cervical IR assessments.

Pursuant to our direction in Appeal No. 992450, *supra*, the hearing officer contacted the designated doctor, Dr. P, to ask questions about his continued use of Table 50 from the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) to assess ROM impairment for those without radiographic evidence of ankylosis (for those persons whom Dr. P considers obese or to have had some preexisting ROM deficits) and about the underlying ROM tables for the cervical and lumbar areas, including our observation that the lumbar lateral ROM, measured at a total six percent whole body impairment, should perhaps be included in the cervical ROM because the straight leg raising test did not operate to invalidate lateral ROM.

Dr. P's delayed response to the hearing officer's letter was to simply "fax" a copy of the April 6, 1999, letter. The claimant opposed the carrier's request to contact Dr. P for specific clarification, and asked the hearing officer to end further delay of the matter.

At this point, the hearing officer read our previous decision as requiring that he attempt to recalculate Dr. P's report. He apparently reviewed the basis upon which Dr. P appeared to invalidate the actual ROM measurements. The hearing officer concluded from Dr. P's report (although responsive to a query about his later IR) that Dr. P did not use the actual ROM measurements because they were out of correlation with what he might expect to find from the effects of the injury. We have stated that this is a matter of medical judgment from clinical observation that may be used by the designated doctor. Although we posed alternative calculations, this was premised on the assumption that Dr. P invalidated all ROM due to the straight leg raising test. That does not appear, upon further consideration of the April 6, 1999, letter, to be the case. The hearing officer's decision is sufficiently supported by the record.

We note that we do not credit unsupported allegations of improper contact between the carrier and the designated doctor, nor do we agree that filing a decision beyond the guidelines set forth in administrative rules results in having the decision disallowed totally.

Accordingly, the IR for claimant as of the date of statutory MMI is 10%. We affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge