

APPEAL NO. 001081

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 April 17, 2000. The appellant (claimant) and the respondent (carrier) stipulated that "[o]n _____, Claimant sustained a compensable injury to the low back, neck, head, left scapular bursitis and a closed head injury." The hearing officer determined that Dr. RM, the Texas Workers' Compensation Commission (Commission)-selected designated doctor certified that the claimant reached maximum medical improvement (MMI) on March 17, 1998, with a nine percent impairment rating (IR); that that certification by Dr. RM is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to that report; and that the claimant reached MMI on March 17, 1998, with a nine percent IR. The claimant appealed; contended that the report of Dr. RM should not be given presumptive weight because Dr. RM inaccurately invalidated range of motion (ROM) tests; argued that the report of Dr. MM, the claimant's treating doctor, should be adopted because Dr. MM properly rated the impairment for the occipital nerve; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he "should be entitled to the [IR] assigned to him by his treating doctor, 9% with an MMI date of 12/4/98." The nine percent IR is the IR assigned by Dr. RM and appears to be the result of a clerical error. The carrier responded, stated that the appeal contains an error, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The carrier stated that it did not have Commission records concerning the timeliness of the claimant's appeal and questioned the timeliness of the appeal. Review of Commission records indicate that the claimant's appeal was mailed on the 15th day after he received the decision of the hearing officer. The 20th day after the claimant received the decision of the hearing officer was a Sunday. The Commission received the claimant's appeal the next day. The claimant's appeal was timely filed.

In a Report of Medical Evaluation (TWCC-69) dated December 19, 1998, Dr. MM certified that the claimant reached MMI on December 4, 1998, with a 15% IR. In a narrative attached to the TWCC-69 Dr. MM assigned five percent for a specific injury to the lumbar spine under 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); invalidated ROM tests for lumbar flexion and extension because of the straight leg raising tests; assigned one percent for loss of right lumbar lateral flexion ROM; assigned zero percent for loss of left lateral lumbar flexion ROM; assigned four percent for a specific disorder of the cervical spine; assigned three percent for loss of cervical ROM; assigned five percent for occipital headaches; and assigned two percent for decreased occipital nerve sensation.

Dr. G examined the claimant at the request of the carrier. In a TWCC-69 dated March 17, 1998, he certified that the claimant reached MMI on that day with a 12% IR. In a narrative attached to the TWCC-69, Dr. G indicated that the 12% was comprised of four percent for a specific disorder of the cervical spine and eight percent for a specific disorder of the lumbar spine and said that the claimant's behavior was grotesque and bizarre, that his ROM was inconsistent and variable to the point that further examination was not indicated and was useless, and the problem was such that the term "symptom magnification cannot be used any more."

In a TWCC-69 dated May 4, 1998, Dr. RM certified that the claimant reached MMI on March 17, 1998, with a nine percent IR. Dr. RM examined the claimant and had Mr. S, a physical therapist, evaluate the claimant, including performing ROM tests. Mr. S performed the evaluation on April 23, 1998. His report indicates that he performed three measurements for each of the tests and invalidated the ROM tests for the cervical and lumbar areas. Mr. S assigned four percent for a specific disorder of the cervical spine and five percent for a specific disorder of the lumbar spine. In a report Mr. S wrote:

Measurement areas included cervical spine, lumbar spine, left shoulder, and left lower extremity. The patient was semi-cooperative, but measurements to all areas were inconsistent and level of effort was poor. [Claimant's] measurement of consistency was determined by comparing gross observed movements with measured movements. It was noted that [claimant's] observed movements during questioning prior to testing were noted to be significantly greater than those which were measured with goniometry and inclinometry. Furthermore, [claimant's] lumbar flexion and extension measurements were invalidated per the criteria established in [AMA Guides]. Secondary to these inconsistencies, [claimant] should be granted percentages based on diagnosis only and no percentage should be applied for [ROM] at this time.

Disputes involving medical evidence are not uncommon. The 1989 Act sets forth a mechanism to help resolve conflicts concerning MMI and IR by according presumptive weight to the report of a doctor referred to as the designated doctor. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. If the Commission selects the designated doctor as was done in this case, the Commission shall base its determination of whether the claimant has reached MMI and the claimant's IR on the report of the designated doctor unless the great weight of the other medical evidence is to the contrary. Sections 408.122(c) and 408.125(e). 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 report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report is accorded the special presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. The hearing officer resolves conflicts in expert evidence and assesses the weight to be given to expert evidence. Texas Employers Insurance

Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To include or not to include a rating for a part of an injury represents a medical difference of opinion. Texas Workers' Compensation Commission Appeal No. 951921, decided December 11, 1995. The hearing officer determined that the report of the designated doctor is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to the report of the designated doctor; and that the claimant reached MMI on March 17, 1998, with a nine percent IR. Those determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge