

APPEAL NO. 001091

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 commenced on March 2, 2000, with the record closing on April 13, 2000. The hearing officer determined that the respondent's (claimant herein) impairment rating (IR) was five percent. The appellant (carrier herein) files a request for review, arguing that the hearing officer erred in finding that the zero percent IR assessment in the designated doctor's report was contrary to the great weight of the medical evidence. There is no response to the carrier's request for review from the claimant in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarizes the evidence and the rationale for her decision as follows in the section of the decision entitled "Statement of the Evidence":

There is no dispute that Claimant sustained a low back injury at work on _____ and that statutory maximum medical improvement [MMI] was reached on March 12, 1999. Claimant was examined by [Dr. Y] and certified to have a 5% [IR] for specific disorders only. Claimant was examined by [Dr. L] as a designated doctor and certified to have a 0% [IR]. Claimant's treating doctor has examined Claimant and certified that Claimant's [IR] is 14%.

* * * *

This case was presented on medical evidence only. Claimant has been treated by [Dr. J] who has ordered several tests to determine the cause of Claimant's continuing complaints of pain. [Dr. J] stated that the tests show Claimant has a significant herniation as well as significant disc bulging at several other levels with radicular symptoms. On December 29, 1999 [Dr. J] indicated that Claimant had reached statutory [MMI] (which the parties stipulated was reached on March 12, 1998 [sic]) with a 14% [IR] - 7% for specific disorders and 7% for [ROM] loss.

An MRI of June 7, 1997 indicated a large protrusion/herniation at L4-5 and documented tearing or fluid clefting of the right paracentral annulus. A lumbar myelogram of May 19, 1998 indicated presumed disc bulge at L4-5 and disc substance excursion occurring over an approximate 2.0 cm base. An MRI of May 20, 1999 showed a[n] annular tear at L5;S1 with 8 mm posterocentral [sic] disc herniation, 3 mm disc herniation in the L4-L5 and tear with right disc herniation at L2-4.

[Dr. W] examined Claimant on or about June 23, 1998 and diagnosed a significant disc protrusion at L4-5 which required pain management with epidural corticosteroid. Claimant was examined by [Dr. Y], the Carrier's doctor, on November 12, 1998 and diagnosed a lumbar strain superimposed over degenerative disc disease at L4-5 and L5-S1 but no herniations. [Dr. Y] certified that Claimant had reached [MMI] with a 5% [IR] for specific disorders as Claimant had invalidated the [ROM] testing based on his straight leg [raise] test. [Dr. K] examined Claimant on or about December 28, 1998. [Dr. K's] impression was lumbar radiculopathy, probable stenosis and degenerative disc disease.

Claimant was examined by [Dr. L] on March 30, 1999. [Dr. L] stated that the examination was generally unremarkable and that he would fill in the blanks on his report regarding Claimant's [IR] after reviewing test results. In a note of March 30, 1999, [Dr. L] stated that he had reviewed the CAT scan and found no significant abnormality and therefore assigned a 0% [IR] for specific disorders. [Dr. J] disagreed with the rating based on the test results which did indicate an abnormality which would warrant a rating 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)]. On August 16, 1999 [Dr. L] re-iterated that Claimant did not have a herniation at any level, only bulges and that bulges did not qualify as warranting an [IR]. [Dr. L] went on to state that he had recently attended a class to keep his designated doctor status and was told that "only a frank herniation is due an [IR]." (Emphasis added by [Dr. L])

After a hearing further clarification was sought from [Dr. L] about whether Claimant might be due an [IR] under the other categories of Table 49 II(B) or II(C) and inquired about the need for a frank herniation under the AMA Guides. On March 15, 2000 [Dr. L] responded that Claimant did not have a herniated disc or significant disc bulge and that he did not believe the radiologist based on his review of the films. [Dr. L] again stated that he had attended a class and that a minimal degenerative disc bulge not due to trauma, and appropriate for age did not warrant an impairment. (Emphasis added by [Dr. L])

In this case it is quite noticeable that all the reviewing doctors have believed that Claimant had some abnormality to his lumbar area. There is some dispute over whether or not Claimant has herniations, bulges or degenerative disc disease. [Dr. L] is adamant that there are no herniations. [Dr. L] reviewed the test results himself. This is supported by [Dr. Y], the Carrier's choice of doctor, who reviewed at least the early MRI and test results and noted disc bulges. However it is of import that even [Dr. Y] indicated that there were bulges, and that Claimant's compensable injury was superimposed over the disc disease and warranted an [IR].

As noted above, [Dr. K] found radicular problems, [Dr. W] noted significant disc protrusion and recommended pain management, [Dr. Y] diagnosed a strain super-imposed over degenerative disc disease. Several radiologists have performed testing and found tears and bulges or possible herniations. The great weight of the medical is contrary to [Dr. L's] certification. On the other hand, the medical does not clearly indicate a herniation and does not support the 14% given by [Dr. J] either. When all the medical evidence is reviewed, [Dr. Y's] certification appears appropriate for the compensable injury and is supported by the great weight of the medical evidence.

Section 408.125(e) provides:

If the designated doctor is chosen by the commission, the report of the designated doctor shall have 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. If the great weight of the medical evidence contradicts the [IR] contained in the report of the designated doctor chosen by the commission, the commission shall adopt the [IR] of one of the other doctors.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. 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 designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support

a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, we do not perceive error in the hearing officer's finding that the great weight of the other medical evidence was contrary to the report of Dr. L. The hearing officer has explained her reasoning for so finding and we do not find that her decision is contrary to the overwhelming evidence. See Texas Workers' Compensation Commission Appeal No. 93400, decided July 7, 1993. The 1989 Act requires that any determination of IR be based upon the AMA Guides. Section 408.124. We held in Texas Workers' Compensation Commission Appeal No. 94471, decided June 7, 1994, that it can reasonably be expected that a designated doctor will assign a rating based on the herniation or provide an explanation for not doing so. Dr. L purports to give an explanation in the present case, but the hearing officer was not required as a matter of law to accept his explanation as being reasonable.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge