APPEAL NO. 001419

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 May 24, 2000. The hearing officer determined that the respondent (claimant) has a 17% whole body impairment rating (IR). The appellant (carrier) appealed, contending that Dr. C, the designated doctor, did not properly apply the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. The appeals file does not contain a response from claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that the designated doctor's 17% IR certification is entitled to presumptive weight. Carrier asserts that: (1) the designated doctor did not compare the contralateral uninvolved side in performing range of motion (ROM) testing; (2) there was no basis to award 10% thumb impairment because there was no ankylosis; (3) the hearing officer should have considered the challenges to the designated doctor's report from Mr. A; (4) the designated doctor should not have awarded impairment for loss of ROM because claimant did not apply full effort; and (5) the designated doctor improperly averaged ROM measurements rather than using the maximum effort figures.

The designated doctor stated that claimant sustained a right thumb and right shoulder injury when his hand was crushed between two rollers. Claimant later underwent right hand surgery. The record does not contain reports from other doctors certifying an IR for claimant. The maximum medical improvement (MMI) date of June 22, 1999, was not in dispute.

The designated doctor filed a Report of Medical Evaluation (TWCC-69) on March 13, 2000, certifying a 17% IR. The designated doctor's report stated that the 17% IR included impairment for loss of ROM in the shoulder and hand and for upper extremity sensory loss. The record contains letters from Mr. A, an IR consultant for carrier, questioning the designated doctor's 17% IR. In letters dated April 17, 2000, and May 3, 2000, discussed below, the designated doctor responded to criticism of his IR report.

The IR report of a Texas Workers' Compensation Commission-selected designated doctor is given presumptive weight with regard to MMI status and IR. Sections 408.122(c) and 408.125(e). The amount of evidence needed to overcome the presumption is the "great weight" of the other medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. A mere difference in medical opinion is not enough to overcome the presumption in favor of the designated doctor. Texas Workers' Compensation Commission Appeal No. 960034, decided February 5, 1996.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Carrier contends that the designated doctor did not compare the contralateral uninvolved side in performing ROM testing. The designated doctor was questioned regarding this issue and responded indicating that he had compared the contralateral uninvolved side in performing ROM testing. We perceive no error.

Carrier asserts that there was no basis to award 10% thumb impairment because there was no ankylosis. The designated doctor clarified that there was no thumb ankylosis and indicated that the amount of impairment for loss of ROM of the thumb was two percent, which was one percent of the hand. The designated doctor stated that the 10% figure was mistakenly entered and his report shows that it is not a part of the final calculations. We perceive no error in this regard.

Carrier contends that the hearing officer should have considered Mr. A's challenges to the designated doctor's report. From the hearing officer's decision, it appears that she did consider the challenges to the designated doctor's report. She discussed the designated doctor's clarification letters and stated that his responses were acceptable. We perceive no reversible error.

Carrier asserts that the designated doctor should not have awarded impairment for loss of ROM because claimant did not apply full effort. In his report, the designated doctor stated that:

> [Claimant] states the pain is very excruciating. He states he doubts if he can apply full effort that would reflect full effort. He participated in the ROM testing but it appears [claimant] is correct, his results indicate he was unable to apply full effort. [Claimant's] pain appears to be genuine. . . .

A designated doctor may invalidate ROM based on observations of suboptimal effort on the part of the claimant in testing. Texas Workers' Compensation Commission Appeal No. 981596, decided August 20, 1998; Texas Workers' Compensation Commission Appeal No. 951283, decided September 19, 1995. The designated doctor responded to Mr. A's criticisms and said that the ROM measurements were correct and that his figures were in keeping with those of Dr. S. The designated doctor could have considered claimant's pain complaints and could have used passive motion to record ROM values while considering validity criteria in deciding whether to invalidate ROM. The designated doctor did not find claimant's ROM measurements to be invalid. We perceive no error.

Carrier contends that the designated doctor improperly averaged ROM measurements rather than using the maximum value figures. The designated doctor responded to this criticism and stated that maximum values were used. The hearing officer could and did determine from the evidence that the designated doctor's report is entitled to presumptive weight.

Carrier attached a report from Dr. O, which was not an exhibit at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether the evidence came to the party's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We conclude that the attachments to carrier's appeal, which were offered for the first time on appeal, do not meet the requirements of newly discovered evidence necessary to warrant a remand. *See* Appeal No. 93111. We have reviewed the record, the briefs, and the hearing officer's determinations and we conclude that the determination that claimant's IR is 17% is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge