

APPEAL NO. 001508
FILED AUGUST 14, 2000

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 June 6, 2000, in _____, Texas, with _____ presiding as hearing officer. She determined that the impairment rating (IR) of the respondent (claimant) is 16%, in accordance with the report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor. The appellant (carrier) appeals, contending that the designated doctor did not follow the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and that he rated claimant for loss of strength that claimant did not demonstrate. The file does not contain a response from claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in according presumptive weight to the designated doctor's report. Carrier first asserts that the designated doctor should have rated claimant for specific disorders of the spine under a different section of Table 49 of the AMA Guides. Carrier contends that the designated doctor should have used Table 49(II)(e) rather than Table 49(IV)(b). Carrier complains that the designated doctor said there was spinal stenosis when there was none shown by the medical evidence.

Claimant said he sustained a compensable injury when a cast iron pipe fell and hit him in the back. Claimant sustained a fracture at T12 and damage to the L5-S1 disc. The designated doctor noted that diagnostic testing showed grade IV tears to the posterior annulus at L3-4 and L4-5, "associated with a 2 mm broad-based disc protrusion effacing the epidural fat," and extending to contact the anterior dura. He also noted that the tests revealed advanced degenerative disc disease along with a complex tear at L5-S1 giving rise to a "5 mm focal central disc protrusion." Claimant underwent a 360° fusion at L5-S1 in December 1999. Claimant's treating doctor certified a 22% IR.

Table 49, entitled "Impairment Due to Specific Disorders of the Spine," consists of four subparts each of which contain various ratings for the three spinal regions. Table 49 II, entitled "Intervertebral Disc or Other Soft Tissue Lesions," contains ratings for both unoperated and surgically treated discs or other soft tissue lesions. Table 49 IV, entitled "Spinal Stenosis, Segmental Instability, or Spondylolisthesis, operated," contains ratings for both single- and multiple-level operations. With regard to the use of Table 49, the AMA Guides in Chapter 3.3 b, page 74, simply states: "Consult Table 49 for the rating of impairments due to specific disorders of the spine." See *also* the Addendum to Chapter 3, p. 94B.

Section 408.125(e) provides that the report of a Commission-selected designated doctor shall have presumptive weight and that the Commission shall base the IR on that report unless it is contrary to the great weight of the other medical evidence. The "great weight of the other medical evidence" does not involve merely equally balancing evidence or a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided August 28, 1992. No other doctor's report is accorded such special, presumptive status. Texas Workers' Compensation Commission Appeal No. 92336, decided September 31, 1992. A difference in medical opinion is not a sufficient basis to discard a designated doctor's report. Texas Workers' Compensation Commission Appeal No. 950166, decided March 14, 1995.

Texas Workers' Compensation Commission Appeal No. 950991, decided July 28, 1995, was an IR case involving lumbar spine surgery at multiple levels and some fusion failure. The treating doctor assigned a rating from Table 49 IV while the designated doctor assigned a rating from Table 49 II. The Appeals Panel reversed the hearing officer's determination that the employee's IR was the 20% found by the treating doctor and rendered a decision that the IR was the 30% found by the designated doctor. The decision stated the following:

Under the facts of this case, the use of either Part II or Part IV of Table 49 to assess impairment for specific disorders of the lumbar spine represents a mere difference of medical opinion and does not constitute a great weight of other medical evidence contrary to the report of the designated doctor. Both Parts II and IV of Table 49 take into account "failed back surgery" in assessing additional impairment for multiple operations. In her discussion of the evidence, the hearing officer incorrectly indicates that only Part IV of Table 49 takes into account failed back surgery.

See *also* Texas Workers' Compensation Commission Appeal No. 94766, decided July 27, 1994; Texas Workers' Compensation Commission Appeal No. 931018, decided December 9, 1993; Texas Workers' Compensation Commission Appeal No. 94304, decided April 26, 1994 (Unpublished); Texas Workers' Compensation Commission Appeal No. 94646, decided July 5, 1994; Texas Workers' Compensation Commission Appeal No. 950332, decided April 11, 1995; and Texas Workers' Compensation Commission Appeal No. 951265, decided September 6, 1995.

The Commission wrote to the designated doctor for clarification and the designated doctor indicated that claimant's nerve root compression was due to degenerative and spinal stenosis. We do not view the designated doctor's explanation for his use of Table 49(IV) as being contrary to the great weight of the other medical evidence. The record did not contain any reports regarding post-surgical MRI or other diagnostic reports. (Dr. P) did opine that the designated doctor should have used Table 49(II) rather than Table 49(IV). Dr. P's opinion on the matter represents a difference of medical opinion which does not amount to the great weight of the other medical evidence.

The IR issue was one of fact for the hearing officer's resolution and it is the hearing officer who is the sole judge of the weight and credibility of the evidence. It is for the hearing officer as the trier of fact to resolve the medical evidence conflicts and inconsistencies which were present in this case. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer found that the great weight of the other medical evidence was not contrary to the designated doctor's IR of 16%. We perceive no error.

Carrier next asserts that the designated doctor incorrectly included a rating for loss of strength or radiculopathy, where there is none recorded in the medical records. In his October 21, 1999, report, the designated doctor stated:

For loss of strength on Table 45, page 69 & Table 11, page 40, section 2, a minimum of five percent grade for L5 and S1, nerve root gives a total of five percent lower extremity impairment. This, on Table 42, page 65, converts to two percent whole body.

When asked for clarification in this regard, the designated doctor said, "Based on positive clinical evidence of lumbar radiculopathy at the L5/S1 level nerve root, per Table 45, page 69, patient received 2%."

Claimant was asked at the hearing whether he had any problems with his leg. He indicated that he did not and said he thought he did not have any loss of strength, but he did not know. He was also asked if he had leg pain and he said, "no I do not have any leg pain." However, the operative report stated that claimant had right leg pain and claimant's medical records refer to discogenic pain. The designated doctor indicated that, when he examined claimant, he found lumbar radiculopathy and loss of strength. Whether this is clearly reflected in the designated doctor's report was a factor for the hearing officer to consider. The hearing officer could also consider that the designated doctor responded to requests for clarification and stated that claimant did have loss of strength and radiculopathy. We perceive no error. We are satisfied that this dispositive IR finding in this case 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).

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur with affirming the decision of the hearing officer that the claimant's impairment rating (IR) is 16% as certified by the designated doctor.

In a case such as the one before us, in which a party contends that a report of a designated doctor was not rendered in compliance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), the hearing officer should first make determinations as to whether the challenged report of the designated doctor was rendered in compliance with the provisions of the AMA Guides and whether it is entitled to presumptive weight. After making those determinations, the hearing officer should then determine whether "the great weight of the medical evidence is to the contrary" of that report. From the comments of the hearing officer in the statement of the evidence in her Decision and Order, it can be inferred or implied that the hearing officer considered the arguments of the carrier and determined that the report of the designated doctor was made in compliance with the provisions of the AMA Guides and is entitled to presumptive weight. The evidence is sufficient to support those inferred or implied determinations.

Tommy W. Lueder
Appeals Judge