

APPEAL NO. 001604

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 8, 2000. The issue concerned the appellant's (claimant) impairment rating (IR), with maximum medical improvement (MMI) not in dispute. The hearing officer determined that the claimant's IR is zero percent in accordance with the report of the designated doctor, which she found was not against the great weight of the contrary medical evidence.

The claimant appeals and argues that she was not faking her movements on the range of motion (ROM) testing, as the designated doctor indicated. She argues that her treating doctor's IR is the more accurate and asks that it be adopted. She indicates that her multiple sclerosis was misunderstood by the designated doctor as symptom magnification. The respondent (self-insured) responds that the hearing officer has properly found facts and applied the law concerning the presumptive weight accorded to the designated doctor's report.

DECISION

Affirmed.

The claimant was a teacher for the self-insured school district and at the end of the school year, on _____, she tripped over an object in her classroom and fell, striking filing cabinets and then the floor with her right shoulder. Her low back was injured as well.

The claimant was examined by a referral doctor, Dr. R, on December 23, 1997, and assigned a one percent IR. Dr. R noted that claimant's past medical history was significant for multiple sclerosis. Dr. R was aware that claimant's back was part of her injury. He found normal ROM of her back, and somewhat impaired motion of her right upper extremity. Dr. R certified MMI as of September 9, 1997.

Presumably due to a dispute over Dr. R's IR (it was not clearly developed), the Texas Workers' Compensation Commission appointed Dr. I as the designated doctor. He certified that she was not at MMI as of March 9, 1998, and recommended six more weeks of physical therapy. He found significantly decreased ROM of the right shoulder, and diagnosed "frozen shoulder." Dr. I noted that the claimant was working full-time.

The claimant had arthroscopic surgery on her right shoulder on December 9, 1998. On July 21, 1999, Dr. C filed an IR certifying MMI had been reached on July 1, 1999, and that claimant had a 15% IR. He had sent her for her ROM measurements to (physical therapy clinic). His report assigned five percent IR to the spine, for ROM deficits only, and 11% IR for the right upper extremity, which consisted of impaired ROM and motor dysfunction.

Because Dr. I was no longer in the designated doctor program, a new doctor, Dr. N, was appointed to evaluate the claimant, perhaps because of a dispute over Dr. C's IR. He noted that an MRI of the shoulder showed no significant abnormality. His IR measurements are similar to those of the physical therapy clinic which evaluated the claimant for Dr. C. The claimant said that Dr. N performed these measurements himself. Dr. N disallowed all ROM measurements, and did not agree with Dr. C's assessment that there was motor dysfunction and felt that decreased strength measurements were due to poor effort on the claimant's right side.

In large part, Dr. N based his conclusions of no impairment for ROM upon an assessment that the claimant was not giving maximal effort, or was voluntarily limiting her movements. The claimant argued at the CCH that her multiple sclerosis, not "faking it," was responsible for some of her limitations. Dr. N indicated that the shoulder should have shown much greater improvement than demonstrated by the claimant in her examination.

Dr. C responded and disputed that claimant was voluntarily limiting her movements. He said he reexamined her on February 2, 2000, and recorded her ROM limitations in her shoulder. He felt that multiple sclerosis was a factor in muscular weakness. Dr. C did not comment on the claimant's back. Dr. N responded by saying his evaluation of claimant's physical capabilities, and his review of objective studies, led him to conclude that the claimant voluntarily limited her ROM. He said he had been unable to find weakness or atrophy in claimant's shoulder or back as Dr. C contended.

"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." Section 408.122(a). To the extent that claimant's restrictions on motion may have related to her underlying multiple sclerosis, they would not be considered part of the "compensable injury" for purposes of rating IR. A designated doctor's report has presumptive weight on impairment. Section 408.125(e).

We have previously stated that "a doctor may through observation and his clinical experience determine either a normal ROM, or that measured limitations are invalid." Texas Workers' Compensation Commission Appeal No. 961738, decided October 18, 1996; Texas Workers' Compensation Commission Appeal No. 960311, decided March 27, 1996. See *also* Texas Workers' Compensation Commission Appeal No. 951283, decided September 19, 1995, and the cases cited therein for a discussion of other instances where a designated doctor invalidated ROM based upon clinical observation. Admittedly, the claimant's ROM measurements from Dr. N were similar to those recorded by the physical therapy clinic; however, the decision of whether to invalidate ROM based upon clinical observations and judgment represents a difference of medical opinion. Texas Workers' Compensation Commission Appeal No. 970499, decided May 1, 1997.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We cannot agree that this was the case here, and affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge