

APPEAL NO. 001894

Following a contested case hearing held on June 2, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with the record closing on July 10, 2000, the hearing officer, resolved the disputed issues by determining that the appellant (claimant herein) attained maximum medical improvement (MMI) on August 6, 1999, with a five percent impairment rating (IR) based upon the report of a required medical examination order (MEO) doctor chosen by the respondent (carrier herein). The claimant appeals, arguing that the hearing officer erred in finding that the great weight of the other medical evidence was contrary to the certification of MMI and IR by the designated doctor. The claimant contends that the hearing officer based this determination on the fact 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) in assessing IR because he did not use Waddell signs when the use of such is not required by the AMA Guides. The carrier responds that the decision of the hearing officer is supported by the evidence.

DECISION

Reversed and rendered.

The parties stipulated that the claimant suffered a compensable injury on _____. The claimant described his injury as an injury to his back which took place while lifting chunks of dry concrete. Dr. W, the carrier's MEO doctor, certified on a Report of Medical Evaluation (TWCC-69) dated August 13, 1999, that the claimant attained MMI on August 6, 1999, with a five percent IR. This certification was apparently disputed and the Texas Workers' Compensation Commission (Commission) chose Dr. Wi to be the designated doctor. Dr. Wi certified on a TWCC-69 dated September 21, 1999, that the claimant attained MMI on September 29, 1999, with a 15% IR. The primary difference between the IR of Dr. W and Dr. Wi was that Dr. W invalidated range of motion (ROM) testing while Dr. Wi did not. Dr. W's rating was based upon specific disorders of the spine. Dr. Wi stated that he did not assess impairment for specific disorders to the spine because the claimant did not have six months of documented pain as his assessment was done less than six months after the injury.

The Commission requested clarification from Dr. Wi. In a letter of clarification dated November 11, 1999, Dr. Wi stated as follows:

In reviewing the records, I was just going on the standard protocol. The claimant's [ROM] did fit the categories that dictated when I validly took his [ROM].

In a letter of clarification dated February 24, 2000, Dr. Wi stated as follows:

I examined the patient and took the history. The evaluation was carried out in a straight, forward manner. I feel that the numbers fell as they have for this patient in an abnormal pathologic condition for minimal findings. I still stand by the [ROMs] that were conducted under standard officer procedures using the [AMA Guides].

I still feel that the numbers do hold up and this is my final evaluation for this patient.

In response to a deposition on written questions taken by the carrier, Dr. Wi stated that he agreed that the claimant was at MMI on August 6, 1999. Dr. Wi did not amend or retract his IR in response to the deposition on written questions.

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.

We have previously held that a hearing officer who finds that the great weight of the medical evidence is contrary to the IR assessment of the designated doctor must detail the reasons for so finding. Texas Workers' Compensation Commission Appeal No. 951125, decided August 28, 1995; Texas Workers' Compensation Commission Appeal No. 961269, decided August 14, 1996. Here, the rationale of the hearing officer in finding that the IR of the designated doctor was contrary to the great weight of the medical evidence was based upon the fact that Dr. Wi did not test for Waddell signs and did not perform straight leg raise testing in both a seated and supine position.

The 1989 Act requires that any determination of IR be based upon the AMA Guides. Section 408.124. Failure by a designated doctor to properly follow the AMA Guides has led to reversal of a decision on IR based upon the designated doctor's report. See Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993; Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993; Texas Workers' Compensation Commission Appeal No. 931008, decided December 16, 1993; and Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994. However, the AMA Guides themselves provide detailed protocols on how ROM is to be tested to validate such testing. The AMA Guides nowhere require the use of testing for Waddell signs nor do they require that the straight leg raise test be performed in both the supine and seated positions. A review of Dr. Wi's reports and the attached worksheet shows that he followed the protocols of the AMA Guides in performing ROM testing. The fact that Dr. W invalidated ROM testing is not a proper ground to reject the ROM validated by Dr. Wi. Nor do we find that Dr. Wi violated the protocols of the AMA Guides in not assessing impairment for specific disorders when there had been less than six months of documented pain. Under the AMA Guides he was not required to do either of these things and by her decision the hearing officer is engrafting new requirements on the protocols of the AMA Guides that, in effect, amend the AMA Guides themselves. We find this to be clear legal error, constituting a failure to give presumptive weight to the report of the designated doctor. We therefore reverse the decision of the hearing officer.

We render a new decision that the claimant attained MMI on August 6, 1999, with a 15% IR. In doing so we recognize that Dr. Wi amended his MMI date in his response to the carrier's deposition on written questions. We order the carrier to pay benefits in accordance with our decision.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCUR IN THE RESULT

I concur in the result. A report of a designated doctor is entitled to presumptive weight if it is a valid report, that is, it was rendered in accordance with the provisions of 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 considered evidence on whether the report of the designated doctor was made in accordance with the provisions of the AMA Guides and made a finding of fact that the report of the designated doctor is entitled to presumptive weight. Whether to assign impairment for an injury and the percentage of impairment to assign for an injury involves medical judgment. A difference of medical opinion on whether to assign impairment, and, if so, how much, does not by itself result in the report of the designated doctor being contrary to the great weight of the other medical evidence. A hearing officer must explain how the report of the designated doctor is contrary to the great weight of the other medical evidence. She did not do so.

Tommy W. Lueders
Appeals Judge