

## APPEAL NO. 001899

On July 11, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) impairment rating (IR) is nine percent. The claimant requests that the hearing officer's decision be reversed and that a decision be rendered that he has a 100% IR as certified by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission). The respondent (carrier) requests that the hearing officer's decision be affirmed.

### DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant said that he was injured when he inhaled chlorine gas. The claimant said that he resumed working for another employer about two years ago, operating a computer in a warehouse, and that he walks around in the warehouse counting items. The claimant said that he drives and fishes. The claimant was examined by Dr. K at the carrier's request and Dr. K certified that the claimant has a nine percent IR. Dr. A, the claimant's treating doctor, certified that the claimant has a 40% IR. Dr. W, the designated doctor chosen by the Commission, referred the claimant to Dr. S for testing, and Dr. S reported to Dr. W that the claimant is "100% disabled." Dr. W then certified that the claimant has a 100% IR. Reports of various tests were in evidence.

Section 408.125(e) provides that, 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, and that, if the great weight of the other 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.

The hearing officer found, among other things, that the great weight of the medical evidence is contrary to the findings of the designated doctor and that the great weight of the medical evidence is that the claimant has an IR of nine percent. The hearing officer concluded that the claimant has a nine percent IR. Whether the great weight of the medical evidence was contrary to the report of Dr. W was a factual determination to be made by the hearing officer, who is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

---

Robert W. Potts  
Appeals Judge

CONCUR:

---

Gary L. Kilgore  
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would remand this case for the appointment of a second designated doctor, whether or not the claimant specifically asked for this particular relief. In my opinion, the claimant did point out the hearing officer's error to a degree sufficient to call for a remand. If the Appeals Panel finds error that is complained of on appeal, the error should be appropriately remedied by the Appeals Panel.

The hearing officer adopted the impairment rating (IR) of another doctor in this case. In my opinion, the hearing officer should adopt the IR of another doctor only if the great weight of the other medical evidence is contrary to the designated doctor's report. This is not a case where the great weight of the other medical evidence is contrary to the designated doctor's report. The hearing officer would have to decide what level of pulmonary function the claimant actually has in order to make that determination. That is a medical question the hearing officer is not qualified to make.

The key determination in this case is the hearing officer's determination that the designated doctor failed to follow the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. The hearing officer determined that the designated doctor's IR was not "valid." I agree with that determination and I would remand this case so that this claimant has the opportunity to have a valid IR assessed by a designated doctor.

I do acknowledge that the Appeals Panel has concluded in some cases that if a designated doctor does not issue a valid IR, then the hearing officer may choose either to have a second designated doctor selected, or adopt the report of another doctor. However, in my opinion, where there is *no valid IR* from a designated doctor, this is the same thing as not ever having had a designated doctor at all. In my opinion, it is only when there is a valid IR, but the great weight of the other medical evidence is contrary to the

designated doctor's report, that a hearing officer should adopt another doctor's IR. If the IR is in dispute, then a claimant is entitled to an impartial doctor, a Texas Workers' Compensation Commission-selected doctor, to assess an IR.

I would reverse and remand for the appointment of a second designated doctor.

---

Judy L. Stephens  
Appeals Judge