APPEAL NO. 002006

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 1, 2000. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is nine percent as assigned by Dr. R, the Texas Workers' Compensation Commission (Commission)-selected designated doctor. The claimant appealed; contended that 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 (AMA Guides); urged that the great weight of the other medical evidence is contrary to the report of the designated doctor; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that his IR is 21% as certified by Dr. L, his treating doctor. The respondent (carrier) replied, stated that the claimant's appeal contains information that is not in the record and should not be considered on appeal, contended that Dr. R properly applied the provisions of the AMA Guides in rendering her report, urged that the claimant did not establish that the great weight of the other medical evidence is contrary to the IR assigned by the designated doctor, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

The dispute in this case centers on whether the designated doctor properly applied the provisions of the AMA Guides when she invalidated range of motion (ROM) for lumbar flexion and extension. We will consider the evidence in the record. The record contains Report of Medical Evaluation (TWCC-69) forms from five doctors. The claimant's treating doctor, Dr. L, assigned 14% for loss of lumbar ROM. Dr. A, who previously treated the claimant, assigned six percent for loss of lumbar ROM. Two doctors who examined the claimant at the request of the carrier invalidated lumbar ROM testing. Dr. AC reported that the claimant failed to meet the straight leg raise test for lumbar flexion and extension and that inconsistencies were observed. Dr. B stated said that there certainly was a discrepancy between what he observed with the claimant's movements and what was later measured during tests.

In a TWCC-69 dated April 25, 2000, Dr. R certified that the claimant reached maximum medical improvement on November 11, 1999 with a nine percent IR. In a narrative attached to the TWCC-69, Dr. R said that the examination was performed on April 15, 2000; that the claimant appeared comfortable during the history taking and physical examination portions of the visit; that while talking with the claimant, he was able to bend over at the waist to retrieve papers from his satchel; that tests of ROM of the lumbar spine revealed restrictions, however, they were not consistent with the observed behavior; that positive results were found in "Seated and Supine Straight Leg Raise, Ely to Buttocks and Kemp's;" that Waddell's signs were positive; that two percent impairment for loss of lumbar ROM was assigned under Table 56 and 57 of the AMA Guides; that

seven percent was assigned for a specific lumbar disorder under Table 49; and that the claimant's IR is nine percent. A Figure 83c, Lumbar Range of Motion worksheet is also attached. It indicates that lumbar flexion and extension were invalidated and that one percent was assigned for loss of lumbar right lateral flexion and that one percent was assigned for loss of lumbar left lateral flexion. A Summary of Validity Study Indicators dated April 15, 2000, and attached to the TWCC-69 has check marks before the following statements:

> Rotation: back pain is reported when shoulder and pelvis are passively rotated in the same plane
>
> Straight leg raising: difference of 30 degrees or more between leg raising performed in sitting and supine positions
>
> Over reaction: disproportionate verbalization, facial expression, and pain behavior. (Using Libman's Test results as base line)

A Commission employee wrote a letter to Dr. R, but a copy of the letter is not in the record. In a letter dated June 16, 2000, Dr. R wrote:

> An [IR] for loss of [ROM] for the lumbar spine in flexion and extension was not assigned due to observed behavior that was not consistent with the examination. I stated [claimant] was seen bending over at the waist retrieving papers from his satchel. Yet, on the exam table during the straight leg raise, he was "able" to raise each leg only six inches. In my opinion, this effort was precalculated and staged to acquire a desired impairment. Therefore, measurements were not valid.
>
> At the time of the exam [April 15, 2000] I did not have medical records from the insurance company nor [Dr. L]. However, [claimant] is a very thorough individual. Not only did he present test scores of his current law classes, he had his medical records. I used these records for the exam and made copies of several for reference. Medical records were sent by the carrier and doctor on April 25 after which I completed my report.
>
> In regard to [Dr. L's] rebuttal letter, I believe my response to the first question answers his rebuttal. According to the guidelines, the Designated Doctor has the recourse to invalidate the rating if the examinee does not put forth a valid effort.

Dr. L and Ms. CC, a nurse who instructs at training for designated doctors, testified that they are not aware of provisions in the AMA Guides that permit a designated doctor to invalidate ROM tests because of observations and that in their opinions, Dr. R was wrong in invalidating the lumbar flexion and extension ROM tests. The claimant testified that the designated doctor did not have all of his medical records.

In numerous decisions, the Appeals Panel has held that a designated doctor may invalidate ROM tests because of suboptimal effort. The Appeals Panel has also reached the same results when designated doctors have used similar terms to indicate that claimants exhibited suboptimal effort. In Texas Workers' Compensation Commission Appeal No. 961568, decided September 20, 1996, the Appeals Panel quoted two sentences in Section 3.3e.2. on page 90 of the AMA Guides in which suboptimal effort and visualized true spine motion are used, commented on the difference between sitting and supine straight leg raising tests, and affirmed a decision of a hearing officer in which the designated doctor invalidated ROM tests. Under the provisions of the AMA Guides, a designated doctor may invalidate ROM tests based on observation.

In the case before us, the hearing officer made a finding of fact that contains stipulations and the following findings of fact:

> 2. The designated doctor's report was prepared after the designated doctor examining the Claimant, reviewing the medical records and utilizing the proper version of the AMA Guides.
>
> 3. The great weight and preponderance of the other medical evidence is not contrary to the determination of the designated doctor and the findings are entitled to presumptive weight.

The Appeals Panel has stated that in cases in which a party contends that the report of a designated doctor was not made in accordance with the provisions of the AMA Guides, the hearing officer should make findings of fact as to whether the report was made in accordance with the provisions of the AMA Guides, whether it is a valid report, and whether it is entitled to presumptive weight before determining whether "the great weight of the other medical evidence is to the contrary." Sections 408.122(c) and 408.125(e). The hearing officer did not make such findings of fact; however such findings may be inferred from the statement of the evidence in his Decision and Order. Hearing officers have also been encouraged to use the language in the 1989 Act and in Commission rules. The claimant was not harmed by the hearing officer using "[t]he great weight and preponderance of the other medical evidence" in Finding of Fact No. 3.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The determinations made by the hearing officer and those that may be inferred are not so against the great weight and preponderance of the evidence as to be clearly

wrong or unjust and are affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge