APPEAL NO. 002295

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 September 5, 2000. The issues at the CCH were the appellant's (claimant) impairment rating (IR) and whether he was entitled to his first quarter of supplemental income benefits (SIBs).

The hearing officer held that only part of the designated doctor's report was entitled to presumptive weight, and he held that the claimant's IR was 13%. He further held that because the claimant had some ability to work during the qualifying period for his first quarter of SIBs, but did not search for employment, he was not entitled to SIBs.

The claimant has appealed. He argues that he should be awarded the entire 18% IR assessed by the designated doctor, and be found entitled to SIBs because he cannot work. The claimant points out that there is no contrary evidence and that the other IR in evidence gives him a 15% IR. The respondent (carrier) responds that the approach taken by the hearing officer on the IR was correct. The carrier further responds that there is sufficient evidence supporting the finding that the claimant was not entitled to SIBs.

DECISION

Reversed and remanded.

The claimant injured his back on _____, and had surgery on March 17, 1999. He had been employed as a driver for 15 years by (employer). He testified that he could not return to this profession and had not been released to work by any doctor. His family doctor/treating doctor was Dr. M. Dr. M referred the claimant to Dr. E. It was stipulated that the claimant had reached maximum medical improvement (MMI), although surprisingly no date was included in the stipulation. The claimant's Application for [SIBs] (TWCC-52) indicated that he did not search for employment.

Although the claimant stated that he had received a 31% IR, a copy of the assessment is not in evidence. The claimant was evaluated by a designated doctor, Dr. B, who apparently first assessed an IR of 7% prior to the claimant's surgery. However, Dr. B reexamined the claimant after the claimant's surgery and certified on December 29, 1999, that the claimant reached MMI on June 11, 1999, with an 18% IR.

Dr. B's IR consisted of 13% from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and an additional 6% for range of motion (ROM) deficits. Dr. B took measurements on December 28, 1999, and when these were invalidated by the straight leg raise test, remeasured the next day and got valid measurements, for which he awarded an additional 6% for lumbar flexion and extension.

On the second day, the figures on all three trials were identical. When the carrier sent this to a peer review doctor, Dr. C, Dr. C took issue with this and indicated it would be physiologically impossible to have identical ROM measurements. Dr. B responded and explained that he understood that the Texas Workers' Compensation Commission (Commission) allowed these measurements to be rounded to the "nearest" 5%. Dr. B further stated that on the second date, he felt that the claimant gave maximum effort, that his results were reproducible, and that physiologically, a patient who has had a two-level fusion would be expected to have some limited ROM. He stated that the claimant's IR was appropriate. Dr. C replied on June 26, 2000, that he would challenge this assertion because he was unaware of any direction from the Commission that ROM could be rounded to the nearest 5E. He posed a hypothetical situation where such rounding could leave the impression that separate measurements were within 5E of each other when they were in fact not. However, Dr. C did not state that this likely happened in the claimant's examination but stood by his earlier statement that the measurements "as presented" were nonphysiologic. Dr. C stated that new ROM measurements should be performed.

Dr. M wrote a letter on July 18, 2000, stating that the claimant was 100% disabled from any employment, and could not ride, sit, stand and walk for sustained periods and that he required daily rest periods. He stated that the claimant could not do any bending, stooping, lifting, or heavy equipment operation, nor could he remain alert. The assertions were repeated in an August 14, 2000, letter, in which Dr. M also noted that the carrier had rejected his request for a pain management program.

The record contains a Report of Medical Evaluation (TWCC-69) completed on March 17, 2000, by Dr. S. He lists his doctor status not as treating or designated but "other." Dr. S certified that the claimant had a 15% IR. No explanation of this report was furnished.

At the beginning of the CCH, the hearing officer proposed a number of stipulations, including several that went beyond coverage and venue matters. Although one of the issues to be determined was the claimant's IR, the hearing officer nevertheless solicited an unqualified stipulation that the first quarter for SIBs ran from June 24, 2000, through September 22, 2000. Because ascertainment of the first quarter of SIBs is always dependent upon the ending of the period for which impairment income benefits is paid, an unqualified or unconditioned stipulation of this kind should never be solicited from the parties where IR is in issue, especially when, as in this record, there is more than one report of IR that equals or exceeds the 15% threshold for SIBs entitlement. The unintended result of the stipulation in this case, as made, would be that the parties also agreed that the IR was 18%. We will interpret this stipulation as setting the dates of the SIBs period in the event that the IR was 18%.

The report of a Commission-appointed designated doctor is given presumptive weight. Sections 408.122(c) and 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No.

92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

The hearing officer erred by giving partial presumptive weight to the report of Dr. B. We have stated early on that presumptive weight is or is not given to the report as a whole; it may not be adopted piecemeal on a presumptive-weight basis by the hearing officer. A full discussion on why such "pick and choose" adoption of a report does not pass muster under the 1989 Act is set forth in Texas Workers' Compensation Commission Appeal No. 94646, decided July 5, 1994. Consequently, the hearing officer was required to consider the report as a whole. Whether a report is done in conformity with the AMA Guides is a matter that can be considered in determining whether the great weight of the contrary medical evidence is against the designated doctor's report; there is no separate threshold of "validity" to which the report must rise before the great weight analysis is employed. Texas Workers' Compensation Commission Appeal No. 951969, decided January 4, 1996. Mere differences in medical opinion between the designated doctor and a peer review doctor as to interpretation of the AMA Guides will not, in and of itself, provide a "great weight" basis against the designated doctor's report.

If the hearing officer was of the opinion that the great weight (not mere preponderance) of the other medical evidence was against Dr. B's report, he was required to select the report of "one of the other" doctors. Section 408.125(e). The only "other doctor" who performed a post-surgical IR evaluation for the claimant was Dr. S. Therefore, if presumptive weight could not be given to Dr. B's 18% IR, then the hearing officer should have considered the adoption of the 15% IR of Dr. S. As the case is being remanded, it would be appropriate to put any attached narrative to Dr. S's report into evidence.

We note that we have agreed, for purposes of assigning an actual IR from the ROM tables in the AMA Guides, that there may be no rounding of a ROM angle upwards in a manner that would cause the IR to be artificially decreased. Texas Workers' Compensation Commission Appeal No. 980894, decided June 17, 1998. We held that an injured worker should not be evaluated as if he were more flexible than he was. While that case did not consider rounding in the measurement of ROM and whether the separate trials are within 10% or 5E of each other, it would also seem consistent that these figures may not be rounded.

On remand, the hearing officer should seek clarification from the designated doctor, who should be instructed that rounding to the nearest five degrees for ROM is not allowed under the AMA Guides. The designated doctor should give actual measurements. A reexamination may be necessary. If the great weight is contrary to the designated doctor's report, the report of Dr. S should be adopted. It is suggested that the date of MMI be included in the stipulation. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such

new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Thomas A. Knapp
Appeals Judge