APPEAL NO. 002396

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 26, 2000. The appellant (claimant) had failed to appear at a May 16, 2000, hearing and a July 19, 2000, hearing; thus, at the outset of the September 26, 2000, hearing the hearing officer held a show cause hearing to determine if the claimant had good cause for his two previous failures to appear at the scheduled hearings. The hearing officer determined that the claimant did not have good cause for his failure to appear on May 16, 2000, but that he did have good cause for his failure to appear at the July 19, 2000, hearing. With respect to the issues before her, the hearing officer determined that the claimant reached maximum medical improvement (MMI) on October 28, 1999, with an impairment rating (IR) of five percent as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant essentially argues that the hearing officer erred in giving presumptive weight to the designated doctor's report because the great weight of the other medical evidence is contrary to the report of the designated doctor. In addition, the claimant contends that the hearing officer erred in finding that he did not have good cause for his failure to appear at the hearing that was scheduled for May 16, 2000. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

Because of the limited nature of the issues before us on appeal, our factual recitation will be limited to those facts most germane to the MMI and IR issues. The parties stipulated that the claimant sustained a compensable injury on July 29, 1998. In a Report of Medical Evaluation (TWCC-69) dated November 9, 1999, Dr. A certified that the claimant reached MMI on October 28, 1999, the date of his examination of the claimant, with an IR of zero percent. In his narrative report, Dr. A stated that the claimant's lumbar MRI was "grossly normal and did not show any evidence of canal encroachment." Dr. A noted that the MRI was a "limited study" because the claimant moved during the MRI; however, he also noted "significant secondary gain and symptom magnification in [claimant's] examination." Thus, Dr. A concluded that the claimant had a zero percent IR. Dr. A's certification was disputed and the Commission appointed Dr. B, a chiropractor, as the designated doctor. In a TWCC-69 dated December 14, 1999, Dr. B certified that the claimant reached MMI on October 28, 1999, with an IR of five percent, which was assigned under Section (II)(B) of 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). Dr. B did not assign a rating for loss of lumbar range of motion (ROM) because the claimant did not satisfy the consistency requirements. In the narrative report accompanying his TWCC-69, Dr. B noted that the claimant exhibited "significant symptom magnification" during his examination.

In a letter dated December 21, 1999, the claimant's treating doctor, Dr. M, a chiropractor, stated that Dr. B's IR was incorrect because Dr. B did not retest ROM on a subsequent day following Dr. B's observation that the claimant exhibited significant symptom magnification during his examination. In addition, Dr. M contends that Dr. B improperly invalidated right and left lateral flexion ROM because the claimant did not satisfy the straight leg raise (SLR) test (that the tightest SLR not exceed the sum of sacral flexion and extension by more than 10E). In a second letter dated May 5, 2000, Dr. M stated that the claimant had not yet reached MMI because the claimant did not receive proper care and diagnostic testing because it was denied by the carrier.

The claimant argues that the hearing officer erred in giving presumptive weight to the designated doctor's five percent IR. Initially, the claimant argues that he has not yet reached MMI based upon Dr. M's May 5, 2000, letter. The opinions of Dr. B and Dr. M as to whether the claimant has reached MMI is a difference of medical opinion. By giving presumptive weight to the designated doctor's report under Sections 408.122(c) and 408.125(e), the legislature has established a procedure where the designated doctor's exercise of professional judgment to resolve such differences is to be accepted. The opinion of Dr. M that the claimant has not yet reached MMI simply does not rise to the level of the great weight of the other medical evidence contrary to Dr. B's report. Accordingly, we cannot agree that the hearing officer erred in giving presumptive weight to Dr. B's report and, thus, determining that the claimant reached MMI on October 28, 1999. The claimant's challenge to the designated doctor's IR is largely premised upon the success of his argument that he has not yet reached MMI. However, to the extent that the claimant is relying on Dr. M's assertion that Dr. B improperly invalidated right and left lateral flexion ROM based on the SLR, we note that Dr. M is incorrect. Dr. B's report and his narrative report clearly establish that he did not assign a rating for right and left lateral flexion ROM because the claimant did not meet the consistency requirements of the AMA Guides and thus, the testing was invalid. With respect to Dr. M's contention that Dr. B should have retested ROM, we note that retesting was not required here because Dr. B's observation of symptom magnification constitutes a clinical explanation for the decision not to retest ROM. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(k) (Rule 130.6(k)). Accordingly, we find no merit in the assertion that the hearing officer erred in giving presumptive weight to the designated doctor's five percent IR.

Finally, we briefly consider the claimant's assertion that the hearing officer abused her discretion in finding that he did not have good cause for failing to appear at the May 16, 2000, hearing. At the hearing, the claimant stated that he arrived late for that hearing because he was "running behind." He did not assert, as he did on appeal, that his pain "makes me not remember." Nevertheless, we find no merit in the assertion that such an explanation rises to the level of good cause for failure to appear at a hearing and reject the contention that the hearing officer abused her discretion in so finding.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Thomas A. Knapp
Appeals Judge