APPEAL NO. 002437

Following a contested case hearing (CCH) held on September 26, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the appellant (claimant herein) had a 12% impairment rating (IR) based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals arguing that the hearing officer erred by admitting documents not timely exchanged without finding good cause and that the designated doctor's IR assessment upon which the hearing officer relied was faulty. The respondent (carrier herein) replies that the evidence to which the claimant objected was properly admitted and that the decision did not turn on this evidence in any case. The carrier also argues that the hearing officer properly gave presumptive weight to the IR assessment of the designated doctor.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarizes the evidence in her decision. The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached statutory maximum medical improvement on November 9, 1998; and that Dr. B was the designated doctor selected by the Commission. Dr. B initially examined the claimant in July 1997 and assessed an 11% IR. On August 20, 1999, Dr. B again examined the claimant and certified on a Report of Medical Evaluation (TWCC-69) that the claimant's IR was 12%. Dr. M disagreed with Dr. B's assessment and in a December 1, 1999, letter stated that the claimant's condition had not sufficiently stabilized to allow his IR to be fairly assessed. Dr. M later assessed a 19% IR on a TWCC-69 dated April 17, 2000. On June 15, 2000, the Commission sent information from Dr. M to Dr. B to see if it would affect his opinion as to IR. Dr. B responded to the Commission in a letter dated June 23, 2000, stating that having reviewed the materials from Dr. M he did not feel that he needed to re-examine the claimant or change his opinion as to the claimant's IR.

At the CCH the claimant objected to a number of the carrier's exhibits as not being timely exchanged with the claimant. These records were exchanged more than 15 days after the benefit review conference (BRC), but within 15 days after the BRC report was sent out. The hearing officer admitted these exhibits as being timely exchanged.

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.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard we do find error in the hearing officer's finding of fact that the great weight of the other medical evidence was not contrary to the second report of the designated doctor. Our reading of the conflicting opinions of Dr. B and Dr. M is that they only constituted a difference of medical opinion, and in such instances, it is proper to give presumptive weight to the opinion of the designated doctor.

As far as the evidentiary issue is concerned, we note that the exhibits to which the claimant objected are primarily opinions of other doctors as to the claimant's IR which are less favorable to the claimant than Dr. B's opinion. In the present case, the primary inquiry was whether Dr. M's opinion outweighed Dr. B's opinion and whether Dr. M's criticisms of Dr. B's IR established it was faulty. Under these circumstances we find any error in the

admission of these documents was harmless. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge