

APPEAL NO. 002483

Following a contested case hearing held on September 25, 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 impairment rating (IR) of the respondent (claimant) is 15% based on the report of the designated doctor. The appellant (self-insured) has appealed, asserting that the hearing officer's finding that the great weight of the other medical evidence does not overcome the presumptive weight to be accorded the report of the designated doctor is against the great weight of the evidence. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the self-insured has paid 45 weeks of impairment income benefits based upon the 15% IR assigned by Dr. K, the designated doctor; that Dr. RC, the treating doctor, ultimately assessed a zero percent IR; and that the self-insured did not seek an independent medical examination to assess the claimant's IR. Though not mentioned in the hearing officer's decision, the parties also stipulated that the claimant reached maximum medical improvement (MMI) on October 4, 1999.

It was not disputed that the claimant, age 61 and a maintenance worker for the (employer), underwent, in May 1998, the surgical repair of a ventral (abdominal wall) hernia which was not work related and that on _____, he sustained a work-related hernia injury at the same location while unloading a trailer containing ceiling tiles and grids and underwent the surgical repair of a hernia at the same site on August 12, 1999. The claimant testified that Dr. A is his surgeon and that Dr. RC is his primary care physician; that both Dr. A and Dr. RC have cautioned him against heavy lifting; that Dr. A indicated there could be a serious problem should there be a recurrent hernia at that site; that he was released by Dr. A to return to work on September 27, 1999; and that he then worked into December 1999 after which he retired. He also stated that Dr. RC originally assigned him an IR of 100% but later reduced it to zero percent "after he was talked to." He said he agrees with the 15% IR assigned by Dr. K and feels it is in compliance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

Dr. A's August 12, 1999, operative report states the preoperative diagnosis as recurrent ventral hernia; the operation performed was the repair of the ventral hernia with use of a mesh over the old mesh; and the operative finding was the "presence of a defect to the right side of the old Marlex mesh." Dr. A wrote on August 24, 1999, that the claimant was doing well and was released to return to work on September 27, 1999. Dr. RC's "Excuse Slip," dated "1-17-2000," states that the claimant is "released to return to work on 10-0-99."

The AMA Guides provide for the rating of abdominal wall hernias in Section 10.9 which sets out symptoms and signs of abdominal wall impairment, and which states that the most important objective procedure in establishing impairment by hernias is the physical examination and that criteria for evaluating permanent impairment due to abdominal wall herniation are listed in Table 6. Table 6 provides for three classes of hernial impairment. Under Class 2, for which the IR range is 10% to 15%, is stated the following:

Palpable defect in supporting structures of adominal [sic] wall; and Frequent or persistent protrusion site of defect with increased abdominal pressure; still manually reducible; or Frequent discomfort, precluding heavy lifting, but not hampering normal activity.

The Report of Medical Evaluation (TWCC-69) signed by Dr. RC on October 19, 1999, reflects that an IR of "100%" was crossed through and replaced with "0%." There is no accompanying narrative report from Dr. RC in evidence.

Dr. K's TWCC-69 of December 18, 1999, certifies that the claimant reached MMI on October 4, 1999, with an IR of 15%. Dr. K's narrative report of the same date states that the claimant currently feels a bulging throughout the abdominal wall, complains of pain at the surgical site with the carrying of heavy objects and lifting, and feels a bulging of the abdominal wall when he lies down. Dr. K also stated that the claimant "is forbidden to do any lifting, pulling, or pushing due to the risk of rupture of the mesh." Dr. K further reported that his examination of the abdomen revealed mild bulging in the middle of the abdominal wall when the claimant is lying down; that the defect at the umbilical area was repaired but that there is pain and tenderness on palpation at the site of the wire mesh repair; that there was "no protrusion of [sic] defect at the site of the surgery"; and that the claimant was noted to have pain and discomfort. Concerning the IR, Dr. K wrote that the claimant is entitled to a 15% IR pursuant to Table 6 of the AMA Guides "since he has an operable defect and support structure of the abdominal wall, with frequent discomfort precluding heavy lifting but not hampering normal activities."

Dr. K issued an addendum report on May 5, 2000, in which he stated that he was asked to review the claimant's case; that despite the two surgical repairs the claimant still has discomfort and abdominal pain at the surgical site; and that the claimant still feels a bulge throughout the abdominal wall when he bends over or carries heavy objects. Dr. K further stated that notwithstanding the two operations, the claimant's situation is still very critical since the mesh can rupture and that the claimant's abdominal wall cannot withstand a third operation. Dr. K concluded by stating that "[b]ased on this, I gave him a 15% [IR]."

Dr. CC, who reviewed the records for the self-insured, reported on May 30, 2000, that "the physical exam [apparently referring to the examination of Dr. K] documented that there was no true palpable defect" and that "the physical exam stated succinctly that there was no protrusion of [sic] defect at the site of surgery"; and that the claimant did complain of pain. Dr. CC went on to state his opinion that Dr. K deviated from the AMA Guides

because in order to assign a rating for impairment from an abdominal wall hernia, regardless of the class and IR range, there must be a palpable defect in the supporting structures of the abdominal wall. Dr. CC read Dr. K's report and addendum to essentially rule out such a defect and that was the basis of the self-insured's position below and remains so on appeal. Dr. CC also added that Dr. RC's IR followed the AMA Guides and "would be the correct impairment."

In his deposition upon written questions, which he signed on September 18, 2000, Dr. K stated that his conclusion that the claimant is precluded from heavy lifting is based on the medical fact that his hernia which has been repaired twice, could rupture again in the future. Concerning the issue of the claimant's having a palpable defect, Dr. K stated that at the site where the mesh is attached to the abdominal wall structure, there was no defect but that the normal structure of the abdominal wall itself had a defect "in that in the middle one could easily feel the mesh." Dr. K further responded that his examination revealed that the muscular structure of the claimant's abdominal wall is "disrupted" and that he still has bulging in the middle of the abdominal wall; that he agrees that the defect in the abdominal wall at the umbilical area was repaired; and that his conclusion that the claimant has bulging throughout the abdominal wall when he bends over and carries heavy objects is based on his objective findings during the physical examination. Dr. K said he noted the abdominal wall bulge when the claimant was lying down, when he changed to a sitting position, and when he bent over.

Section 408.125(e) provides that the report of the designated doctor concerning the IR will be given presumptive weight and that the Texas Workers' Compensation Commission will base its determination upon such report unless it is against the great weight of the other medical evidence. The self-insured cites Texas Workers' Compensation Commission Appeal No. 970293, decided April 2, 1997, which stated that "[f]or the claimant to have a Class I impairment under Table 6, the claimant must have a palpable defect in the support structures of the abdominal wall and one of the other two criteria listed." The self-insured contends that Dr. CC's report and Dr. K's report both demonstrate that Dr. K failed to correctly apply the AMA Guides because those reports establish that the claimant did not have the "palpable defect" required by Table 6 for an abdominal wall hernia rating.

The self-insured had the burden to prove that the report of the designated doctor is contrary to the great weight of the other medical evidence. As noted, the self-insured challenges the finding that the great weight of the other medical evidence does not overcome the presumptive weight to be accorded the report of the designated doctor. The hearing officer states in her discussion of the evidence that she believes that the requirements of Table 6 of the AMA Guides were met because Dr. K found both a defect in the claimant's abdominal wall and that he had discomfort which precluded him from heavy lifting.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). As an appellate reviewing tribunal, the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). To the extent Dr. K's report is ambiguous about his finding a palpable defect, such is for the hearing officer to resolve.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge