APPEAL NO. 010586

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 November 16, 2000, and February 13, 2001. The disputed issues of (1) the appellant's (claimant) impairment rating (IR); (2) the claimant's entitlement to first quarter supplemental income benefits (SIBs); and (3) whether the respondent (self-insured) was entitled to suspend impairment income benefits to recoup a previous overpayment were all resolved adversely to the claimant. The claimant submitted a timely appeal as to the first two issues in the case, but did not appeal the determination of the hearing officer as to the third issue. The determination of the third issue has become final by operation of law. Section 410.169. The self-insured submitted a response to the appeal, urging that the decision and order of the hearing officer be affirmed in all respects.

DECISION

Affirmed.

The hearing officer was presented with voluminous records and heard testimony from the claimant and six other witnesses. The key issue in the case is the claimant's IR. The claimant sustained a compensable injury in a bus accident on _____. At a CCH held on July 9, 1996, the hearing officer entered a decision and order that the claimant had a mental trauma injury and psychological condition that arose in the accident of _____, which were part of the compensable injury.

There is evidence that Dr. J, a psychiatrist, examined the claimant on July 9, 1997, and opined that her symptom complex was not related to the bus accident. Various treating doctors, including a psychologist, Dr. E; a chiropractor, Dr. Po; and a psychiatrist, Dr. S, assigned IRs of 85%, 91%, and 90%, respectively. These ratings led to a dispute and the appointment of Dr. B as the designated doctor. Dr. B examined the claimant on February 27, 1998. He referred the claimant to Dr. Pa for a psychiatric evaluation. Dr. B noted in his report that Dr. Pa concluded that the claimant had "moderate impairment as defined in the [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)] for mental disorders." Dr. B quoted Dr. Pa as stating that the claimant had "not reached [Maximum Medical Improvement (MMI)] in the psychiatric category." Dr. B signed a Report of Medical Evaluation (TWCC-69) on April 10, 1998, certifying an MMI date of "02-27-98" with an IR of 7%, based on the claimant's lumbar spine injury only.

Dr. J did a peer review of the designated doctor certification of MMI and IR on September 30, 1998. He opined that the claimant reached MMI on January 1, 1998, and assigned a 20% whole person IR, which included the lumbar spine and a rating for "moderate emotional disturbance under ordinary stress." Dr. T also did a peer review of the designated doctor's report on October 4, 1998, and opined that the claimant did not have a permanent impairment from her injuries.

Apparently, noting the absence of a rating for the claimant's psychological condition, the Texas Workers' Compensation Commission (Commission) contacted Dr. B in December 1998. Although the Commission letter is not included as an exhibit, Dr. B did respond to the Commission with a letter dated April 25, 1999, included as part of Carrier's Exhibit No. 17, in which he referred to Dr. Pa's report describing the claimant's impairment as "moderate." Dr. B then refers to the "Mental Health Treatment Guidelines and Impairment by Dr. C" where "moderate impairment" can have a range of whole person impairment from 20% up to 90%. Dr. B then selected 45% as the mental health IR. With the previously assigned 7% rating for the physical impairment (lumbar spine), he assigned a whole person IR of 49%.

The self-insured asked for a benefit review conference on May 20, 1999, to dispute the change in IR by the designated doctor. Dr. Pe, a clinical psychologist, performed a peer review on July 28, 1999, concerning whether the IR was assigned in accordance with the AMA Guides. He concluded that it was not, because the claimant had never undergone any psychological testing, and Dr. Pe opined that the designated doctor's rating of 45% for mental impairment was not warranted. The self-insured arranged for the claimant to undergo an independent medical examination (IME) with Dr. J on November 4, 1999, but the examination did not occur at that time.

Inexplicably, the next documented action did not occur until June 13, 2000, when Dr. Pe did another peer review. He stated that there was "absolutely no evidence to substantiate the presence of lasting psychological injury in this case." The self-insured initiated a Request for Medical Exam Order (TWCC-22), which was approved by the Commission on October 5, 2000. Pursuant to this order, Dr. J examined the claimant on October 20, 2000. The claimant was also scheduled for psychological testing with Dr. Pe on December 6, 2000, but she refused to sign an informed consent form and eventually departed Dr. Pe's office without participating in any psychological testing. Dr. J completed his report on January 18, 2001, diagnosing the claimant with "malingering." Dr. J explained that his 1998 peer review report was meant to convey that the claimant would deserve an IR of 20%, if her condition were genuine, but that he has confirmed at the most recent exam that "her condition is <u>not genuine</u> and it is <u>not</u> a result of her accident." (Emphasis in original.) He assigns her "correct rating of zero."

Based upon the foregoing evidence, the hearing officer made the following Findings of Fact:

> 15. Claimant's presentation of mental symptoms are not permanent, do not arise from a lasting psychological injury from the _____ accident, but do arise from motivational factors, and are therefore not the appropriate subject of an [IR] under the [AMA] Guides.
>
> 16. [Dr. J's] reports, taken together, establish that [Dr. B's] reports do not assign a correct IR for any mental condition related to Claimant's _____ injury. [Dr. B's] reports taken together are not in

substantial compliance with the requirements of the appropriate version of the [AMA] Guides for assigning a mental impairment, in that [Dr. B's] reports are based on [Dr. Pa's] report that does not provide an adequate diagnosis, an adequate account of the longitudinal history, or an account [of] motivational factors. [Dr. B's] reports are not entitled to presumptive weight on the matter of mental impairment.

17. [Dr. B's] determination that Claimant has an IR of 7% for a specific disorder from the _____ injury is in accordance with the [AMA] Guides and is not against the great weight of the other medical evidence.

The hearing officer went on to make the following relevant Conclusions of Law:

5. Because [Dr. B] served as a commission-designated doctor who determined that Claimant has a 7% [IR] for the lumbar spine from the _____ injury, and [Dr. B's] report of an IR for the lumbar spine is not against the great weight of the other medical evidence, the impairment for the lumbar spine is presumed to be correct, and therefore Claimant has a 7% [IR] from the _____ injury.

6. Because [Dr. B's] reports for mental impairment do not follow the [AMA] Guides, and are against the great weight of the other medical evidence, the reports is [sic] not entitled to presumptive weight on mental impairment, and Claimant has a 0% IR for mental impairment.

Section 408.125(e) provides that, if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight and that the Commission shall base the IR on that report unless the great weight of the other medical evidence contradicts the IR contained in the report of the designated doctor. The correct IR is a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence offered. Section 410.165(a). As the finder of fact, the hearing officer is required to resolve the conflicts in the evidence, including the medical evidence. Texas Employers Ins. Co. v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). If the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, it will be upheld.

In this instance, Dr. B initially determined that the claimant's compensable back injury resulted in a 7% IR. No rating was given by Dr. B at that time for the compensable mental trauma injury and psychological condition. After reviewing all the evidence, the hearing officer determined that the designated doctor never made a correct determination of the claimant's mental impairment, as stated in Finding of Fact No. 16, and that his reports were "not entitled to presumptive weight on the matter of mental impairment." The hearing officer determined that the designated doctor's report on the question of mental

impairment was against the great weight of the other medical evidence. The hearing officer went on to conclude from the "other medical evidence" that the claimant had "a 0% IR for mental impairment." We have previously affirmed a hearing officer in giving presumptive weight to only the IR assigned for the compensable injury where the impairment assigned for the compensable and noncompensable conditions is "separate and distinct" and can be determined from the designated doctor's report without requesting additional information. Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996; Texas Workers' Compensation Commission Appeal No. 950314, decided April 14, 1995; Texas Workers' Compensation Commission Appeal No. 941739, decided February 7, 1995; Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995. By analogy, we hold that it was proper for the hearing officer to disregard the improperly assigned mental IR of Dr. B, while accepting his properly assigned physical IR. The hearing officer had evidence before him from which he could logically determine the issues. Our review of the record does not demonstrate that these determinations are so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no basis exists for reversing the hearing officer's decision and order on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In view of our decision on the correct IR, the claimant does not meet the basic requirement for entitlement to SIBs, that is, an IR of 15% or greater. Section 408.142. The hearing officer's decision on the second issue is affirmed.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Michael B. McShane
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Robert W. Potts
Appeals Judge