

APPEAL NO. 010938

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 April 4, 2001. With regard to the only issue before her, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 20% as assessed by the designated doctor in his first report of May 5, 1999.

The appellant (carrier) appealed, pointing to reports from its peer review doctors and to the designated doctor's "amended" report assessing a 12% IR, and asserting that 12% is the correct IR. The claimant responds, urging affirmance.

DECISION

Affirmed.

The claimant was employed by a health care system and on _____, she fell in the parking garage hitting her left shin. The parties stipulated that the claimant sustained a compensable left lower extremity injury on _____ and reached maximum medical improvement on February 11, 1999. The claimant testified that she had continued working after her compensable injury except during periods when she was hospitalized or receiving treatment for her compensable injury.

In March 1999, the claimant's treating doctor referred the claimant to Dr. H for evaluation and Dr. H, in a report dated March 5, 1999, assessed a 12% IR based on 4% impairment of the lumbar spine and 21% impairment of various components of a left lower extremity impairment (LEI) combined to be an 8% whole person impairment and resulting in the 12% IR. At issue is Table 48 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association entitled "Impairment of the Lower Extremity Due to Peripheral Vascular Disease." Dr. H assessed the claimant in Class 1 (which lists various factors to be considered and allows for "0-5% impairment") and assessed a 5% LEI assessment.

This assessment was disputed and the claimant was seen by Dr. K, the designated doctor who, on a Report of Medical Evaluation (TWCC-69) and narrative dated May 3, 1999, assessed a 20% IR. Dr. K did not assess an impairment for the lumbar spine but assessed impairments for various components of LEI including a "38% . . . (LEI) between class 2 [which allows '10-35% impairment'] and [class] 4." Dr. K discussed the various factors that he considered in assessing the rating from Table 48.

The carrier had a peer review performed by Dr. P, who, in a report dated May 16, 1999, noted that the major difference in the IRs of Dr. H and Dr. K was in the assessment from Table 48 (5% versus 38%). Dr. P concluded "that a 5% impairment/class 1 is probably much more reasonable." Dr. P's report was sent to Dr. K by letter dated June 24, 1999, asking for a response. Dr. K replied on a form dated July 17, 1999, stating:

Since [Dr. P] and [Dr. H] feel my evaluation was to [sic] generous I will amend my [IR]. I feel [Dr. H's] recommendations are too low. I feel 17% LEI is more appropriate which converts to 7% WPI.

Dr. K used the "17% WPI [with] hip and ankle impairments" to arrive at a 12% IR without an additional examination or more detailed narrative.

On July 16, 1999, before Dr. K had responded to Dr. P's report, the claimant was examined by Dr. C, the carrier's required medical examination doctor, who, in a report of that date, was of the opinion that the claimant had reflex sympathetic dystrophy, based on some other testing, and commented that he found Dr. H's assessment from Class 1 of Table 48 as "the most appropriate." The carrier contends that various diagnostic studies done in 1996 through 1998 failed to show deep vein thrombosis or "arterial insufficiency at rest" or other conditions which would warrant a higher IR.

The claimant was subsequently reexamined by Dr. H, who, in a report dated September 6, 2000, referenced some additional testing and assessed a 24% IR based in part on an assessment of a 40% impairment from Table 48, Class 3 (which allows a 40 to 65% impairment). Dr. He, the treating doctor, agreed with this rating. Subsequently, another letter, including several reports, one of which was Dr. H's September 6, 2000, report, was sent to Dr. K for "review and response." On a response form dated January 28, 2001, Dr. K checked "No" that his opinion of the IR had not changed and checked "No" whether he needed to reexamine the claimant.

The hearing officer did a thorough job in summarizing the pertinent medical records (the claimant testified that she had been seen by 20 doctors) and concluded:

In this case, the designated doctor's amended report was based solely on one new medical report from a peer review doctor, [Dr. P], whose opinion was not based upon an examination. The designated doctor amended his report because [Dr. P] and [Dr. H] felt his evaluation was "too generous," not based on any medical justification. This does not constitute a proper reason for amending the report and the original assessment of a 20% IR is given presumptive weight.

The carrier argues that a designated doctor may amend his report for a proper purpose and in a reasonable time. The hearing officer agrees that Dr. K's "amended report was done within a reasonable time" but found it "was not done for a proper purpose" giving several reasons. The carrier attempts to rebut those reasons but the hearing officer fairly clearly believed that just because two other doctors felt Dr. K's IR was "too generous" was not an appropriate reason to amend his report. The hearing officer gave presumptive weight to the designated doctor's first report. The hearing officer did not err in doing so.

There was certainly conflicting medical evidence and the hearing officer, as the sole judge of the weight and credibility of the evidence, resolves the conflicts in the evidence,

including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)) to determine 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.). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them 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).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge