APPEAL NO. 010975
FILED JUNE 13, 2001

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 12, 2001. The hearing officer resolved the sole issue before her by determining that the appellant (claimant) had a 0% impairment rating (IR) based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals contending that the designated doctor's examination was not thorough and that he relied on his observations of her in the parking lot rather than his examination in assessing her IR. The respondent (carrier) replies that the hearing officer's decision should be affirmed.

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.

It was undisputed that the claimant suffered a compensable injury on _____, and the parties agreed that the claimant attained maximum medical improvement (MMI) on April 26, 2000. The claimant and the medical reports describe the claimant's injury as an injury to the right upper extremity resulting from repetitive trauma. The claimant has undergone three surgical procedures for her injury, including surgery for carpal tunnel syndrome and two surgeries to transpose nerves in her right elbow.

There were reports from three examinations conducted to assess the claimant's impairment in evidence. The first of these was done by Dr. D, the carrier's required medical examination order doctor, who examined the claimant on January 17, 2000. Dr. D certified on a Report of Medical Evaluation (TWCC-69) dated February 2, 2000, that the claimant was not at MMI. Dr. D stated in his narrative report that the claimant showed signs of reflex sympathetic dystrophy (RSD) and agreed with her treating doctors that use of spinal cord stimulator should be considered to treat the claimant. An impairment examination was performed by Dr. M, the claimant's treating doctor, who certified on a TWCC-69 dated May 4, 2000, that the claimant had a 51% IR. This assessment was based on two components–a 19% whole body impairment to the claimant's upper right extremity combined with a 45% whole body impairment due to the effects of the injury on the claimant's mental/emotional state.[1] The third IR assessment was done by Dr. N, the designated doctor who certified on a TWCC-69 dated September 8, 2000, that the claimant has a 0% IR. Dr. N stated in his narrative report that he observed the claimant smoking in the parking lot of the building in which he offices after the examination and observed her exhibit greater range of motion of the right extremity than he observed during his examination of her.

[1]Dr. M relied upon a report from Dr. C, who assessed the 45% whole body impairment to the claimant's emotional/mental state.

Dr. N was requested to clarify his opinion and in a January 9, 2001, letter stated as follows:

> I have reviewed the letter from [Dr. M]. At the time I saw [claimant], I saw no signs that would suggest [RSD]. As I have indicated to you, it was my impression that after observing her both in and out of my office, that she was capable of much more activity with the extremity in question than she demonstrated during the evaluation. Inasmuch as I am unable to measure submaximal effort, I continue to be of the opinion that she has a 0% whole person impairment.

The claimant testified that Dr. N's examination was not as thorough as those of Dr. D and Dr. M. The claimant testified that she does not believe that Dr. N was able to observe her smoking in the parking lot in his office after the examination. The claimant testified and argues on appeal that Dr. N incorrectly based his assessment of her impairment on his observation of her outside his office when his examination showed range of motion testing very similar to that of Dr. D and Dr. M.

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. We have further held that a designated doctor may invalidate range of motion testing based upon clinical observation. *See* Texas Workers' Compensation Commission Appeal No. 961568, decided September 20, 1996.

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 overwhelming weight 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 these standards, we find no error in the hearing officer's giving presumptive weight to the report of the designated doctor and in finding the great weight of the other medical evidence was not contrary to Dr. N's IR assessment.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge