

APPEAL NO. 011296
FILED JULY 18, 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 May 16, 2001. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on December 2, 1999, with a 1% impairment rating (IR) as assessed by the designated doctor, whose report was not contrary to the great weight of other medical evidence.

The claimant appealed, asserting that the designated doctor's examination was inadequate and incorrect and that he "could not have reached MMI with a herniated disk still needing surgery." The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant was employed as a truck driver for the employer freight line. The parties stipulated that the claimant sustained a compensable (cervical and lumbar spine) injury on _____. A cervical and lumbar MRI performed on February 25, 1999, had an impression of degenerative changes and a "probable C5-6 right sided herniation." The portion of the report for the impression of the lumbar spine is not in evidence.

The claimant's treating doctor at the time was Dr. D, who, in a Report of Medical Evaluation (TWCC-69) and narrative, both dated December 2, 1999, certified MMI on that date with a 17% IR. Dr. D apparently (not entirely clear) assessed 7% impairment for cervical loss of range of motion (ROM), 6% impairment for a specific cervical disorder, and 5% impairment from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) "for an S1 radiculopathy" combined to arrive at a 17% IR.

The parties stipulated that Dr. C was the "Commission [Texas Workers' Compensation Commission]-selected designated doctor." Dr. C, in a TWCC-69 and narrative dated January 11, 2000, certified MMI on December 2, 1999, with a 1% IR. Dr. C recited that the claimant had testing including "Xrays; MRI; EMG/NCT." Dr. C assessed 0% impairment for specific disorders of both the cervical and lumbar spine stating that "there is no objective clinic or medical finding of impairment resulting from a compensable injury, based on competent objective medical evidence." Dr. C invalidated ROM testing based on inconsistencies, assessed a 0% impairment for cervical motor or sensory deficits and assessed a 1% impairment for "neurologic lower extremity impairment."

The claimant changed treating doctors to Dr. H, whose letterhead indicates he is a doctor of osteopathic medicine. In a narrative report dated January 18, 2001, Dr. H gives an extensive recital of the claimant's treatment, refers to Dr. C as an "IME," disagrees with Dr. C's assessment, indicates he used the AMA Guides "4th Edition" and concludes:

I believe the whole person [IR] should be due to specific spine disorders, which is noted on table 75, page 3-113. It is noted from IIC which states unoperated on, stable with medically documented injury, pain, rigidity, associated with moderate to severe degenerative changes on structural test including unoperated on herniated nucleus pulposus with or without radiculopathy for the cervical area gives this a 6% whole body person impairment, the lumbar area gives a 7% whole body person impairment. According to F. "multiple levels with or without operations and with or without residual signs and symptoms add a 1% per level", so we added a 1% for the cervical and 1% for the lumbar, now totally 15% total whole body impairment.

There were no indications or worksheets that Dr. H considered ROM or neurological deficits. When it was pointed out to Dr. H that he should have used the third edition, Dr. H merely changed his letter to reflect that he had used the third edition, Table 49 and used the verbatim language quoted above, of the prior report.

Regarding the MMI date, both Dr. D and Dr. C certify MMI on December 2, 1999. Dr. H does not certify an MMI date. The claimant argues that he could not have reached MMI with a herniated disk still needing surgery. It is unclear whether the claimant has a herniated disk and even if he does, the Appeals Panel has held that additional medical treatment after MMI does not preclude a certification of MMI. Texas Workers' Compensation Commission Appeal No. 94036, decided February 14, 1994.

Regarding the IR, the claimant's appeal stresses medical matters involving medical judgment. Sections 408.122(c) and 408.125(e) of the 1989 Act provide that the report of a Commission-appointed designated doctor determining the date of MMI and the claimant's IR shall have presumptive weight and the Commission shall base its determination on such report, unless the great weight of other medical evidence is to the contrary. We have held that a "great weight" determination requires more than a mere balancing or preponderance of the evidence; that no other doctor's report, including the treating doctor's report, is accorded the special presumptive status; and that the designated doctor's report should not be rejected absent a substantial basis for doing so. Texas Workers' Compensation Commission Appeal No. 960897, decided June 28, 1996.

The hearing officer weighed the credibility and inconsistencies in the evidence and the hearing officer's determination on the issues is not against the great weight of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

DISSENTING OPINION:

I would reverse and render the opinion that the great weight of contrary medical evidence outweighs the designated doctor's report and that the claimant's impairment rating (IR) is that certified by Dr. D. As the medical evidence from both treating and referral doctors indicates, the claimant has continued to be plagued with problems from his stipulated injury. These residual problems cannot be so greatly reduced to a simple one percent lateral range of motion deficit as has been done by the designated doctor.

Second, the designated doctor's stated rationale for disallowing any rating from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) was that there was no objective medical evidence upon which to base the rating. This is not the case, as both the MRI and a consulting neurologist's evaluation of the MRI states that there is a cervical herniation showing encroachment on the foramen. In addition, there is clear evidence of six months of documented pain. A Table 49 IR appears in order under these circumstances, and in the absence of any explanation in the designated doctor's report as to why such evidence was rejected. Presumptive weight does not mean a "rubber stamp" adoption of the designated doctor's report where the hearing officer weighs the evidence and determines that the great weight of other medical evidence proves that the claimant is not at maximum medical improvement, or that the percentage of impairment is not accurate. See Texas Workers' Compensation Commission Appeal No. 94053, decided February 23, 1994. Part of the "great weight" can come within the designated doctor's report, when the AMA Guides are not followed.

Susan M. Kelley
Appeals Judge