

APPEAL NO. 011851
FILED SEPTEMBER 25, 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 (CCH) was held on July 10, 2001. The hearing officer determined that the appellant's (claimant) date of maximum medical improvement (MMI) is July 22, 1998, and that his impairment rating (IR) is 11%, as certified by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor on December 7, 2000. The claimant has submitted a request for review which states his disagreement with several of the findings of fact and conclusions of law. There was no response from the respondent (carrier).

DECISION

Affirmed.

This case is before the Appeals Panel as a dispute over the certification of MMI/IR. We reviewed a previous case involving this claimant (Texas Workers' Compensation Commission Appeal No. 002152, decided October 27, 2000), which resulted in a remand back to the hearing officer for further proceedings. See Claimant's Exhibit No. 1. In the initial CCH held on August 28, 2000, the hearing officer (who, we note, is a different hearing officer than the one who conducted this hearing) determined that the claimant's compensable injury extended to the coccyx; that determination was not appealed and became final. We remanded for the hearing officer to determine the date the claimant reached MMI and his IR. We included the following direction in our instructions for the remand:

Since the designated doctor did not consider the fracture of the coccyx when he certified that the claimant reached MMI and assigned an IR, the designated doctor should again evaluate the claimant and consider all of the claimant's compensable injury.

The hearing officer conducted a remand hearing, and submitted his determination that the issues of MMI and IR were not then ripe for adjudication, as the designated doctor had not yet reexamined the claimant. See Claimant's Exhibit No. 2. The hearing officer instructed the Commission to schedule the claimant for another appointment with the designated doctor, and advised the parties that they could set the matter for benefit dispute resolution if they disagreed with the designated doctor's certification of MMI/IR. There is no indication that there was any request for review submitted after that CCH on remand.

By way of background, Dr. B, the Commission-selected designated doctor, originally evaluated the claimant on November 20, 1998, and certified on a Report of Medical Evaluation (TWCC-69) that the claimant reached MMI on July 22, 1998, with an IR of 11%. Dr. B rated the claimant's cervical spine injury at four percent, based on 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), with invalid range of motion (ROM) and no neurological compromise. Dr. B rated the claimant's lumbar spine injury at seven percent, also based on Table 49 of the AMA Guides, invalid ROM, no evidence of motor compromise, and a decrease in sensation which was insufficient to affect the overall rating, as shown in Carrier's Exhibit No. 1. He combined the ratings for the cervical spine and the lumbar spine, using the AMA Guides, to reach the 11% rating. After the events described above, Dr. B was directed to, and did, reevaluate the claimant on December 7, 2000. He again certified that the claimant reached MMI on July 22, 1998, with an IR of 11%. He assigned a rating of four percent for the cervical spine injury based on Table 49 of the AMA Guides, invalid ROM, and no evidence of neurological compromise. He assigned a rating of seven percent for the lumbar spine injury based on Table 49 of the AMA Guides, invalid ROM, and neurological compromise that was insufficient to affect the overall rating, as shown in Carrier's Exhibit No. 2. This resulted again in a combined rating for the cervical spine and the lumbar spine, using the AMA Guides, of 11%. Since Dr. B opined that the claimant's coccyx injury did not result in an impairment, it is fair to conclude, as the hearing officer did, that Dr. B assigned a zero percent IR to the coccyx injury. The claimant requested a benefit review conference on December 29, 2000, to dispute the designated doctor's findings on MMI/IR. See Claimant's Exhibit No. 3.

The record also contains a letter from the claimant's treating doctor, Dr. S, entitled "[MMI] Addendum," dated November 8, 1999, which purports to add a five percent rating for the coccyx to his prior IR of 25% for cervical-lumbar impairment, resulting in a combined whole person IR of 29%. There is also a TWCC-69 from Dr. W, the carrier-selected required medical examination doctor, dated April 24, 2000, which certified that the claimant reached MMI on June 25, 1998, with a 13% IR. Dr. W was aware of the coccyx injury but did not believe that it affected the IR, which he gave the claimant in June 1998 when he first examined the claimant.

The report of a Commission-appointed designated doctor is given presumptive weight. Sections 408.122(c) and 408.125(e). A certification of MMI and IR by a designated doctor will be accepted unless the great weight of the other medical evidence is to the contrary. In this case, the hearing officer could find that the other medical evidence did not overcome the presumption afforded to the designated doctor's report. Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); 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.). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). This tribunal will not upset 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. 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). We do not find them so here.

The claimant complained about the assistance he received from the ombudsman at the CCH. He believed that his rights were not protected because he could not afford legal counsel. Our review of the record in this case indicates that the hearing officer fully advised the claimant of his rights to representation, the claimant agreed to proceed with assistance from an ombudsman rather than an attorney, and the ombudsman provided able assistance to the claimant. The claimant testified at length during the CCH and was afforded the opportunity to present all the documentation he wished to present. None of his documents were excluded. The claimant was asked if he wished to make an opening argument in addition to the argument of the ombudsman, but declined. The claimant asked to make a closing argument in addition to the ombudsman's closing, and was permitted to do so. We do not perceive any prejudice to the claimant.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **COLONIAL CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**WALTER EDWARD NEULS
12850 SPURLING DRIVE, SUITE 250
DALLAS, TEXAS 75380.**

Michael B. McShane
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge