

APPEAL NO. 020673
FILED MAY 2, 2002

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 February 19, 2002. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on November 23, 1998, the date of statutory MMI (see Section 401.011(30)(B)) as stipulated by the parties, and that the claimant has a 37% impairment rating (IR) as assessed by Dr. G, the third designated doctor, whose report was entitled to presumptive weight. The parties stipulated to the MMI date and MMI is not at issue.

The appellant (self-insured) appeals, contending that the replacement of the first designated doctor was an abuse of discretion and that his 0% IR should be adopted or, in the alternative, that the report of Dr. S, the second designated doctor, who assessed a 10% IR, should have presumptive weight and her IR adopted. The self-insured also contends that the great weight of the other medical evidence is contrary to Dr. G's report assessing a 37% IR. The claimant responds, urging affirmance.

DECISION

Affirmed.

The background facts are set out in the hearing officer's Statement of the Evidence; the stipulations; Texas Workers' Compensation Commission Appeal No. 980066, decided February 25, 1998; and Texas Workers' Compensation Commission Appeal No. 980816, decided June 2, 1998. Dr. K was the first designated doctor and he assessed a 0% IR. After that assessment, there was a CCH regarding whether the claimant's compensable injury included depression, anxiety, and phobia. The hearing officer in that case determined that those preexisting conditions "were not permanently aggravated" by the compensable injury. The Appeals Panel in Appeal No. 980066, *supra*, reversed that determination and remanded the case, pointing out that "[p]ermanency is a requirement for impairment, but not for a condition to become a part of the compensable injury." The hearing officer reconsidered his decision and determined that the depression, anxiety, and phobia were part of the compensable injury, and the Appeals Panel in Appeal No. 980816, *supra*, affirmed. A Texas Workers' Compensation Commission (Commission) benefit review officer (BRO) then sought clarification from Dr. K, who replied by letter dated October 26, 1998, that he had retired; that his records were in storage; and that it would be a waste of time to try and reevaluate the claimant for range of motion (ROM). Dr. K did attempt to answer the BRO's question by saying that he believed the claimant's injury was a resolved soft tissue injury. Comparison of Dr. K's January 1998 letterhead and the October 1998 letterhead would indicate that he was no longer in practice. The Commission did not abuse its discretion in replacing Dr. K as the designated doctor, because he had retired and his report is not entitled to presumptive weight.

Subsequently, Dr. S was appointed as the second designated doctor, apparently without objection from the self-insured. In a January 6, 2000, report Dr. S assessed a 10% IR (4% for a specific disorder of the cervical spine, 5% for a specific disorder of the lumbar spine, and 1% neurological). Dr. S noted that another report had "allotted something like 18% for psychiatric impairment" and that she did not believe the compensable injury precipitated "any such psychiatric problems and [she] therefore refuse[d] to allot [the claimant] anything in terms of a psychiatric impairment." Dr. S went on to specify in detail reasons for her statement and concluded, "I would not go so far as to say that [the claimant] is a true malingerer, however, I believe that she is definitely a symptom magnifier." A BRO, in a letter dated May 26, 2000, wrote Dr. S advising that the Commission had determined that the compensable injury included depression, anxiety, and phobia; Dr. S was asked to evaluate the conditions and assess whether "there is an impairment for any or all of the conditions." (Both the hearing officer, in her comments in this case, and the claimant, in argument, comment that Dr. S could have assigned a 0% IR for these conditions but did not do so, although it is not clear whether Dr. S realized that to be the case.) Dr. S replied that she believed the conditions preexisted the compensable injury and asked the BRO to "re-read" the last two paragraphs of her report, which reference the claimant's psychiatric problems. The BRO again wrote Dr. S a letter, dated December 8, 2000, reiterating the request to "evaluate the psychological conditions as part of the compensable injury." Dr. S replied:

Ordinarily, I am very happy to comply with the Commission's Rulings. However, I feel so strongly regarding this patient's "psychiatric impairment" (please see my original report) that I simply cannot feel comfortable allotting this patient an impairment in that category. Please understand that this is in no way meant to defy the Commission, but rather to keep intact my own sense of principles. I feel that I could not fairly evaluate this patient regarding the above complaint and I believe that the best course of action on my part, at this point, would be to withdraw as the Designated Doctor. I regret having to take this action, but I believe it would be in the best interest of everyone concerned. Again, I would ask that the Commission not take offense to this action in as much as I have re-evaluated and re-written reports at the request of the Commission in the past. I feel that this is a very special circumstance.

The Commission accepted Dr. S's withdrawal and appointed Dr. G as the third designated doctor. Dr. G assessed a 37% IR, which included a 10% impairment for the mental disorders and 23% impairment for ROM. This report is generally consistent with the report of a referral doctor who assessed a 36% IR, which included 18% "psychiatric impairment" plus 14% impairment for various ROM loss.

Based on the above, we cannot say that the hearing officer erred in giving Dr. G's report presumptive weight and finding that the 37% IR was not contrary to the great weight of the other medical evidence. We note that the self-insured apparently did not challenge the appointment of Dr. S as the second designated doctor at the time and, consequently,

the self-insured did not preserve its objection that Dr. S was improperly appointed. We again note that Dr. S could have chosen to say that she had considered and evaluated the claimant's psychiatric condition and assessed a 0% IR; however, she did not do so.

The hearing officer did not err in her analysis, and her decision is supported by the evidence. Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**AR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge