

APPEAL NO. 033107
FILED JANUARY 12, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 031015, decided June 9, 2003. We remanded the case for the appointment of a new designated doctor to evaluate the claimant and assign an impairment rating (IR). On remand, the hearing officer resolved the issue before him by determining that the appellant/cross-respondent's (claimant) correct IR is 25%. Both parties appeal the decision on remand. The claimant appealed, contending that the IR assessed by the new designated doctor is invalid and not entitled to presumptive weight. The claimant argues that the IR of 60% assessed by the claimant's treating doctor, Dr. N, should be adopted. The appeal file does not contain a response from the respondent/cross-appellant (carrier). However, the carrier filed an appeal disputing the IR of 25% found by the hearing officer. The carrier argues that it was error for the Appeals Panel to "disturb the original Decision and Order entered by the hearing officer in this case"; that the newly appointed designated doctor, Dr. G, was not qualified to serve; and that the claimant's IR should be assigned a 0% IR as determined by the carrier-required medical examination doctor, Dr. Je.

DECISION

Affirmed.

The claimant contends that there is no valid certification of maximum medical improvement (MMI) and that the hearing officer's finding of statutory MMI is invalid as a matter of law. As we noted in Appeal No. 031015, *supra*, the benefit review conference report (BRC) showed that the parties agreed that the claimant reached statutory MMI as of January 30, 2002. No response to the BRC report was in evidence and the date of MMI was not a contested issue at the contested case hearing (CCH) for the hearing officer to resolve.

We next turn to the evidentiary objection made by the claimant. The hearing officer reopened the record to admit as a hearing officer's exhibit a blank Designated Doctor Application (TWCC-72) and the computerized versions of the matrix for both Dr. J, the first designated doctor and Dr. G. The claimant objected to the admission of the documents as well as the admission of Dr. J's answers to deposition on written questions on the basis that such documents are "irrelevant, incompetent and prejudicial..." The claimant additionally objected to any records or documents regarding Dr. J because the case was remanded for examination by a new designated doctor. The claimant also contended that admission of the matrices for both Dr. G and Dr. J were objectionable because they are incomplete and inconsistent with the applicable statutes and rules, and thus, incompetent and of no probative value.

We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We find no abuse of discretion in the hearing officer's admission of the complained-of documents over the claimant's objections. The claimant has failed to offer sufficient proof that the admission of the document amounted to reversible error. Further, the hearing officer has a duty to fully develop the record. We note that at the prior CCH which was reversed and remanded, the hearing officer referred to the computer selection matrix but it was never in evidence or mentioned.

The carrier argues, as it did in Appeal No. 031015, *supra*, that the claimant did not present any evidence that Dr. J was not qualified to render the IR in this matter, essentially urging reconsideration of that decision. As noted previously, the burden of establishing that the designated doctor is not qualified rests with the party disputing the qualifications, there was evidence that Dr. J was an orthopedic surgeon and that the better practice would have been for the claimant to develop more evidence regarding the medical qualifications of Dr. J. Referencing Texas Workers' Compensation Commission Appeal No. 022770, decided December 17, 2002, we stated that we could not agree that the scope and practice of an orthopedic surgeon would include the treatment and procedures performed for a patient with respiratory conditions such as the claimant. We also note that the 1989 Act does not provide for reconsideration of Appeals Panel decisions. Texas Workers' Compensation Commission Appeal No. 001610, decided July 14, 2000.

Both parties argue that Dr. G was not qualified to examine the claimant as a designated doctor in this case. However, there is sufficient evidence to support the hearing officer's finding that based on the information concerning Dr. G's medical experience and knowledge as indicated on his TWCC-72, Dr. G was qualified to serve as the alternate designated doctor for the claimant.

As we noted previously, the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) provide that "a forced expiratory maneuver must be performed during the examination and evaluation of each patient for permanent pulmonary impairment." It is undisputed that Dr. G did not perform such tests on the claimant during the examination. However, in this instance the hearing officer took official notice that there are no pulmonologists in San Antonio and the surrounding areas on the Texas Workers' Compensation Commission's Designated Doctor List. There was also evidence that Dr. G did some pulmonary testing when he examined the claimant and the hearing officer noted that Dr. G specifically referred to, and commented on, the results of the spirometry performed by the claimant's treating doctor and used the results of the test performed by the treating

doctor on June 18, 2003, to reach an appropriate IR for the claimant. We acknowledged in Appeal No. 031015, *supra*, that the designated doctor is not prohibited from relying on testing performed by other medical professionals in determining an IR and that there may be circumstances in which the designated doctor may not be able to complete the required testing.

The Appeals Panel is precluded from another remand by Section 410.203(c). There is some evidence in the record to establish that treatment of respiratory ailments was in the scope of Dr. G's practice. The hearing officer noted that Dr. G adopted the figures of the testing performed by the claimant's treating doctor and Dr. G used all of the information available to him to determine the claimant's IR. The hearing officer's decision is not 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).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701-2554.**

Margaret L. Turner
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. While I understand that the geographic availability of a doctor with expertise in the area of the claimant's injury is significantly restricted, the AMA Guides require that the designated doctor perform a forced expiratory maneuver during his examination. In my opinion, because the second designated doctor failed to

perform the required test, his IR was not made in accordance with the AMA Guides and, therefore, is not valid. For this reason, and because we have already remanded the case and cannot do so again, I would reverse the hearing officer's decision and render a new decision that the claimant's IR cannot be determined.

Chris Cowan
Appeals Judge