APPEAL NO. 040025
FILED FEBRUARY 25, 2004

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 December 12, 2003. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) compensable injury of _____, has continued to extend to and include the claimant's C5-6 injury after October 7, 2002, and such injury has caused the claimant to sustain disability from May 29, 2001, through October 6, 2002, and from November 4, 2002, through June 2, 2003. The hearing officer also determined that the claimant has a 5% impairment rating (IR) due to his compensable injury of _____. The issues regarding extent of injury and disability were not appealed and have become final pursuant to Section 410.169. Both the claimant and his attorney filed appeals, disputing the IR. The respondent (carrier) responded, contending that the evidence and law fully support the decision and order of the hearing officer with respect to the issue of IR.

DECISION

Affirmed.

The claimant attached documents to his appeal, some of which were not admitted into evidence at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence, in that, the claimant did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing or that its inclusion in the record would probably result in a different decision. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered.

We have previously held that the 1989 Act does not restrict the Appeals Panel's consideration to a single appeals document. *See* Texas Workers' Compensation Commission Appeal No. 950868, decided July 13, 1995. Both the request for review filed by the claimant and by the claimant's attorney were filed timely and will be considered.

The claimant testified that he had a cervical fusion and diskectomy on March 28, 2002, and a revision surgery on May 27, 2003. The designated doctor certified that the claimant had a 5% IR using 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). The designated doctor noted in his report that after the second surgery, the claimant's swallowing and radiculopathy problems were completely resolved and that the claimant most reasonably fits in Diagnosis-Related Estimate Category II because of his highly successful surgery. We have held that a claimant's IR, under the fourth edition of the AMA Guides, may not be based on impairment that the claimant no longer has at the time of the designated doctor's IR examination, but the impairment must be "permanent" to be included in an IR. Texas Workers' Compensation Commission Appeal No. 030091-s, decided March 5, 2003.

Section 408.125(e) provides that where there is a dispute as to the IR, the report of the Texas Workers' Compensation Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. 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.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor was a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the 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 to 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In this case, we are satisfied that the hearing officer's IR determination is sufficiently supported by the evidence. Accordingly, we cannot agree that the hearing officer erred in determining that the claimant's IR is 5% in accordance with the opinion of the designated doctor.

We affirm the decision and order of the hearing officer.

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

**LEE F. MALO**
**12222 MERIT DRIVE, SUITE 700**
**DALLAS, TEXAS 75251**.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Robert W. Potts
Appeals Judge