

APPEAL NO. 041384
FILED JULY 26, 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 (CCH) was held on May 10, 2004. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is 12% as certified by the designated doctor. The claimant appealed the hearing officer's IR determination, and asserted that his IR is 28% as determined by his treating doctor. The respondent (carrier) responded, urging affirmance.

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 next address the claimant's contention that the hearing officer "omitted issues that came out of the benefit review hearing." The benefit review conference (BRC) report listed the following two issues: "What is the claimant's date of [maximum medical improvement (MMI)]?" and "What is the claimant's [IR]?" The BRC report reflects that the parties agreed that the date of MMI was October 13, 2003, the statutory MMI. Our review of the record reflects that the sole disputed issue at the CCH was IR. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7).

At the CCH, the parties stipulated that the claimant sustained a compensable right shoulder and lumbar spine injury while in the course and scope of his employment on _____, and that the claimant reached statutory MMI on October 13, 2003. It is undisputed that the Texas Workers' Compensation Commission (Commission)-appointed designated doctor is Dr. Mc. The claimant testified that he

had surgery to his right shoulder, and that although spinal surgery had been approved he had not undergone any type of spinal surgery.

The evidence reflects that the designated doctor used 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) to determine the claimant's IR. The designated doctor certified that the claimant's IR was 12%, which included 10% impairment for the lumbar spine, Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy, and 3% impairment for the right shoulder. In response to a request for clarification from the Commission, the designated doctor stood by his 12% IR.

Section 408.125(c) provides that for a claim for workers' compensation benefits based on a compensable injury that occurs on or after June 17, 2001, the report of the designated doctor has presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Rule 130.6(i) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight.

We have reviewed the complained-of determinations. The claimant made the same arguments it makes on appeal to the hearing officer. The hearing officer reviewed the record and decided what facts were established. The claimant contends that his IR is 28%, based on 3% impairment for the right shoulder, 25% impairment for the lumbar spine, DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity. The hearing officer specifically found that the medical evidence was insufficient to establish that there was any loss of motion segment integrity in the claimant's lumbosacral spine. The hearing officer determined that the great weight of the other medical evidence was not contrary to the designated doctor IR of 12%. Nothing in our review of the record reveals that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse it on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant complains that the hearing officer's Background Information section omits critical information that would support his contention that his impairment of the lumbar spine is within DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity. Section 410.168 requires only that the hearing officer make findings of fact and conclusions of law and does not require a statement of the case or statement of the evidence. The hearing officer stated in the decision that she considered all of the evidence. We perceive no error.

We affirm the decision and order of the hearing officer.

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

**ROBERT PARNELL
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge