FEB 22 1995

APPELLANT
ASSISTED BY AN OMBUDSMAN
AT THE HEARING
PRO SE ON APPEAL

V.

RESPONDENT
REPRESENTED BY:

§ DECISION
§ ON
§ APPEAL
§
§
§ FEB 22 1995
§ DIRECTOR
§ DIVISION OF HEARINGS
§ TEXAS WORKERS'
§ COMPENSATION COMMISSION
§ APPEAL NO. 950040
§

The appeal is brought 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 8, 1994, The issues at the hearing were (1) whether the appellant (claimant) injured his right shoulder, in addition to his back, on (2) whether the claimant has sustained disability; (3) whether the claimant has reached maximum medical improvement (MMI), and if so; (4) what is the claimant's correct impairment rating (IR); and (5) whether there was an abuse of discretion in approving (Dr. B) as an alternate treating doctor. The hearing officer determined that: (1) the claimant did not sustain a compensable injury to his shoulder on ; (2) the claimant has experienced disability since January 13, 1994; (3) the claimant reached MMI on September 30, 1994; (4) the claimant has a five percent IR; and (5) that the claimant's treating doctor for his injury of , is Dr. B. The claimant appealed the determinations that his shoulder is not part of his compensable injury and that he has reached MMI. He also urges that the respondent (carrier) agreed that his shoulder injury was part of his compensable injury. The carrier responded that the complained of determinations of the hearing officer are supported by sufficient evidence and that the issue of an agreement was not discussed at the hearing and was raised for the first time on appeal.

DECISION

We affirm.

The claimant testified that he was working as a truck driver. He said that on he and others were repairing a roof for the employer. When descending a ladder, he slipped and fell to the ground. He said that he hit his shoulder on the ladder when he was falling. The claimant testified that he told all health care providers except (Dr. T), a required medical examination doctor, about his shoulder problems. He testified that a small spot on his shoulder became a larger mass. He said that it got smaller after he received treatment, but that it hurt more after it got smaller. Medical records dated the day of the injury reflect that claimant reported that he hit his head on a building first and then landed on his back. He was first seen at the (Clinic). At the Clinic a head contusion was diagnosed and a cervical collar was applied. The records from the Clinic do not indicate a shoulder injury and reflect that the claimant was not treated there but was referred to (Hospital 1) because he needed a careful neurological evaluation. Records from Hospital 1 show that the claimant complained of back pain and leg cramps and that he had no headache. The records do not contain any comments about a shoulder problem and contain the statement "[n]o other complaints." X-rays were taken of the skull and of the cervical, thoracic, and lumbar spine. The x-rays of the skull were normal. The x-rays of the spine did not reveal fractures or dislocations but did reveal degenerative disc disease with narrowed disc spaces. He was released from Hospital 1, prescribed medication, and advised to apply warm soaks for 30 minutes four times daily and to see his family doctor for follow-up care the next day. The claimant began treating with (Dr. F) at (Hospital 2). Dr. F reported that the claimant complained of a spot on a muscle on his shoulder on January 21, 1994. On February 3, 1994, Dr. F recorded that it was a fluid filled mass and was probably a hematoma. On May 9, 1994, Dr. F reported that his impression was lumbar strain and degenerative arthritis and that the claimant had reached MMI. He also reported that at his request a functional capacity evaluation and range of motion studies had been performed, but that he did not yet have the results from the physical therapist. On May 16, 1994, Dr. F reported that the claimant reached MMI on May 9, 1994, with a five percent IR. Dr. T examined the claimant on March 30, 1994. He reported that the claimant's pain was centered in his lower back, that without the claimant's medical records it was impossible to draw final conclusions, but his impression was residual back and right lower extremity complaint and pre-existing lumbar spondylosis prior to the injury. On August 1, 1994, the claimant requested that (Dr. B), a chiropractor, become his treating doctor. The request was approved, and Dr. B became his treating doctor on September 1, 1994. (Dr. O), the Texas Workers' Compensation Commission (Commission)-selected designated doctor in a Report of Medical Evaluation (TWCC-69) stated that the claimant reached MMI on September 30, 1994, and assigned a five percent IR. In reports dated September 29, 1994, and October 11, 1994, Dr. B states that in his opinion the claimant has a torn

muscle in his shoulder. In a report dated November 9, 1994, Dr. O reported that he did not address the claimant's shoulder condition when he assigned the five percent IR. Dr. O opined that additional tests are need to determine if the claimant's right shoulder soft tissue mass is just a muscle tear or a tumor. He said that an exact diagnosis would be needed before he could say that the claimant reached MMI for his shoulder condition.

The burden of proof is on the claimant to prove the extent of an injury by the preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 94815, decided August 15, 1994. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The testimony of the claimant only raises an issue of fact for the hearing officer to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In her discussion, the hearing officer pointed out the inconsistencies in the claimant's testimony and the medical records related to the claimant's reporting his shoulder problems to health care providers soon after his falling from the ladder. She also stated that the fact that a shoulder injury is not reflected in the records of the Clinic and Hospital 1 does not necessarily mean that the claimant did not sustain a shoulder injury as claimed, it does indicate that his testimony of having sustained a shoulder injury is not particularly reliable. She did not find the evidence sufficient to meet the claimant's burden of proving by a preponderance of the evidence that he injured his shoulder when he fell from the ladder. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the fact finder, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The evidence is sufficient to support the determination of the hearing officer that the claimant did not sustain an injury to his shoulder on

We now move to the issue of IR. Dr. O, the Commission-selected designated doctor, reported that he did not consider the claimant's shoulder condition when he certified that the claimant reached MMI on September 30, 1994, and assigned a five percent IR. The hearing officer determined that the claimant's compensable injury does not include an injury to his shoulder, and we found the evidence to be sufficient to support that determination. Therefore, it was appropriate for Dr. O not to include the

claimant's shoulder condition when assigning an IR. If the Commission selects the designated doctor as was done in this case, the Commission shall base its determination on whether the claimant has reached MMI and the claimant's IR on the report of the designated doctor unless the great weight of the other medical evidence is to the contrary. Section 408.122(b) and Section 408.125(e). We have held that it is not just equally balancing evidence or a preponderance of the evidence that can overcome the presumptive weight given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report is accorded the special presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. The hearing officer's decision that the report of Dr. O is entitled to presumptive weight and has not been overcome by the great weight of contrary medical evidence is supported by sufficient evidence.

In his request for review the claimant states that the carrier at a benefit review conference (BRC) held on October 13, 1994, agreed to accept his shoulder injury as part of his compensable injury. Such an alleged agreement was not mentioned at the hearing and the report of the BRC admitted as Hearing Officer Exhibit No. 1 does not mention any agreement at the BRC. In reviewing the decision of a hearing officer, the Appeals Panel shall consider only the record developed at the hearing and the written request for review and the written response. Section 410.203. Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992. An issue raised for the first time on appeal is not considered. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. Dr. B also sent the Appeals Panel a letter dated January 28, 1995, and the claimant sent a letter dated January 26, 1995. The decision and order of the hearing officer was distributed on December 23, 1994, under a cover letter dated December 21, 1994. Section 410.202(a) provides "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same day serve a copy of the request for appeal on the other party." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h) provides that the Commission shall deem the received date of communications to be five days from the date mailed. Both letters were sent more than 30 days after the decision and order was distributed and were not timely filed to be considered by this Appeals Panel. Because of the late filing, we will not address whether the documents would otherwise be considered.

Having found the evidence to be sufficient to support the determinations of the hearing officer, we affirm.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge