APPEAL NO. 950258

Following a contested case hearing held in (city), Texas, on November 28, 1994, the hearing officer, (hearing officer), resolved the sole disputed issue by according presumptive weight to the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission) and finding that appellant's (claimant) whole body impairment rating (IR) was five percent. In two timely filed statements voicing a variety of complaints about the unfairness of designated doctor's rating, claimant appeals the IR asserting, in essence, error in the designated doctor's failure to include any impairment for her limited range of motion (ROM). The respondent (carrier) replies asserting the sufficiency of the evidence to support the decision.

DECISION

Affirmed.

The parties stipulated that claimant, an x-ray technician, sustained a compensable injury (moving a heavy patient) on or about (date of injury), and that she reached maximum medical improvement (MMI) on June 29, 1993. Claimant, the sole witness, testified that the only two doctors to certify that she had reached MMI were her treating doctor, (Dr. F), and the designated doctor, (Dr. T). She disagreed with Dr. T's five percent IR asserting that his examination took only about five minutes, that he did not have other medical reports present at the exam, and that he did not check her reflexes or measure her ROM. When she asked to be sent to WorkWell for computer measurements claimant said that Dr. T responded, "your height is against you. We can't measure you." Commenting on the fact that Dr. F issued an initial report assigning her an IR of five percent and later a second report with a 35% IR, claimant said that she inquired into the matter with Dr. F's office and was told there had been "a mixup in the office." Claimant commented to the hearing officer that even she felt that 35% is "a little bit too high."

Dr. F signed a TWCC-69 on June 29, 1993, reflecting claimant's visit on May 19, 1993, and stating that claimant reached MMI on that date with a whole body IR of "permanent/partial 5%" for "persistent weakness in plantar flexor power of her foot." Another TWCC-69 dated November 17, 1993, which on the signature line had Dr. F's name typed but no signature, changed the IR to "35%."

Dr. T's first Report of Medical Evaluation (TWCC-69) certified that claimant reached MMI on January 5, 1994, the date of her examination, with an IR of five percent. In a revised TWCC-69 Dr. T changed the MMI date to June 29, 1993, the stipulated MMI date, but did not change the IR. In his accompanying narrative report Dr. T, an orthopedic surgeon, stated that he reviewed claimant's lumbar spine MRI scan showing a disk protrusion at L5-S1 with mild lateralization to the left and he diagnosed L5-S1 herniated nucleus pulposus. Dr. T also described in detail the results of his clinical examination including claimant's being "neurologically intact with negative bilateral straight leg lifts," no evidence of muscle weakness, wasting, reflex or sensory changes, hypoactive but bilateral

reflexes, and no decreased sensation in a dermatomal distribution. Respecting ROM, Dr. T stated: "Examination of the lumbar spine is invalid as the patient cannot forward flex or extend to make any meaningful measurements. Lateral flexion does appear to be unaffected." He concluded that based on her objective physical evaluation and diagnostic studies, he claimant's whole body IR was five percent.

A Commission benefit review officer (BRO) wrote Dr. T on May 16, 1994, asking if he had performed ROM testing on claimant and had used the inclinometer method, asking that he retest claimant if he had been unable to obtain valid measurements, and also asking whether it remained his opinion that claimant's IR was five percent. In his June 20th response Dr. T stated that he had not been able to obtain any validity from claimant's ROM testing of her lumbar spine "as she could not or would not flex or extend enough to make a valid measurement," that he had attempted to make the measurements with an inclinometer, and that "when a patient cannot cooperate to assess [ROM], these measurements become invalid." Dr. T went on to advise that he was willing to see claimant again to attempt to assess her lumbar spine ROM, and that otherwise he maintained his opinion that her IR was five percent. There was no evidence that claimant returned to Dr. T for retesting.

Addressing IR disputes, Section 408.125(e) provides that the report of a designated doctor selected by the Commission shall have presumptive weight and that the Commission shall base the IR on such report unless the great weight of the other medical evidence is to the contrary in which case the Commission shall adopt the IR of one of the other doctors.

The hearing officer found that Dr. T's findings regarding claimant's IR were not contrary to the great weight of the other medical evidence. We view the evidence as sufficiently supportive of that finding and the corresponding conclusion that claimant's IR is five percent. The Appeals Panel has stated that the designated doctor occupies a unique position in the process of resolving disputes over MMI and IR, that no other doctor's report, including that of the treating doctor, is accorded this special presumptive status, and that overcoming such presumptive status requires more than a mere balancing or preponderance of the evidence. *See generally* Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992; Texas Workers' Compensation Commission Appeal No. 93539, decided August 12, 1993; Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1993. While claimant's testimony was to the contrary in certain respects, Dr. T's report and response to the BRO indicate that he had access to and reviewed other medical records and that he conducted an examination of claimant including checking her reflexes and attempting to obtain ROM measurements with an inclinometer. The hearing officer is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility it is to be given. Section 410.165(a). It is for the hearing officer to resolve the conflicts and inconsistencies in the evidence including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We see no basis in the record to disturb the hearing officer's findings nor do we find them to be so against the great weight

and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge