APPEAL NO. 950265

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001, *et seq*. On December 12, 1994, a contested case hearing was convened in (city), Texas, with (hearing officer) presiding. The issues were the correct date of maximum medical improvement (MMI), and the correct impairment rating (IR) to be assigned to the appellant, (claimant), who is the claimant, due to a compensable back injury he sustained on (date of injury), while employed by (employer).

The hearing officer found that claimant had reached MMI on September 14, 1992, with a 12% IR, in accordance with the report of the designated doctor. He further found that the great weight of other medical evidence was not contrary to this report.

The claimant has appealed, arguing that the designated doctor did not take range of motion (ROM) measurements and did not use an inclinometer. Claimant argues various portions of the evidence that he believes were misconstrued by the hearing officer, and argues that he should have a date of statutory MMI (which he states was sometime in March 1994) and a 16% IR given to him by (Dr. M), one of his later treating doctors. The carrier responds that the decision should be affirmed.

DECISION

We affirm.

We note at the outset that while there was no testimony regarding periods of disability, the benefit review conference (BRC) report in evidence indicated that the period of disability began April 22, 1991. We note that, according to Section 401.011(30)(B), MMI would be reached according to statute, regardless of claimant's physiological MMI status, 104 weeks after the eighth day of disability, or sometime in April 1993.

The claimant injured his back when he fell on (date of injury). He was first treated by a chiropractor, who referred him to the Texas Back Institute (back clinic) when tests revealed herniated lumbar discs at L4-5 and L5-S1. He was treated by (Dr. R), at first through conservative treatment, and eventually through surgery to remedy a large bilateral herniation at L4-5. The records indicate that the Texas Workers' Compensation Commission (Commission) may have erroneously misinformed Dr. R that claimant reached statutory MMI in September 1991, and that Dr. R thereafter assessed 15% (prior to doing surgery). This appears to have been based upon the report of Odessa Physical Therapy (therapy clinic) of November 1, 1991; the ROM component of that IR was only 1%. Surgery was performed December 30, 1991. Dr. R certified that claimant reached MMI on March 12, 1992, with a 10% IR. Dr. R superseded this in July, 1992, with a 16% IR and MMI date of March 26, 1992.[1]

[1]The therapy clinic also assessed a 19% IR on March 23, 1992, which included a 2% ROM IR.

It appears from the medical records that in July 1992, claimant was being treated by (Dr. C), of the back clinic. Dr. C certified that claimant reached MMI on July 8, 1992, with a 12% IR, derived from specific spinal; conditions and neurological and sensory impairments. Dr. C stated that claimant's ROM measurements were invalidated.

Claimant testified that he had no active medical treatment from September 1992 until March 1994. It appears that claimant returned to the therapy clinic. A history of claimant's current complaints recited that claimant had moved furniture up and down stairs; he absolutely denied during the hearing that he had given such a history. Claimant saw Dr. R during this month as well.

A designated doctor, (Dr. D), was appointed by the Commission, and determined that claimant had reached MMI on September 4, 1992, with a 12% IR. Claimant agreed that Dr. D had him bend in different ways. He stated that Dr. D did not use an inclinometer. Dr. D's report indicated that claimant received 10% for specific condition of the spine, plus two percent for slight ROM deficits.

Claimant testified that he received a 16% IR from his second treating doctor, (Dr. M). In May 1994, Dr. M wrote that he believed that the IR of 12% was too low, and it was likely that claimant should have a 15% or above, observing that this would make claimant eligible for supplemental income benefits. He stated in this letter that claimant was not at MMI. The letter reported that claimant spend up to 16 hours a day reclining (which is noted with emphasis). It appears that claimant was thereafter put into a PRIDE therapy program, and thereafter discharged by Dr. M, who certified that claimant reached MMI on July 18, 1994, with a 16% IR. (The ROM deficit component of this was seven percent).

"Maximum Medical Improvement" is defined, as pertinent to this case, as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated. . . ." TEX. LAB. CODE ANN. § 401.011(30)(A). We have stated many times that the presence of pain is not, in and of itself, an indication that an employee has not reached MMI; a person who is assessed to have lasting impairment may indeed continue to experience pain as a result of an injury. *See* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993.

The report of a Commission-appointed designated doctor is given presumptive weight. TEX. LAB. CODE ANN. §§ 408.122(b), 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92166, decided June 8, 1992. There was conflicting evidence that it was the responsibility of the hearing officer to weigh. Section 410.165(a).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The record in this case does not lead us to the conclusion that the hearing officer's determination has been clearly wrong, and the decision and order of the hearing officer are accordingly affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge