APPEAL NO. 950317

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 9, 1995, in (city), Texas, to determine the single issue, what was respondent's (claimant) correct impairment rating (IR). The hearing officer, (hearing officer), determined that the designated doctor's determination of impairment was against the great weight of the other medical evidence, and he thus accepted the 22% IR of another doctor. The appellant (carrier) appeals, contending that the hearing officer improperly relied upon lay testimony in overcoming the statutory presumption accorded the designated doctor's report. The appeals file does not contain a response by the claimant.

DECISION

Affirmed.

The claimant injured his back while working for (employer); the date of injury stipulated to by the parties was (date of injury). The claimant said he treated with (Dr. S) whose report of December 13, 1991, states that claimant (per an MRI) had significant degeneration of the L4-5 and L5-S1 disks, with associated herniations at those levels. While Dr. S initially recommended conservative treatment, the evidence shows that on April 7, 1992, he performed a two level lumbar decompressive laminectomy and fusion. On April 26, 1993, Dr. S completed a Report of Medical Evaluation (Form TWCC-69) certifying that claimant reached MMI on May 17, 1993, with a 22% IR. Dr. S indicated in his report that claimant's IR was comprised of 12% due to a single level operation with residual symptoms, with an additional one percent for the additional level; in addition, he assigned 10% for loss of range of motion (ROM).

Because the carrier disputed this IR, the Texas Workers' Compensation Commission (Commission) selected (Dr. D) as designated doctor. Dr. D's report indicates he examined the claimant on July 8, 1993; claimant maintained that Dr. D did not initially have his medical records but stated that they were later sent to the doctor. Dr. S's report dated July 15, 1993, notes claimant's complaints of continued pain and stiffness in his back; the section entitled, "Range of Motion of the Back" contains "actual" figures for flexion, extension, and rotation compared with "normal" values which appear to show loss of ROM in all areas except lateral flexion. The report mentions "lumbar rigidity" and states, "The limitation of motion with regard to the back is, in my opinion, related to the previously described surgery." His stated impression was status post lumbar fusion at L4-5 and L5-S1 with instrumentation secondary to a herniation and a mechanically unstable back. While he stated his conclusion that claimant had limitation of motion in flexion and extension of the low back, he said that no paravertebral spasm or other positive objective findings were noted. He assigned the claimant a 10% IR "[b]ased soley [sic] on the surgical history of a surgically treated disc lesion with residual symptoms."

On July 27, 1993, Dr. D wrote carrier's adjuster to state he had received films regarding the claimant, including extension and flexion films "which reveal measurements at the L4-5 level of 10 degrees, at the L5-S1 in forward flexion of 30 degrees and at the L5-S1 in extension of 40 degrees." He also noted that postoperative x-rays showed "excellent fusion" and pedicle screws which were well placed. He stated that after reviewing these films there was no change in his opinion as stated in his July 15th report. On August 19, 1993, he again wrote the adjuster to state he had received and reviewed additional medical reports on claimant and that his opinion had not changed.

In letters dated July 28 and September 15, 1993, Dr. S wrote the Commission concerning his disagreement with Dr. D's conclusions, stating as follows:

> [Dr. D] states that this rating is based on solely on [sic] the surgical history of a surgically treated disc lesion with residual symptoms and in accordance with AMA Guidelines to Evaluation of Permanent Impairment, Third Edition.
>
> However, this patient did not solely have a surgically treated disc lesion. All our reports reflect the fact that this gentleman had segmental instability, his impairment should have been calculated under Table 49, Paragraph 4, rather than Table 49, Table [sic] 2. This, in and of itself, results in a 13% [IR].
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> Furthermore, [Dr. D] makes no mention concerning any impairment awarded to [claimant] for limited [ROM] of the spine. According to AMA Guidelines, this is to be included . . . [Dr. D] notes a 50% limitation of flexion, 40% limitation of extension and gives no impairment for these ratings.

On November 16, 1993, a Commission benefit review officer (BRO) wrote Dr. D, inquiring whether he used an inclinometer in performing ROM studies and whether he performed at least three measurements; whether he had claimant's medical records; and whether it continued to be his opinion that claimant's IR was 10%. On February 11, 1994, Dr. D replied to carrier's adjuster as follows: an inclinometer was used during ROM testing which was performed three times "with the maximum effort range recorded in my report;" that he had medical records at the time of his initial evaluation, with additional records submitted in July and August of 1991; and that "based on a careful assessment of all surrounding factors made available thus far, I find nothing contained herein that would cause me to alter an/or [sic] amend any of my original comments and conclusions as expressed in my previously submitted reports."

The hearing officer held that Dr. D's determination that claimant had a 10% IR was against the great weight of the other medical evidence. In its appeal the carrier contends that Dr. D examined the claimant and provided subsequent reports to the Commission indicating his justification and supporting rationale for his IR; it further contends that the only evidence offered to overcome the presumptive weight given the designated doctor's report was claimant's own testimony and that no medical evidence substantiates an incorrect use

of the AMA Guides. It also states that more than a mere balancing of the evidence is required to overcome the report of the designated doctor.

The Appeals Panel has held that a hearing officer who rejects a designated doctor's report as against the great weight of the medical evidence must clearly detail the evidence relevant to his or her consideration and clearly state why the other evidence is to the contrary. Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. In our opinion, the hearing officer in this case did so. Contrary to carrier's assertion, however, it does not appear that the hearing officer relied upon the claimant's own testimony (which mentioned, among other things, the length of Dr. D's examination, the fact that he initially may not have had claimant's medical records, and the presence of carrier's nurse in Dr. D's offices, although not at the examination) in reaching his decision. The hearing officer's Finding of Fact No. 13 states, "[Dr. D] failed to assign any impairment for a loss of [ROM] either under Table 49 or Table 50 of the Guides to the Evaluation of Permanent Impairment, [Dr. D] noted a loss of [ROM], but did not invalidate [ROM] studies, or use the Ankylosis Table for the fusion." It is thus apparent that the hearing officer found inconsistent the references in Dr. D's report to claimant's lack of ROM due to the fusion surgery versus Dr. D's failure to assign any impairment due to ROM. We have previously held that a hearing officer may find that part of the great weight of the other medical evidence against a designated doctor's conclusion may be found within that doctor's own report. Texas Workers' Compensation Commission Appeal No. 94053, decided February 23, 1994. In addition, the hearing officer, through another finding of fact, also appears to have credited Dr. S's opinion that, pursuant to Table 49 of the AMA Guides, the claimant's condition merited a 13% IR due to the specific disorder, which includes one percent for an additional level, rather than Dr. D's 10%.

As carrier notes in its appeal, this panel has held that overcoming the presumptive weight accorded a designated doctor's report requires more than a "mere balancing of the evidence." Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held, however, that medical opinion is not weighed according to the number of doctors who take a position; rather, it should be weighed according to its thoroughness, accuracy, and credibility with consideration given to the basis it provides for the opinions asserted. Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993. In this case the hearing officer found the treating doctor's assessment of claimant's condition and the impairment it merited to outweigh the conclusions reached by the designated doctor. We cannot say, upon our review of the medical evidence, that it is so weak or lacking as to make the hearing officer's decision against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge