APPEAL NO. 950336

This 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 January 24, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The disputed issues reported out of the Benefit Review Conference (BRC) were whether the appellant (claimant herein) reached maximum medical improvement (MMI) and, if so, what was his impairment rating (IR). By agreement of the parties, the hearing officer added the issue of whether (Dr. H) or (Dr. K) was the designated doctor properly appointed by the Texas Workers' Compensation Commission (Commission).

The hearing officer found that Dr. H was the designated doctor and that, as certified by Dr. H, the claimant reached MMI on February 9, 1994, with a two percent IR. The claimant appeals these determinations arguing that Dr. H, who was the first designated doctor appointed in this case, did not perform an adequate examination and that certain "cultural and political considerations" may have impermissibly tainted his conclusions about the date of MMI and the correct IR. Claimant therefore contends that Dr. K, who was the second designated doctor selected by the Commission, was the proper designated doctor and that his opinion on the issues of MMI and IR should prevail. The respondent (carrier herein) replies that the decision and order of the hearing officer are correct as a matter of law, supported by sufficient evidence and should be affirmed. A response by the claimant to the carrier's response to his appeal will not be considered because it is not timely as an appeal and our review is limited to the record of the CCH, the appeal and a response to the appeal. Section 410.203(a)

DECISION

We affirm.

In a finding of fact not appealed by either party and which has now become final pursuant to Section 410.169, the hearing officer determined that the claimant sustained a compensable injury to his left shoulder and right middle finger on (date of injury). At the request of the carrier, (Dr. O) on February 9, 1994, in a Report of Medical Evaluation (TWCC-69) certified that the claimant reached MMI on that date and assigned a two percent IR solely for loss of range of motion (ROM) of the left shoulder. He was unable to identify any pathology in the left upper extremity and found symptom magnification on functional capacity testing. A February 9, 1994, EMG requested by Dr. O was reported as normal. A previous MRI of the left shoulder done on November 23, 1993, was also negative.

Dissatisfied with Dr. O's evaluation, the claimant next saw (Dr. B) at the request of (Dr. W), his treating doctor. An EMG by Dr. B on April 4, 1994, was reported as disclosing left brachial plexopathy and mild left carpal tunnel syndrome. In an examination of April 21, 1994, Dr. B diagnosed left brachial plexus injury and left frozen shoulder. Dr. B did not offer an opinion on either date of MMI or an IR.

The claimant disputed Dr. O's certification and the Commission selected Dr. H as designated doctor. The letter of appointment was not in evidence, but as conceded by the parties, Dr. H was the first designated doctor in this case and was selected to determine both date of MMI and an IR. In a TWCC-69 of May 31, 1994, Dr. H found MMI as of February 9, 1994, the same date found by Dr. O, and also assigned a two percent IR. The two percent IR was based solely on loss of ROM of the left shoulder. He commented that his physical examination of the claimant's upper extremities disclosed "no cyanosis, edema, atrophy or dystrophy." He found no sensory or neuron deficits and stated that the claimant showed a "marked increase of the pulse . . . during the left shoulder [ROM] testing, suggesting he experienced pain. The diagnosis is left shoulder strain." He also referred to the MRI of November 23, 1993, and the EMG of April 4, 1994, as normal. No mention was made of the February 9, 1994, EMG.

The BRC in this case was held on December 5, 1994. In her report, the benefit review officer (BRO) wrote:

> the problem, however, is that [claimant] is Arabic and [Dr. H] is Jewish. [Claimant] feels that [Dr. H] is prejudice [sic] against him. The claimant is being sent to another designated doctor who is neither Jewish nor Arabic. . . .

That second designated doctor was Dr. K who was asked to determine both a date of MMI and an IR. Dr. K did not complete a TWCC-69, but completed a narrative report on December 29, 1994, in which he stated:

> I do feel [claimant] has reached at least statutory MMI, since it has been slightly over two years since the injury. I believe he does have a legitimate left shoulder adhesive capsulitis, possible with some degree of inferior capsular instability (. . .) but I feel the presence of a neurological lesion is still very much in question, and I am very concerned about his absolute denial of any knowledge of a left clavicle fracture or any prior injury to the left shoulder.

He assigned an eight percent IR based solely on loss of ROM of the left shoulder.

The claimant testified that he had no problem with his finger after a "couple days." He said he was dissatisfied with Dr. H's examination because he, Dr. H, was not responsive to his, claimant's, concerns and questions; because Dr. H did not test his left shoulder, but only his elbow and did not ask the claimant where he was injured; and because Dr. H said the EMG done by Dr. B was "wrong." About a week after this examination by Dr. H, the claimant said he went to the local Commission office to dispute it. When asked by a Commission employee why he wanted to dispute it, the claimant recalled he said Dr. H was "no good" and asked if he was Jewish. The employee reportedly said yes, and the claimant responded ". . . okay, I understand. That's it." The claimant admitted that Dr. H made no racial comments, and in his closing argument said Dr. H was "maybe" prejudiced. He also stated he agreed with Dr. K's eight percent IR and presumably the statutory date of MMI.

Dr. H responded to the following written questions which were entered into the record:

Did you examine [claimant] in accordance with the AMA Guides to the Evaluation of Permanent Impairment, 3d Edition . . . 2nd printing?

Answer: Yes.

Does a patient's race or religion affect your medical opinions regarding impairment?

Answer: Absolutely not.

Are you aware [claimant] is claiming you were prejudiced against him because he is Muslim?

Answer: No, not at all.

Did [claimant's] race or religion influence your opinions expressed in the report of May 31, 1994?

Answer: Absolutely not.

The hearing officer determined that Dr. H was the properly designated doctor in this case and afforded his certification of MMI and IR presumptive weight. On appeal, claimant renewed his argument that Dr. H should not be considered a designated doctor because he was not "objective" in his evaluation of the claimant. The claimant urges that because Dr. H "is Jewish . . . cultural and political considerations may have affected his ratings and date of [MMI]." The carrier replies that "there is . . . no credible evidence [Dr. H] is Jewish," but even if he were "there is no indication that any prejudice affected his opinions."

The integrity of the designated doctor process is vital to the fair and efficient administration of the workers' compensation program. We have frequently referred to the uniqueness of this position as an agent of the Commission, *see* e.g., Texas Workers' Compensation Commission Appeal No. 94182, decided March 24, 1994, and Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, and described designated doctors as "impartial arbiters." Texas Workers' Compensation Commission Appeal No. 950123, decided March 7, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992. For this reason, we have disapproved unilateral communications between a party and a designated doctor. Texas Workers' Compensation Commission Appeal No. 94553, decided June 6, 1994. To avoid compromise of the designated doctor's position, we have also carefully limited the circumstances when the first selected designated doctor may be superseded by a second designated doctor to those rare cases where the first selected is unable or

unwilling to comply with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). *See* Texas Workers' Compensation Commission Appeal No. 950068, decided April 6, 1995, and cases cited therein. Mere dissatisfaction by a party with the first designated doctor is not sufficient reason to appoint a second designated doctor. Texas Workers' Compensation Commission Appeal No. 941729, decided February 10, 1995. In this case, we believe the BRO acted precipitously and without sufficient cause to replace Dr. H solely on the strength of the claimant's so-called "problem" with Dr. H. Leaving aside the question of whether or not Dr. H was, in fact, Jewish, we point out that when the BRO made the decision to appoint a second designated doctor, there was not even a scintilla of evidence that Dr. H may have been less than impartial in his examination or that his report was somehow corrupted. Compare our decision in Texas Workers' Compensation Commission Appeal No. 94662, decided June 3, 1994, where the report of the putative designated doctor referred to "racially corrected results." We remanded for an explanation. In the case now appealed, there is no indication that race played any role in Dr. H's report or that he was unable or unwilling to provide a certification of MMI and IR consistent with the 1989 Act. In effect a second designated doctor was appointed for no reason sanctioned by the Appeals Panel. Having reviewed the record in this case, we find no error in the determination of the hearing officer that Dr. H was the designated doctor in this case and that there existed no valid reason to appoint Dr. K to this position.

Pursuant to Sections 408.122(b) and 408.125(e), the report of a designated doctor selected by the Commission has presumptive weight and the determination of MMI and IR shall be based on that report unless the great weight of the other medical evidence is to the contrary. Great weight means more than an equal balancing or even a preponderance of the medical evidence and whether the great weight of the other medical evidence is contrary to the report of the designated doctor is a factual determination to be made by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Although Dr. O also assigned a two percent IR for loss of ROM of the left shoulder, the claimant asserts that the great weight of the other medical evidence is Dr. K's report because Dr. H's examination was not "real good;" Dr. H did not examine his shoulder; Dr. H erred in not giving controlling weight to an EMG which Dr. B read as abnormal; and because Dr. H selected a date of MMI well before his examination of the claimant. While a claimant may provide probative evidence about the circumstances of an examination, his testimony is not medical evidence. Contrary to the claimant's assertion that Dr. H did not do ROM testing of his left shoulder, Dr. H's report specifically refers to and gives the results of such testing. There was also no indication that Dr. H did not have available prior medical test results. In any case, he could disregard a prior, apparently abnormal EMG test or disagree with the interpretation of that test in arriving at a diagnosis of the compensable injury based on his own personal examination of the claimant and the exercise of his professional judgment. Although it may be more common for an examining doctor to certify MMI as of the date of the examination, nothing in the 1989 Act or our decisions prevents a doctor from certifying an earlier or "retrospective" date of MMI based on a comparison of his findings on the date of the examination with other medical data. *See* Texas Workers'

Compensation Commission Appeal No. 92686, decided February 3, 1993. Claimant's disagreement with Dr. H (other than as discussed above), as he candidly stated at the CCH, comes down to a dissatisfaction with Dr. H's lower IR and a belief that Dr. H did not examine him the same way Dr. K and other doctors did. We are unwilling to give credence to such a challenge when not supported by medial evidence that Dr. H's examination was inadequate. *See* Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992.

We are satisfied that the hearing officer correctly afforded presumptive weight to the report of Dr. H, the designated doctor, and that her findings and conclusions are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge