APPEAL NO. 950415

Following a contested case hearing held in (city), Texas, on February 2, 1995, the hearing officer, (hearing officer), resolved the sole disputed issue by granting presumptive weight to the report of the designated doctor and determining that the whole body impairment rating (IR) of the appellant (claimant) is 13%. Claimant maintains on appeal, as he did at the hearing, that the 15% IR of his treating doctor, (Dr. S), should have been adopted by the Texas Workers' Compensation Commission (Commission) rather than the 13% IR of the designated doctor, (Dr. W), because the two doctors differed only on the impairment from loss of range of motion (ROM) and the treating doctor, being more familiar with claimant, was better positioned to know claimant's real ROM impairment. The respondent (carrier) asserts the sufficiency of the evidence to support the decision.

DECISION

Affirmed.

The case was presented on documentary evidence and argument. An undated Report of Medical Evaluation (TWCC-69) signed by (Dr. T), represented at the hearing as claimant's first treating doctor, stated that claimant had reached maximum medical improvement (MMI) on "11-18-92" with an IR of "0%." This report recited that claimant injured his back on (date of injury), lifting a tire while working on a tractor, that he has a lumbar disc strain but no fracture, and that he has decreased back motion and some stiffness. The diagnosis was lumbar strain with discogenic back disease.

(Dr. S), represented as claimant's current treating doctor, stated on a TWCC-69 dated June 15, 1994, that claimant had not reached MMI, that date of MMI was "unknown," and that claimant's IR was 15%. In attached notes of June 14, 1994, Dr. S stated that claimant had "moderate ROM lumbosacral spine" which included four percent impairment for hip flexion, five percent for extension, and six percent for lateral bending for a total whole person impairment of "15 degrees." There was no indication that Dr. S assigned an impairment rating for anything other than abnormal lumbar spine ROM. Dr. S's impression was multiple level degenerative disc disease with lumbosacral spine instability.

In his TWCC-69 dated October 5, 1994, Dr. W stated that claimant reached MMI on September 22, 1994, with an IR of 13%. Dr. S thereafter stated his disagreement with that IR on the TWCC-69. In his narrative report of September 23, 1994, Dr. W stated that he assigned claimant five percent impairment due to a specific disorder of the lumbar spine "from Table 49 #2-B of the AMA Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)]," and eight percent for abnormal lumbar spine ROM consisting of four percent for lumbar flexion, three percent for lumbar extension, and one percent for lateral flexion. Dr. W attached his lumbar spine ROM worksheet, commented that claimant's lumbar flexion and extension was validated by the straight leg raise test, and

indicated that his evaluation was based on the AMA Guides mandated by the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 408.124(b) (1989 Act).

Section 408.125(e) provides that the Commission shall give presumptive weight to the report of the designated doctor selected by the Commission and base the IR on that report unless it is contrary to the great weight of the other medical evidence. Claimant argued below that he understood that provision but felt it should not be applied blindly but selectively, on a case-by-case basis. He contended that the only difference in the ratings of Dr. S and Dr. W was in the area of abnormal ROM, that it was known that ROM varies from day to day (no medical evidence was offered to support that statement), and that as the treating doctor, Dr. S, was in a better position to accurately assess claimant's ROM. The Appeals Panel had occasion to address this contention in Texas Workers' Compensation Commission Appeal No. 93674, decided September 17, 1993, when it pointed out that "[w]hile the time spent with a designated doctor will almost never be equal to that the patient spends with the treating doctor, Texas Workers' Compensation Commission Appeal No. 93031, decided February 25, 1993, observed that the 1989 Act provides a presumption to the designated doctor, not the treating doctor, even though the treating doctor would normally be more familiar with the claimant's injury." The opinion went on to note that "the designated doctor's purpose is to evaluate, not carry out a plan of treatment, . . . " The Appeals Panel has also stated that the "great weight" determination amounts to more than a mere balancing or preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Finally, claimant did not mention the obvious invalidity of Dr. S's IR given that Dr. S also stated that claimant had not reached MMI. *See* Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence. We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust and we do not find them to be so in this case. 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge