APPEAL NO. 991083

Following a contested case hearing held in Denton, Texas, on April 27, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the sole disputed issue by determining that the appellant's (claimant) impairment rating (IR) is zero percent based on the report of the designated doctor. Claimant appeals for evidentiary insufficiency the dispositive conclusion of law as well as findings of fact that nothing she presented refuted the designated doctor's assignment of the zero percent IR and that the IR assigned by the designated doctor is not contrary to the great weight of the other medical evidence. The response filed by the respondent (carrier) urges the sufficiency of the evidence to support the challenged findings and decision.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached maximum medical improvement (MMI) on May 19, 1998; and that Dr. E was the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). Not appealed are findings that Dr. E assigned claimant an IR of zero percent and that claimant's treating doctor, Dr. H, assigned claimant an IR of 15%.

Claimant testified that her injury consisted of bilateral carpal tunnel syndrome (CTS) and cubital tunnel syndrome (CuTS) in her right elbow; that she underwent carpal and cubital tunnel release surgery on November 25, 1997, on her right hand and elbow; that she returned to her employment with (employer) in March 1998 working full-time at light duty and that she later resumed her full duty employment as an order entry representative using a computer; that she last saw Dr. H for a pain medication refill before her September 29, 1998, examination by Dr. E; and that the repetitive keyboard work of her job is causing her some problems such as having pain, dropping objects, and not being able to use her arms around the house as she once could. She said her left arm is a little stronger than her right but that her left thumb goes numb. She also said she would not say her surgery was unsuccessful since she no longer feels the burning sensation and her hand is less numb.

Claimant further testified that Dr. H spent approximately one hour examining her before assigning a 15% IR whereas Dr. E spent only about 10 minutes. She also said that Dr. H used some different machines during the examination; that Dr. E's measurements were not as "extensive" as those of Dr. H's; that both used grip strength machines; and that Dr. E's technique in measuring her wrist range of motion (ROM) varied from Dr. H's. She conceded she had no medical training and could not show that Dr. E failed 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). Claimant further stated that she felt that Dr. E was "angry" with her. She said that when Dr. E entered the examining room and extended his hand to shake her hand, she offered her left

hand to protect her right hand and the look on Dr. E's face was "not good." She also stated that Dr. E yelled at her to try harder and that she "was just shocked by his method" and "was terrified" and "shaking."

Dr. H's Report of Medical Evaluation (TWCC-69) dated May 19, 1998, certifies that claimant reached MMI on "05/19/98," the date of her visit, with an IR of 15% consisting of 11% for the right arm and five percent for the left. The attached worksheets reflect that Dr. H's ratings included abnormal motion impairment and peripheral nervous system impairment. Another addendum states that the ratings are based on loss of ROM and loss of motor strength and grip in the hand and arms due to CTS and CuTS.

Dr. E's TWCC-69 dated October 2, 1998, certifies that claimant reached MMI on "5-19-98" with an IR of "0%." At the bottom of this form, Dr. H checked the box indicating his disagreement with the IR, asserting that claimant has significant loss of grip and pinch strength, and references his IR. In his accompanying narrative report, Dr. E stated that while claimant would not extend her hand to shake hands with him and was very conservative with the use of her right hand, she was observed in the parking lot having no difficulty getting keys out of her purse and using her right hand to open the car door, get into the car, and start the engine. Dr. E further reported that, although claimant showed evidence of the surgical procedures to the right wrist and elbow, there was no gross loss of strength and no muscle atrophy; that her sensory testing was completely within normal limits; that there were only minor differences in strength between the right and left sides which he felt was primarily due to pain response rather than true muscular weakness; that claimant is not symptomatic on the left side and no abnormalities were found in wrist, forearm, or elbow ROM; and that the slight differences in ROM between the right and left will be considered normal. Dr. E concluded that "[o]verall, this examinee has a 0% [IR]."

Responding on December 21, 1998, to questions propounded by a Commission benefit review officer, Dr. E stated that he had reviewed the EMG findings of Dr. M reported on October 29, 1997; that, while he examined both upper extremities, claimant did not complain of left side symptoms; that the left upper extremity ROM should not have been impaired by the minimal findings on EMG/NCV which were a baseline normal; and that, with regard to grip strength, girths, and pinch strengths, claimant's motivation and veracity should be considered suspect in that she appeared to purposely limit the use of her right arm but, when casually observed, had no difficulty using it. Dr. E concluded by stating that he stood by his original IR which is "0%" and that he did not need to reexamine claimant.

Section 408.125(e) provides that the report of the designated doctor chosen by the Commission shall have presumptive weight and that the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has stated that "it is not just equally balancing evidence or a preponderance of evidence that can outweigh such report, but only a 'great weight' of other medical evidence that can overcome it," that we have emphasized "the unique position that a designated doctor occupies under the Texas Workers' Compensation system," and that "no other doctor's report, including a report of a treating doctor, is accorded this special, presumptive status." Texas Workers' Compensation Commission Appeal No. 92412,

decided September 28, 1992.

Section 401.011(23) defines impairment to mean "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." In Texas Workers' Compensation Commission Appeal No. 941052, decided September 19, 1994, a case in which the Appeals Panel reversed the hearing officer's determination that the employee's IR was 42% and rendered a new decision that it was zero percent, the Appeals Panel stated that the claimant has the burden to show that an injury resulted in some amount of impairment and that the fact that the evidence shows that a claimant sustained a compensable injury "does not automatically mean there was necessarily some degree of permanent impairment flowing from that injury."

The only medical evidence contrary to the designated doctor's report is the report of the treating doctor, Dr. H, who in May 1998 found abnormal motion impairment and peripheral nervous system impairment and assigned a 15% IR. We cannot say that the hearing officer's determination that Dr. H's report does not constitute the great weight of the medical evidence contrary to Dr. E's report is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The Appeals Panel has recognized that a designated doctor testing for abnormal ROM can take into account observed voluntary restriction of movement, symptom magnification, and lack of effort. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 94528, decided June 14, 1994, and Texas Workers' Compensation Commission Appeal No. 951283, decided September 19, 1995.

We affirm the decision and order of the hearing officer.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Alan C. Ernst
Appeals Judge