APPEAL NO. 931045

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). On October 13, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. There were four issues to be determined: 1) whether the claimant sustained a compensable injury on (date of injury); 2) whether the claimant timely reported this injury to his employer; 3) whether the carrier timely contested compensability; and 4) whether the claimant had disability as a result of a compensable injury. The claimant contended that the injury sustained on (date of injury), was a mental trauma injury.

The hearing officer determined that the claimant was not injured in the course and scope of his employment, that he had not timely reported the alleged injury to his employer, that the carrier timely contested compensability, and that the claimant did not have disability as that term is defined by the Workers' Compensation Act.

The claimant has appealed the decision. The appeal does not list specific findings and conclusions that are appealed. Nevertheless, a fair reading of the appeal indicates that the claimant disagrees with the hearing officer admitting certain evidence tendered by the carrier that claimant states he had not previously seen; that the hearing officer's decision is based upon evidence that is not credible or was fabricated by the employer and carrier; that the claimant disputes the hearing officer's decision that he did not have disability (based in large part upon his assertion of the disability finding of the Social Security Administration as "res judicata"); that he was supposed to be assisted by a black ombudsman; and that he did not receive a fair hearing because of racial prejudice. Carrier responds that the decision should be affirmed.

DECISION

After considering the record in light of the points of error raised, we affirm the hearing officer's decision.

The facts will be briefly summarized.[1] The claimant, an engineer for (employer), contended he sustained a mental trauma injury. While he acknowledged that he had been previously treated for hypertension and job-related stress, he contended that a specific incident, a meeting on (date of injury), caused mental trauma to the extent that he became unable to work as of (date). He identified his primary treating physician as (Dr. J) and said he had also been treated by a psychiatrist, (Dr. P).

In direct and cross-examination, claimant stated numerous times that he was unable to recall all persons who attended the meeting, what the topic of discussion was, what was said, and what subsequent medical treatment he received for the effects of the (date of injury) meeting. He did not know if he mentioned the (date of injury), meeting to Dr. J.

[1]Because claimant has not appealed the hearing officer's determination that the carrier timely disputed the claim, we will not summarize testimony relating to that issue.

What he did recall was that he thought he was going to the office of (Mr. A) to discuss a denial of requested medical leave for the following day, and that several persons there ended up hollering at him. He stated that he must have "freaked out" and he left the meeting "screaming." Claimant stated that since then, he does not leave the house (unless driven by another) and he is unable to work. Although the claimant maintained he told his supervisor's secretary about his work-related injury, he was unable to recall whether he told any other persons.

The claimant attributed his failure of recollection to medication he was taking. He stated that an employee named RF filled out various applications and claims for him, including one for workers' compensation, which he just signed. The record indicated that claimant filed a workers' compensation claim with the Texas Workers' Compensation Commission (Commission) in October 1991, asserting a May 20, 1991, date of injury. The claimant also signed an application for long term disability benefits, asserting that he had not applied for and did not expect to receive workers' compensation.

Many exhibits and letters, several of which were admitted without objection from the claimant, indicate that claimant was involved, as of (date of injury), in a dispute with his employer over an evaluation in which he received an overall rating of "proficient" but which claimant perceived as unfavorable. The memos and records also indicate that claimant perceived his work environment and coworkers as hostile, and that he was, at the recommendation of his doctor, taken off work for periods of time prior to (date of injury), relating to stress. The records also indicate that, prior to (date of injury), claimant had initiated a racial discrimination complaint which was investigated by the employer. The claimant's testimony also indicated that, prior to (date of injury), claimant perceived he had been subjected to harassment at the workplace. Claimant is referred to in at least one record as working a 4:00 a.m. to noon shift.

Mr. A testified that he was the Director of Diversity and Development for the employer, and as such met several times with the claimant in 1990 and 1991. He indicated that in early 1991, after claimant had returned from a leave of absence, that persons in management attempted a few times to set up a meeting with the claimant to discuss aspects of job performance and an issue relating to multiple Social Security numbers. He stated that the meeting eventually took place (date of injury), and did not last more than 15 or 20 minutes. He stated that there was no yelling by either the claimant or the three management participants, whom he identified as himself, Mr. RF, and Mr. KM. Mr. A said that the meeting ended when claimant, without presenting his viewpoint, stood up and announced he would leave, and then left. Mr. A said he approved claimant's requested leave of (date), although claimant's managers had recommended against it.

Claimant did not receive long term disability, but produced a decision from the Social Security Administration that he was approved for Social Security disability benefits.

Records of Dr. J and Dr. P indicate that he began seeing Dr. P on referral from Dr. J on January 24, 1991. Records of both indicate that work-related stress was part of the

reason for treatment, although the (date of injury), meeting is not specifically identified as the basis of any new or additional trauma. Although claimant appears to have been released back to work in July 1991 by Dr. J, opinions after that date from Dr. J and Dr. P indicate that claimant cannot work because of his condition.

A June 24, 1991, letter from claimant to the employer's chief executive officer enclosed a copy of a real estate license dated June 20, 1991, and pointed out that claimant can also be of service to the company due to pending qualification as a paralegal. On August 12, 1991, claimant wrote to Mr. F requesting that he be given a new position, pointing out that he had would soon have an MBA and real estate associates degree, and that he was qualified as a paralegal.

More than one letter in the record showed that claimant wrote to the carrier's attorney stating that he would not accept certified mailings due to inability to leave the house, and that he would regard attempts at personal delivery of documents as trespass. Claimant requested delivery by regular mail. Claimant agreed that he had stated he could not accept certified mailings, but did receive regular mail.

WHETHER THE HEARING OFFICER ERRED BY ADMITTING CERTAIN EVIDENCE OVER OBJECTION OF FAILURE TO EXCHANGE

The claimant objects that the hearing officer considered evidence submitted by the carrier that claimant had never seen before. We interpret this to be an assignment of error based upon the carrier's failure to exchange documents it intended to present at the hearing, and that such evidence should have been excluded in accordance with Section 410.161.

The record indicated that only four documents were objected to at the hearing for failure to exchange. (Another document, a performance appraisal, was objected to on the basis of relevance only; claimant also indicated in his appeal that carrier submitted evidence he did not see for two doctors, but these were admitted with no objection at the contested case hearing). The hearing officer reviewed the first document, the application for private disability benefits, page-by-page with the claimant and ascertained that he had seen all but three pages. The carrier's attorney responded that the entire application had been sent to claimant by regular mail. The hearing officer admitted the document and told claimant that it was his impression that he had probably received the entire document. We cannot agree that error was committed.

An affidavit from claimant's former boss, MM, was presented. It was dated October 11, 1993, two days before the hearing. The carrier's attorney indicated she had received it the day before and mailed a copy to claimant by regular mail. The hearing officer, noting the date the affidavit was executed, overruled claimant's objection. We surmise that the hearing officer was noting good cause due to carrier's late receipt of the item, and, while it would be preferable to have good cause expressly found, cannot state that the hearing officer erred. But even if he did err, we would note that the affidavit itself is by and large cumulative of evidence already in the record where it is relevant to the issues before the

hearing officer. (While the affiant denies that claimant gave him notice of injury, claimant has not appealed that aspect of the hearing officer's decision, and, further, did not himself testify that he had given notice to the affiant, but to his secretary.) Acceptance of the affidavit would not itself have led the hearing officer to conclude against all other evidence that claimant had no disability or had not sustained an injury, and consequently would not amount to "reversible error." *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The other documents admitted over objection for failure to exchange were a memo and a second performance evaluation. The carrier asserted these items had been exchanged by regular mail and the hearing officer consequently admitted them. We cannot agree that the hearing officer abused his discretion in admitting these items.

We would respectfully point out that the decision of the hearing officer would have been supportable from the other evidence in the record, and none of these records were items that made the difference between a decision for the carrier and a decision for the claimant.

WHETHER THE HEARING OFFICER ERRED BECAUSE HE FOUND THAT CLAIMANT DID NOT HAVE DISABILITY AS DEFINED IN THE 1989 ACT

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 determinations made by the hearing officer are based upon the Texas Workers' Compensation Act, and not upon other laws (such as those governing the Social Security Administration). "Disability" is defined in Section 401.011(16) (1989 Act): "`Disability' means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." In other words, a compensable injury must first be found, and then it must cause an inability to obtain and retain employment equivalent to the pre-injury wage. Any determination made by the Social Security Administration is governed by whatever definitions of disability exist in its own enabling legislation, and cannot be considered as "res judicata" over a Commission proceeding.

Because the hearing officer determined that there was no compensable injury, he could not find disability in favor of the claimant. The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977).[2] The hearing officer is the sole judge

[2]Claimant argued at the end of the hearing, and alludes in his appeal, to the fact that the carrier did not produce evidence from another doctor that was used by Social Security. However, it was the responsibility of the claimant, and not the carrier, to submit evidence that he believed would be favorable to his claim.

of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). We would note in this case, however, that the claimant's testimony did not establish a traumatizing event on (date of injury), because he testified he could not recall what was discussed; his account of the tenor of that meeting was contradicted by Mr. A's testimony, which the hearing officer, as finder of fact, could choose to believe. As to the general work-related stress that is indicated in the evidence, repetitive mental trauma stress is not compensable under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92337, decided August 21, 1992, *citing* Transportation Insurance Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979).

All in all, the hearing officer's determinations that claimant did not sustain a compensable mental trauma are sufficiently supported by the evidence. Because the hearing officer did not find the occurrence of an essential event which must be found as part of a conclusion of "disability" under the 1989 Act, we cannot agree with claimant that the hearing officer erred by not finding in claimant's favor on disability. We also note that the hearing officer found as fact that the (date of injury), meeting was a legitimate personnel action, which is supported by the testimony of Mr. A, and that this also would constitute an exception to compensability even if the evidence demonstrated that this meeting caused trauma. *See* Section 408.006(b).

REQUEST FOR OMBUDSMAN

At the beginning of the hearing, the hearing officer asked if claimant understood the proceeding had legal ramifications, that the ombudsman was there to render assistance (and not legal representation), and if he desired to go forward. Claimant stated he did. At the end, in response to the hearing officer's questions, claimant affirmed his understanding of the ombudsman's role a second time and also said he had been satisfied with that ombudsman's assistance. The tapes of the hearing reveal the ombudsman to have been an active assistant. In light of this, claimant's assertion now that he was supposed to have had another ombudsman is without merit.

FAIRNESS OF HEARING

Finally, the record is without any indication that claimant did not receive a fair hearing. The claimant was permitted to fully present his case. The hearing officer's rulings on objections were no more unfavorable than favorable to claimant's case. The hearing officer's determination is supported by the record of facts in the case.

The decision of the hearing officer is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge