

APPEAL NO. 93416

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On April 26, 1993, a contested case hearing (CCH) was held. The issues agreed upon at the hearing were: Whether claimant's myasthenia gravis (MG) was aggravated by his employment, and if so, whether claimant has had disability, entitling him to receive temporary income benefits (TIBS). The hearing officer determined that respondent, claimant herein, suffered a compensable aggravation of his MG when he postponed receipt of medical care in deference to the wishes of his employer.

Appellant, carrier herein, contends that the hearing office misapplied the facts, the law, and the argument presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds alleging carrier's appeal was not timely filed and refuting carrier's contentions.

DECISION

The decision of the hearing officer is reversed as incorrectly applying the law as to aggravation of a preexisting condition and a new decision is rendered.

Addressing claimant's contention that carrier's appeal should not be considered because claimant "was not notified [of the appeal] until June 1, 1993." A review of the file shows the decision of the hearing officer was distributed, by mail, on May 7, 1993. The carrier asserts that it received the hearings decision on May 10, 1993. Article 8308-6.41 provides that a written appeal is to be filed "with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received . . . and shall on the same date serve a copy of the request for review on the other party." Carrier's appeal was received on May 25th, which was the 15th day after the date carrier received the hearing officer's decision. Carrier's appeal certifies a copy of the appeal was sent to claimant by certified mail, return receipt requested. The return receipt shows receipt by claimant on June 1, 1993. The appeal was timely filed and served on the claimant.

Claimant, now a 30-year-old man, testified he was employed as a human resource administrator by (employer). Claimant stated his duties required him to be responsible for 180 employees located on 11 oil rigs. It was claimant's contention, both at the benefit review conference (BRC) and the CCH, that working long hours, stress, forced cancellation of doctor's appointments, demotion, and required attendance at certain events, aggravated and accelerated his MG.

From claimant's testimony, and the medical literature, admitted as Claimant's Exhibits No. 1 and 11, MG is described as a disorder in which the muscles become weak and tire easily. The eyes, face, throat and limb muscles are most commonly affected. In

claimant's case, the throat and voice appeared to be most affected. The admitted literature comments on the causes and incidence as follows:

CAUSES AND INCIDENCE

[MG] is an *autoimmune disorder* in which, for unknown reasons, the body's *immune system* attacks and gradually destroys the receptors in muscles that are responsible for picking up nerve impulses. As a result, affected muscles fail to respond, or respond only weakly, to nerve impulses.

[MG] is a rare disease; two to five new cases per 100,000 people are diagnosed annually. It affects more women than men (in a ratio of 3 to 2). Although it can occur at any age, [MG] usually appears between the ages of 20 and 30 in women and 50 to 70 in men.

SYMPTOMS AND SIGNS

The disease may develop suddenly or gradually. It is extremely variable in the way it affects different people and in how it affects the same person from day to day. The affected muscles become worse with use but may recover completely with rest. Symptom-free periods typically alternate with relapses of the condition.

The eye muscles are the most commonly affected, and most sufferers have drooping eyelids and double vision. Weakness is also common in the muscles of the face, throat, larynx (voice box) and neck. This causes difficulty speaking, so that the voice becomes weak, hoarse, nasal, and slurred toward the end of a conversation. Chewing and swallowing become increasingly difficult as a meal progresses, so that the sufferer may choke or regurgitate food through the nose. Sometimes the jaw must be supported to prevent it from hanging.

Infection, stress, menstruation, medications, and other factors can exacerbate the condition.

Abnormalities in the thymus gland are present in about three quarters of affected people and, in about 10 to 15 percent of them, a *thymoma* (tumor of the thymus gland) is found.

DIAGNOSIS

The disease is diagnosed by a physical examination, the patient's history, and various tests. The most commonly used diagnostic test involves the injection of a drug called edrophonium into a vein. Within a minute, power is temporarily restored . . .

TREATMENT

. . . In severe [MG],thymectomy (removal of the thymus gland) often considerably improves, and sometimes, cures, the condition. Otherwise, regular exchanges of the patient's antibody-containing plasma for antibody-free plasma may be carried out; high doses of *corticosteroid drugs*, which block the immune process, may be given.

Although not clear from the record, claimant's MG was argued to have been in remission and asymptomatic in the early spring of 1991. In January, April and May 1991, claimant was required to go to the sites of three industrial accidents. On April 30, 1991, claimant was required to attend the funeral of another employee before being permitted to travel to a funeral of a family member the next day. Claimant testified he had been promised a promotion, which turned into a demotion after claimant's medical problems surfaced. Claimant, on cross-examination, testified that his first symptoms of reoccurrence of MG appeared prior to_____, but the first symptom which caused him to seek medical treatment occurred on_____, when claimant experienced speech problems while trying to address a meeting. Claimant stated he sought treatment from a general practitioner, but stated that he did not seek his employer's approval to take time off because of his belief that "such approval would have been denied. . . ." Claimant testified that his employer would not grant him sick leave and made him cancel medical appointments in June, July, August and September. There are no specifics of the circumstances involved. We do note that claimant did see Dr. H on August 21, 1991. Claimant was referred to Dr. F, an ear, nose and throat specialist, and eventually was seen by Dr. H, a neurologist.

Dr. H's first report is dated August 21, 1991, and states:

[Claimant] . . . was seen in my office for Neurological Evaluation of his symptoms manifested by slurred speech, intermittent, Diplopia on right lateral gaze, intermittent, difficulty swallowing, nervous and tense, intermittently, and mild memory problem.

The patient stated that his symptoms started approximately 2 months ago when he had to talk in front of 1600 (sic) people and he started experiencing

some expressive aphasia. After he spoke two words, it started clearing. Since, he has been experincing (sic) some problems talking. He is unable to express his words clearly. There is some dysarthria rather than dysphasia. He is able to understand things very well. These spells come intermittently. They might get worse late in the afternoon.

Also, the patient has been experiencing intermittent double vision mostly to the right lateral gaze. Sometimes it will get worse to the point that he has to turn his head to the right side to be able to see one. He does experience some blurry vision. This happens also whenever the weather is hot.

Also, the patient has been complaining of difficulty in swallowing which is constant. Sometimes he feels like he is going to choke.

The patient admitted that he is under a lot of pressure and stress related to his work. His company recently merged with another company and the other company started giving different orders and he has to obey these orders and relay these orders to his fellow employees because he is the Manager and oversees almost 180. . . . In other words, he has been under pressure and stress from his work and he wonders if these symptoms he is experiencing could be related to his work.

The patient was wondering whether he has a Tumor since it is positive in his family.

IMPRESSION: I think the patient has mostly (sic) likely an Anxiety Neurosis. Other possibilities such as MS and [MG] should be ruled out or Myopathy.

In a medical report dated March 23, 1992, Dr. W, an ear, nose and throat specialist, states he first saw claimant on October 22, 1991. It is clear from that report that as of October 22nd a diagnosis of MG had not yet been made. The report states that "[a]pproximately in the first week of November he was seen by [Dr.H] . . ." who confirmed the diagnosis of MG. The report goes on to state "[claimant] was under the care of [Dr. H], was hospitalized in December were (sic) he underwent plasmapheresis without obvious benefit. It was recommended to him [claimant] that he undergo a thymectomy which was performed in (City)." Dr. W concludes "[i]t is our hopes that [claimant] will regain a functional voice. It is our strong feeling that [claimant] may re-enter the work place. . . ." [Claimant] would perform adequately in a management type position." Claimant was referred to Dr. L, chairman of Otolaryngology at the (University).

Dr. L, in a report dated March 31, 1992, gives a diagnosis of "[m]yasthenia gravis patient who has improved on surgery and medical treatment" and suggests waiting "6

months to evaluate return of function."

Dr. H, in a report dated December 28, 1992, confirmed claimant had "been under my care for a long period of time after he was diagnosed as having [MG]." (Parenthetically we note the first diagnosis of MG was made either in the first week of November 1991, according to Dr. W, or on October 30, 1991, according to the hearing officer.) Dr. H goes on to state:

I feel that if this condition was brought to my attention earlier than when he came the patient might have gotten more benefits and his condition would have improved better. He came to me when he started noticing this problem while he was at work and he brought it to his company's attention but they tried to postpone him thinking he had to work and there was nothing wrong with him.

In a letter report dated January 27, 1993, Dr. H states: "Stress and anxiety cannot create [MG] but can aggravate and exacerbate the condition in certain patients. It may be so in this case."

Dr. W, in a report dated April 12, 1993, states ". . . secondary to his [MG] . . . makes [claimant] almost completely disabled. He is unable to converse in an understanding tone. This is a direct result of his disease of [MG]." Although claimant was not easy to understand (on the tape of the CCH), Dr. W's statement is somewhat extreme.

The hearing officer, in her discussion, cites Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979) and concludes that "repetitive stress," not traceable to a specific time, place and cause, would make claimant's theory of aggravation of his preexisting MG not a compensable injury or disease. However, the hearing officer based her decision, not specifically advanced by claimant, that delay in seeking medical care constitutes an aggravation of a preexisting condition. Ostensibly, this was based on a medical report where Dr. H theorized that if claimant had come to Dr. H earlier, claimant "might have gotten more benefits and his condition would have improved better."

Specifically, the challenged findings and conclusions of the hearing officer were:

FINDINGS OF FACT

5. As a result of on-the-job stress, Claimant's previously asymptomatic [MG] became symptomatic.
6. Claimant was required to postpone obtaining reasonable and necessary medical treatment for [MG] in order to meet the

performance standards imposed by his employer.

7. As a result of postponing reasonable and necessary medical treatment, Claimant's condition deteriorated, and did not respond to treatment as well as it would have had medical treatment not been postponed.

CONCLUSIONS OF LAW

3. Claimant did not suffer a compensable aggravation of his preexisting [MG] when the stress of his job caused his preexisting [MG] to become symptomatic on or about ____.
4. Claimant suffered a compensable aggravation of his [MG] when he postponed receipt of medical care in deference to the wishes of his employer.

We reject the hearing officer's theory that postponing medical care amounts to aggravation of a preexisting condition, both as a general proposition of law and as specifically applied to this case, where the demands of employment may have caused some delay in seeking medical care. This is sheer speculation by the hearing officer, and it is not supported by the facts or the law.

We have on a number of occasions held that, under case law, an injury includes an aggravation of a preexisting condition, whether or not that condition was job related. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 92216, decided July 10, 1992, citing Gulf Insurance Co. v. Gibbs, 534 S.W.2d 720 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.). In order for aggravation to be found, there is an active incident which is alleged to have resulted in the enhancement, acceleration, or worsening of the condition. Even assuming that the employer's practices regarding sick leave could be injury producing, there is no evidence that the progression of the MG was accelerated or made worse beyond the course it would naturally have followed. In the theory proposed in the instant case, the hearing officer finds that the failure to halt the progress of the disease is the aggravation. We find no authority for that proposition. Further, the determination runs counter to the facts in this case. Dr. H speculates that had he seen claimant earlier, claimant "might have gotten more benefits," but, in fact, Dr. H did see claimant on August 21, 1991, and failed to make the diagnosis of MG at that time (although he considered it a possibility). The diagnosis of MG was not made until more than two months later, after claimant had seen a number of other doctors, and five weeks after claimant had quit his job and presumably was available for full time testing. Surely Dr. H does not mean to say that had he seen claimant in June 1991 he could have made the diagnosis of MG at that time,

when he failed to make the diagnosis two months later.

Regarding either the hearing officer's theory regarding postponement of medical care as aggravation or the claimant's original theory that stress occasioned by his work aggravated or exacerbated his MG, we point out that in Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) the court held that generally issues of injury and disability may be established by the testimony of the claimant alone; however, as an exception to the general rules ". . . when a subject is one of such scientific or technical nature that [the finder of fact] cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry, only the testimony of experts skilled in that subject has any probative value. (Citations omitted.) It has been held that the cause, progression and aggravation of disease, and particularly of cancer, are such subjects." We believe that the cause, progression and aggravation of MG are not subjects of common knowledge and also require expert medical testimony. The claimant has the burden of establishing a causal connection between the injury and the employment. Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980). In the instant case, both the medical literature and the testimony established that stress, among other things, are factors that can exacerbate MG. Dr. H, in his January 27, 1993, report, states "[s]tress and anxiety . . . can aggravate and exacerbate [MG] in certain patients. It may be so in this case." Claimant testified he was under considerable stress, but as he conceded on cross-examination, some of this stress was associated with his personal life. Although the hearing officer found that stress caused claimant's MG to become symptomatic, she found that did not constitute compensable aggravation. Further, the literature seems to say that stress is one of several factors that can aggravate MG and that MG "is extremely variable in the way it affects different people and in how it affects the same person from day to day." There is no expert medical testimony which states, with reasonable medical probability (Schaefer, supra) that claimant's MG aggravation was caused by work-related stress, (or even the postponement of medical care). Claimant has failed to prove a causal connection between his work-related stress (as opposed to stress in his personal life) and the aggravation of his MG. In addition, we have held that the bare assertion that an aggravation has occurred does not relieve the proponent of the burden of proving that an injury, as defined in the 1989 Act, Article 8308-1.03(27) has been sustained. Texas Workers' Compensation Commission Appeal No. 92713, decided February 8, 1993.

Claimant, in his response, cites a number of personnel actions which he feels were unfair to him. While we recognize claimant's frustration with his employer and how he perceives he is being treated, we only decide issues involving workers' compensation benefits in accordance with the statute (the 1989 Act), applicable case law and rules and regulations. We are not authorized to consider, nor do we solicit, additional evidence. Rather we base our decision on the record developed at the CCH and the written request

for review and response. Article 8308-6.42(a). Claimant recites that he resides in Louisiana, was not represented at the CCH and does not have case law or Appeals Panel decisions available to him. We note that claimant was assisted by an ombudsman at the hearing and in any event, we are obligated to render opinions based on the law and rules, as we understand them, and cannot make exceptions for those unrepresented litigants who may not have case law available to them.

Finding that there is insufficient evidence that claimant's postponement of medical care resulted in an aggravation of claimant's MG, we find that the determinations of the hearing officer were against the great weight and preponderance of the evidence as to be manifestly wrong, the decision of the hearing officer is reversed and a new decision is rendered that claimant's current condition was not caused or aggravated by his employment. Claimant is not entitled to workers' compensation benefits.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge