APPEALS PANEL NO. 94016
FILED FEBRUARY 8, 1994

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1989 Act), a contested case hearing was held in (City), Texas, on November 19, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) did not suffer a lumbar injury in his (date of injury), accident, that his correct maximum medical improvement (MMI) date was January 4, 1993, and that he had a whole body impairment rating of six percent. Claimant filed a general request for review urging that the back injury was a re-injury and, therefore, apparently compensable and that he is not able to work. Claimant also attaches several medical reports to his request for review, all but one of which were admitted at the contested case hearing. Respondent (carrier) faults the lack of specificity in the request for review, argues that claimant is merely wanting the Appeals Panel to look at new evidence, and urges that the decision be affirmed.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, the decision and order are affirmed.

Three issues were presented at the contested case hearing: Whether and when the claimant reached MMI; the claimant's impairment rating if MMI had been reached; and whether the claimant's low back problems resulted from the (date of injury), compensable injury. The claimant is a 68 year old man who was employed as a night watchman. The claimant stated that on (date of injury), he slipped on a step and fell into a guardrail. He testified that he injured his neck and lower back. He stated he went to an emergency room, then to an attorney and then sometime later to a (Dr. S) who became his treating doctor. A report dated "7/9/92" from Dr. S indicates X-rays showing degenerative disease of the cervical spine. There is no mention of any lumbar problem in any of Dr. S's reports through 1992 and references are only to cervical (neck) and some chest pain. Dr. S. issued a Report of Medical Evaluation (TWCC Form-69) dated "9/4/92" wherein he found MMI on "9/3/92" with zero impairment. A subsequent TWCC Form-69 issued by Dr. S dated "11/25/92" indicates that claimant has continuance of cervical pain, that he has degenerative disease, that he is improving and that he is anticipated to reach MMI on "12/31/92" with a seven percent impairment rating. This report was confirmed in a statement of Dr. S dated "1/4/93." In January, the claimant started seeing a (Dr. A) who notes in a report dated January 12, 1993, that in addition to neck pain, the claimant complains of low back radiation to his left leg and numbness and tingling sensation to the left lower extremities. In this report Dr. A records the claimant's fall while performing night watchman duties and also indicated that "[l]ater he had a fall and hit his head and suffered injury to his neck, head and back." Dr. A also records that the claimant had a back injury in 1980 which resulted in back surgery. A report from Dr. A dated May 6, 1993, indicates that the claimant has reached MMI, as far as Dr. A can help him. A May 18th report, assesses a 20% impairment rating.

The claimant was examined by (Dr. L), a Texas Workers' Compensation Commission designated doctor in July 1993. Dr. L was also provided with the medical records and tests including a MRI C-spine report and films, a CT L-spine report and films, and the physical therapy records. Dr. L's report indicated that the claimant reached MMI on "1/4/93" with a six percent impairment rating. Dr. L specifically addressed the lumbar complaints, related them to post laminectomy symptoms and stated there was no significant aggravation associated with the incident of (Date of Injury). His TWCC Form-69 states "pre-existing and unrelated." A statement from a (Dr. MD), dated November 12, 1993, states with regard to the claimant's lower back, "I believe that this is a re-injury of a problem which had seen resolution in the past" and that "[t]he myelogram suggest that we have a picture of lumbar canal stenosis."

We first note that the claimant has included an additional statement of Dr. MD in his request for review. The Appeals Panel considers the record developed at the contested case hearing and the request for review and response. Section 410.203. We have previously held that we can not consider new items of evidence sent along with a request for review since the hearing officer is the fact finder. Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992; Texas Workers' Compensation Commission Appeal No. 931187, decided February 8, 1994. We note that the additional statement from Dr. MD contains no additional information such that it would, in any reasonable likelihood, cause a different result. Appeal No. 91132, *supra*. See generally Holgin v. Texas Employers Insurance Association, 790 S.W.2d 97 (Tex. App.-Fort Worth 1990, writ denied), for a discussion of newly discovered evidence requirements for a new trial.

The hearing officer determined that the claimant did not suffer a lumbar injury on (Date of Injury). He also accepted the report of the designated doctor and determined that MMI occurred on January 4, 1993, with a six percent whole body impairment rating. As the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence (Section 410.165(a)), the hearing officer is the fact finder in a contested case hearing. Section 410.168(a). Where there is any conflict or inconsistency in the evidence, it is the hearing officer's responsibility as fact finder to resolve such conflicts and inconsistencies. Garza v. Commercial Insurance Company of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He can believe one witness and disbelieve another (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)) and can believe all, part or none of the testimony of any given witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)), including the testimony of a claimant who as an interested party only presents the hearing officer with a factual issue. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer also determines the weight to be given the medical evidence in a case and resolves any conflicts in such evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Texas Workers' Compensation Commission Appeal No. 93836, decided

November 1, 1993. While there may have been some indication of a conflict between the various medical records over the course of a year and a half, there was clearly sufficient medical evidence to support the findings and conclusions of the hearing officer including that of the claimant's original treating doctors and the designated doctor. Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge