APPEAL NO. 94034
FILED FEBRUARY 10, 1994

This appeal is brought pursuant to 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*.). A contested case hearing was held on December 1, 1993, in (City), Texas, with (Hearing Officer) presiding as hearing officer. The issues at the hearing were the correct date of maximum medical improvement (MMI); the correct impairment rating (IR); if the date of MMI was determined not to be June 26, 1992, whether the appellant (claimant) had disability after that date entitling her to temporary income benefits (TIBS); and whether the claimant's current need for psychological treatment for chronic depression is related to her compensable back injury of (date of injury). The hearing officer determined in accordance with the report of the Texas Workers' Compensation Commission (Commission) appointed designated doctor that the claimant reached MMI on June 26, 1992, with a zero percent IR; that the claimant did not have disability after this date entitling her to TIBS; and that the claimant's psychological condition and need for treatment were not compensable under the 1989 Act because neither "naturally flow" from the claimant's compensable back injury. The claimant appeals these findings and conclusions of the hearing officer asserting prejudice in the admission of certain incomplete medical records and contending that the evidence established that her depression was caused by her (date of injury), injury. The respondent (carrier) replies that the hearing officer's decision is supported by the evidence and concedes that certain medical records, mistakenly represented by its attorney to be complete, were not. Carrier attached the remaining records to the response to claimant's appeal and avers that consideration of the additional records would not have changed the outcome of the case. The carrier suggests that the appropriate remedy for any error in this regard is either a remand to the hearing officer to consider this evidence or a review of the evidence by the Appeals Panel.

DECISION

The decision and order of the hearing officer are affirmed.

The parties agreed that the claimant injured her back in the course and scope of her employment at (employer) on (date of injury), when she picked up two five-gallon cans of pizza sauce to carry to the refrigerator. She now complains that she is in chronic severe pain and suffers from memory loss. She was first seen in an emergency room the next morning. On March 23, 1991, (Dr. A), her treating physician, gave a preliminary diagnosis of acute lumbar myositis which he confirmed on her last visit of October 28, 1991. Other medical records of Dr. A show that on April 12 and 22, 1991, he prescribed Triavil, which was described at the hearing as anti-depressant medication. On referral from (Dr. AT) found on April 25, 1991, low back pain with radiation to the right side, moderate restriction of the lumbar spine and no sensory deficits. An MRI of the lumbar spine taken on April 30, 1991, was negative. On further referral from Dr. A on May 13, 1991, (Dr. AV) diagnosed acute lumbar strain/sprain.

In December 1991 the claimant was diagnosed with breast cancer and a radical

mastectomy was performed at the (Center) on February 5, 1992. Follow-on testing showed the cancer had not spread and the claimant does not attribute her current depression to the cancer or its treatment. A psychosocial assessment conducted at the Center in January 1992 showed that the claimant, in addition to understanding her medical condition, expressed both financial and alcohol abuse problems. She stated she began drinking again[1] after her accident at the employer's. As a result of the accident, she said she lost her job and her apartment and was living on TIBS and food stamps. She refused to return to a formal alcohol detoxification program and wanted a prescription for librium to assist her self-help detoxification.

Records of the (Center) reflect that on February 7, 1992, (three days after the surgery), she complained that she had no place of her own to stay, no job and no money and that she was moving in with a friend. According to these records, she:

> became very upset after looking at the site of her surgery; was a painful and shocking experience to her body self-image. She also expressed her fears about the impact it could have in her relationship with her [boy] friend. Due to her high anxiety the doctor was called in and medication was administered to relax her.

A later report of March 2, 1992, reflects that the claimant was tearful and upset because of no stable housing arrangements. Her boyfriend put her out of his apartment. She was staying with various friends and had not gotten into a detoxification program. Her workers' compensation benefits were to be stopped soon and she could no longer get food stamps because she did not have a permanent address.

The claimant was seen in the psychiatry section of the department of neuro-oncology at the Center from June 1992 until September 1993, where she was diagnosed with major depression. According to (Dr. V), the Acting Chief of the Psychiatry Section, this depression was "likely of multifactorial etiology. While the diagnosis of breast cancer was a complicating stressor, it was certainly not the cause of [claimant's] affective disorder."

On February 18, 1992, the claimant was seen at carrier's request by (Dr. M) who found no objective evidence of lumbar pathology. He recognized that her recent mastectomy "complicated" his evaluation, but "[f]rom a strictly Orthopedic point of view," assigned a zero percent IR and a date of MMI of February 18, 1992.

On June 26, 1992, (Dr. P), the Commission selected designated doctor, examined the claimant and assigned a zero percent IR with a date of MMI of June 26, 1992. He noted that the claimant had a mastectomy, but there was "no evident metastatic involvement, but surely that must be considered as regards a possibility for the ongoing symptoms" of chronic low back pain. He found probable degenerative disc disease at the

[1]The claimant admitted to long-standing alcohol abuse.

L4-5 level and believed the claimant "has simply sustained a modest soft tissue injury superimposed on the pre-existing [degenerative] condition." Pursuant to a request from the hearing officer on September 29, 1993, Dr. P reviewed a June 25, 1993, lumbar myelogram not previously available to him which disclosed "[w]idened anterior extradural space at the L5-S1 level" and a CT scan of the lumbar spine of the same date which disclosed mild bulges at the L3-4, L4-5 and L5-S1 levels without focal herniations and mild epidural lipomatosis at the L5-S1 level. He also reviewed a report of July 15, 1993, by (Dr. G) on referral from (Dr. H), the claimant's current treating physician. Dr. G stated that the claimant describes her lower back pain as severe, unremitting, chronic and aching 24 hours a day, seven days a week. She also reported numbness in her lower extremities. According to Dr. G, the claimant was upset during his examination because she cannot afford her own apartment, no longer receives workers' compensation benefits and "does not know what she is going to do with the rest of her life." His diagnoses included myofascial pain syndrome, lumbar and radicular pain, degenerative disc disease at L4-L5, depression and chronic pain syndrome. Dr. G, in a letter of August 27, 1993, also reviewed by Dr. P, described the relation between depression and chronic pain saying the former frequently accompanies the latter and that each may be the cause of the other. Dr. H opined in a letter of August 24, 1993, that it is "not uncommon for patients with chronic pain to be depressed, and that claimant's depression is one of the sequalae [sic] of her injury and impacts upon her recovery." After reviewing this additional information, Dr. P confirmed his previous assessment of MMI and assignment of IR. As to the claimant's "major depressive syndrome," Dr. P observed that the claimant has a multiplicity of medical problems "each of which may be contributing to a degree to the depressive state. How much might be contributing to this accident, however, cannot be meaningfully quantified."

On March 11, 1993, Dr. H, in a TWCC-69, determined that the claimant reached MMI on March 11, 1993, with a five percent IR. The IR was based on a specific disorder of the lumbar spine, specifically an un-operated injury and pain associated with none-to-minimal degenerative changes of the lumbar spine.[2] A report of October 14, 1992, which presumably accompanied this TWCC-69, refers to lumbar disc degeneration and states:

> The patient is insincere when she presents her symptoms. She also seems depressed about her situation.
>
> I [Dr. H] think it is extremely important in this patient that she learn to take control of her pain rather than having the pain control her. She can do this by recognizing the situation that caused her problems, and either avoiding them or wearing the back brace and the TENS unit.

[2]We note that Dr. H relied on Table 53 for this IR. However, the AMA Guides to the Evaluation of Permanent Impairment, 3d edition, 2d printing, February 1989, mandated by Section 408.124 of the 1989 Act for assigning an IR includes this information in Table 49. There was no evidence that the use of the correct table would have produced the same result. *See* Texas Workers' Compensation Commission Appeal No. 93875, decided November 15, 1993.

Claimant also introduced into evidence a medical journal article that points out a "close relation between chronic pain and depression."

Based on this evidence, the hearing officer determined that the correct IR and date of MMI were zero percent and June 26, 1992, as found by Dr. P, the designated doctor in this case, and that the great weight of the other medical evidence was not to the contrary. The hearing officer further found that the claimant's psychological condition (depression) did not "flow" from the (date of injury), compensable back injury and that the carrier was not liable for TIBS after the date of MMI as found by the hearing officer.

The claimant's first assertion of error in this decision is that the hearing officer did not consider all her medical records from (Dr. C), a psychiatrist at the (Center), and that had she done so, it "could have made" a difference. It is not clear how or when the claimant first discovered that, contrary to the affirmative representations of the carrier's attorney when these records were introduced into evidence, they were not complete. In any case, at the hearing, claimant objected to the introduction of this evidence, not because of incompleteness, but because it also contained records dealing with her course of treatment for her cancer. She considered these portions personal with no bearing on her psychological condition. The hearing officer overruled the objection and admitted this evidence as Carrier's Exhibit No. 5 under the assumption that it was complete.

The Appeals Panel does not consider objections and issues not first raised at the hearing. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992; Texas Workers' Compensation Commission Appeal No. 93103, decided March 22, 1993. Similarly, the Appeals Panel is limited in its review to the record established at the hearing and will not consider new evidence presented for the first time on appeal. Section 410.203(a). If new evidence is presented that "would probably produce a different result" if considered by the hearing officer, the case will be remanded. Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993.

Despite the affirmative representation by the carrier's attorney at the hearing that the medical records of Dr. C were complete, the claimant was responsible to review what was offered and make all appropriate objections to the evidence at the hearing. The records were of her treatment. It is reasonable to expect that she knew or should have known of their completeness at the hearing. Absent fraudulent misrepresentations as to the nature or completeness of the evidence, which we do not find in this case, the claimant's objection to these records on a basis not raised at the hearing will not now be heard for the first time on appeal. We have, nonetheless reviewed that portion of the records not introduced to determine if their admission would have likely produced a different result. These records consist almost entirely of medical data dealing with the claimant's course of treatment for cancer, and which is specifically the type of information she objected to at the hearing. In addition, approximately three pages record entries from the (Center) and are consistent in tenor with those already introduced and discussed above. Also included are approximately six pages of psychiatric assessments by Dr. C, which recount the claimant's depression and anxiety because of her living conditions, her

loss of workers' compensation benefits, lack of a job, alcoholism, poor self-image, and her relationships with others. Dr. C's first assessment was on June 23, 1992, the last on April 20, 1993. This evidence, in our opinion, is cumulative of other evidence that points to a "multifaceted etiology" of her depression. In any event, a "Current Mental Status Examination" by Dr. C as of September 10, 1992, was admitted into evidence. This reasonably summarized the other non-admitted records of Dr. C and restates his diagnosis of "major depression." Under these circumstances, we conclude that the failure of the hearing officer to consider this evidence, had there been timely objection by the claimant to its partial admission, would not have been reversible error.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011 defines injury to include "damage or harm to the physical structure of the body and a disease . . . naturally resulting from the damage or harm." The Appeals Panel has recognized that a compensable injury originating in physical trauma can extend to and include post- traumatic stress and chronic depression disorders. *See* Texas Workers' Compensation Commission Appeal No. 93100, decided March 25, 1993. However, whether a psychological condition results from the original injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993. The hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision on a sufficiency of the evidence challenge we will reverse only if the decision is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

In this case, the hearing officer resolved against the claimant the issue of whether her (date of injury), encompassed her depression. The evidence about the cause of the claimant's depression was conflicting. Several sources, either singly or in combination, were offered as possible causes of her depression. These included termination of her workers' compensation benefits, loss of her job, loss of her apartment, her cancer treatment, lack of self esteem, and alcohol abuse as well as her back injury. Claimant contends in her appeal that her evidence that Dr. A prescribed anti-depressant medication before her cancer diagnosis and in connection with his treatment of her back problem establishes the causal connection between her depression and the back injury. We do not

agree. This was only one aspect of the evidence considered by the hearing officer. We cannot say that the determination of the hearing officer that the claimant's psychological condition was not caused by her compensable back injury is subject to reversal or without sufficient evidence in the record.

Sections 408.122(b) and 408.125(e) provide that where a designated doctor is chosen by the Commission, the report of that doctor shall have presumptive weight and the Commission shall base its determination of a date of MMI and correct IR on that report unless the great weight of the other medical evidence is to the contrary. This "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Whether the great weight of the other medical evidence is contrary to the opinion of the designated doctor is normally a factual determination, Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993, and must be based on medical, not lay evidence. Texas Workers' Compensation Commission Appeal No. 93442, decided July 9, 1993.

In this case only Dr. P, Dr. M, and Dr. H gave opinions on an IR and date of MMI. As to MMI, the respective dates given were the dates of the various examinations. As to IR, the different rating assigned by Dr. H was based on her judgment that the claimant's disc degeneration warranted a five percent IR, which is in the category of none-to-minimal degenerative change. Dr. M and Dr. P disagreed. Dr. M, in a TWCC-69 and one page attached report concluded that from an orthopedic perspective the claimant "had no objective evidence of significant pathology" and assigned a zero percent IR. Dr. P, though he recognized the probability of some disc degeneration, concluded that the claimant had only a modest soft tissue injury "superimposed on the pre-existing condition." In a comprehensive report, supplemented by his review of additional diagnostic test results, he gave a reasoned analysis to support his determination based on no evidence of herniation or impingement of the neural elements.[3] Our review of this evidence compels the conclusion that Dr. H's medical opinion on either IR or date of MMI does not constitute the great weight of the other medical evidence contrary to Dr. P's certification. For this reason, we conclude that the hearing officer properly accorded presumptive weight to the designated doctor's report and thus his determination that the claimant's correct IR is zero percent and that she reached MMI on June 26, 1992, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.[4] Cain v. Bain, *supra*.

The decision and order of the hearing officer are affirmed.

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[3]Because the claimant's depression was not found by the hearing officer to be part of her injury, no IR needed to be assigned for it. *Compare* Texas Workers' Compensation Commission Appeal No. 93100, decided March 25, 1993.

[4]Because we affirm the decision of the hearing officer, the MMI occurred on June 26, 1992, the issue of entitlement to TIBS after this date is moot. Section 408.101(a).

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge