

APPEAL NO. 950003
FILED FEBRUARY 13, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 17, 1994, a contested case hearing (CCH) was. The issue as restated by the hearing officer and agreed upon by the parties was: "1. Does the Claimant have disability after April 13, 1994 as a result of her chemical exposure injury?" No evidence was taken at the CCH and, for reasons discussed below, the hearing officer dismissed claimant's (appellant) claim and advised the parties that he would order that the carrier (respondent) is no longer required to pay benefits. In the discussion portion of his decision the hearing officer stated:

At the [CCH], the parties were told the claim would be dismissed. After review of the record it became clear that a dismissal of the [CCH] would not give the Carrier relief. The Claimant continues to receive Temporary Income Benefits [TIBS]. The Carrier has continued these benefits pending the outcome of the [CCH.] Equity dictates the Carrier is entitled to relief.

Accordingly, the hearing officer determined that claimant did not have disability after April 13, 1994, due to her compensable injury and that carrier does not owe income benefits after April 13, 1994. The hearing officer determined, in his decision and order, that claimant remains entitled to medical benefits related to her compensable injury.

Claimant appealed, reiterating the argument that she made to the hearing officer that she refused to see Dr. R, the carrier's choice of required medical examination (RME) doctor; that she had "good reason" not to see Dr. R; and that she has been "denied due process." Carrier responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are reversed and we remand for the hearing officer to develop evidence on the issue reported from the benefit review conference (BRC) and then reissue a decision.

As previously indicated, no evidence was taken at the CCH. Although the hearing officer makes various factual determinations, these appear to be based on the BRC report which was admitted as a hearing officer's exhibit. However, the Appeals Panel has held that the BRC report is not evidence of recited facts contained therein and should not be considered as evidence by the hearing officer. Sections 410.026(d) and 410.027(b). Texas Workers' Compensation Commission Appeal No. 94063, decided February 22, 1994; Texas Workers' Compensation Commission Appeal No. 941698, decided February 2, 1995.

A critical issue in this case is the claimant's refusal to be examined by carrier's RME doctor. This issue was addressed after the hearing officer's introductory remarks. Claimant made it abundantly clear that she had no intention of being examined by Dr. R or complying with the hearing officer's order to attend such an examination. Section 408.004 provides that the Texas Workers' Compensation Commission (Commission) may require an employee to submit to medical examinations to resolve medical issues of impairment, maximum medical improvement (MMI) and similar issues. Carrier, under the cited section, is required to pay for the examination and reasonable incidental expenses. The employee is entitled to have a doctor of the employee's choice present at the RME examination and carrier is required to pay that doctor's fee. If these requirements are met and, based on carrier's representations at the CCH it appears they were (although no request order and/or other documentary evidence on this point was offered or admitted), under Section 408.004(f) "an employee who, without good cause, fails or refuses to appear at the time scheduled for an examination . . . commits . . . a Class D administrative violation." The hearing officer found claimant did not have good cause for refusing to be examined by the RME doctor. That determination appears to be supported by the evidence but would not be binding on an Administrative Procedures Act hearing officer. However, the penalty for refusing to appear for an RME examination is a Class D administrative violation, not dismissal of the claim.

The hearing officer, as he discussed at the CCH, had the option of taking evidence and making factual determinations which would have excused carrier from paying further income benefits. However, the hearing officer did not take evidence and told claimant that he would dismiss her claim if she did not attend the RME examination. We do not disagree with the hearing officer's statement of evidence which recites:

The rationale, the logic, the Law, and the Rules were repeatedly explained to the Claimant. She continued to refuse to see the Carrier's doctor. The Claimant stated she did not agree with the Rules, and would not obey any order to see the Carrier's doctor. The Ombudsman and the Claimant's mother could not change the Claimant's mind. She remained adamant.

The hearing officer then stated he was dismissing the case and advised the parties of their appellate rights. Claimant stated she would rather have her case dismissed than be examined by Dr. R. Subsequently, the hearing officer made certain factual determinations which included:

FINDINGS OF FACT

- 5.The Claimant was involved in a serious automobile accident on April 13, 1994.
- 6.The Carrier properly requested and received a Commission Order that the Claimant be examined by a doctor of their choice.

8.The Claimant's inability to work after April 13, 1994, is caused by the auto accident of April 13, 1994.

CONCLUSIONS OF LAW

3.The Claimant does not have disability after April 13, 1994, due to a chemical exposure injury.

4.Income benefits paid after April 13, 1994, are over payments [sic] made by the Carrier.

We would observe that there is no evidentiary bases for those determinations. No evidence was taken and claimant only referred to her pulmonary condition at the CCH. Although claimant made reference to a statement from her friend at the CCH, that statement was not offered into evidence, and the hearing officer refused to consider it as a basis for claimant's alleged "good reason" for refusing to see Dr. R.

Claimant, with her appeal, attaches her friend's statement, certain medical reports and a letter from the carrier advising that claimant's TIBS were being suspended effective upon the receipt of the hearing officer's decision. Carrier objects to those attachments as exhibits which had not been timely exchanged or properly presented at the CCH. The Appeals Panel normally considers only the record developed at the CCH, the request for review and response thereto (Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992, and others) and thus have declined to consider new evidence on appeal. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In the present case, claimant sought to have her friend's statement considered as good cause for failing to attend the RME examination, but the hearing officer refused it and no formal offer or ruling on the matter was had. Claimant never had an opportunity to offer medical reports at the proceeding on November 17, 1994. We certainly believe medical evidence regarding claimant's condition was probative on the issue of whether claimant's disability after April 13, 1994, was due to a chemical exposure injury.

Carrier's response emphasizes that claimant "repeatedly showed contempt" for the hearing officer's order that claimant be examined by the carrier's choice of doctors. That may be so; however, the penalty for refusing an examination by carrier's RME doctor is a Class D administrative violation pursuant to Section 408.004(f). Although carrier generally cites "Section 410.151 *et. seq.* [and] Rule 142.2" as authority that the hearing officer

"properly entered his decision," we find nothing in the Act or Commission rules which allow a hearing officer to make factual determinations that have no evidentiary basis. While we are mindful that the workers' compensation dispute resolution process has very relaxed rules of evidence, some evidence is necessary to support factual determinations regarding claimant's inability to work, and her physical or medical condition before and after an alleged (no evidence on this point) automobile accident of April 13, 1994. We understand the reluctance of carrier to proceed on a sole cause defense where claimant has refused to be examined by the RME doctor; however, some evidence should have been introduced to support the hearing officer's factual determinations.

Finally, we comment on the hearing officer's conclusions of law that "income benefits paid after April 13, 1994 are over payments [sic] made by the carrier." Overpayment and possible recoupment, fine points of law, were not issues reported from the BRC and were not brought up, much less agreed upon by the parties, at the CCH. We reaffirm the Appeals Panel's general statement, articulated in past decisions, that the hearing officer should refrain from creating issues not joined by the parties. Texas Workers' Compensation Commission Appeal No. 92071, decided April 9, 1992; Texas Workers' Compensation Commission Appeal No. 94213, decided April 5, 1994. Consequently, that conclusion of law is reversed as not only not being supported by the evidence, but for the reason that no issue of overpayment had been agreed upon or raised by the parties.

Accordingly, the hearing officer's decision and order are reversed and the case is remanded for the hearing officer to receive evidence upon which he can made factual determinations and conclusions of law on the issue reported out of the BRC.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge