

APPEAL NO. 950051
FILED FEBRUARY 22, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 30, 1994, a hearing was held. The hearing officer determined that appellant's (claimant) low back condition was not caused by the injury to his shoulder of _____, and that disability ended on January 7, 1994, so that no disability stemmed from the low back condition. Claimant asserts that the hearing officer erred in not finding that the back condition was compensable, in admitting a document of Dr. M to which he objected, and in not finding disability resulting from the low back condition. Respondent (carrier) replies that the decision should be affirmed.

DECISION

We affirm.

Claimant had worked for (employer) a short time when he hurt his shoulder lifting a metal plate on _____. He was sent to Dr. H by the employer. Notice is not an issue in this case. On November 23, 1992, claimant filed a claim for injury listing the part of the body affected as "left shoulder;" for the nature of the injury, the word "shoulder" was also written. Neither Dr. H, nor Dr. K, to whom Dr. H referred claimant, note in any record in evidence that claimant complained of low back pain.

Dr. M reported in January 1993 that claimant presented to him at that time with "acute" radiculopathy at L5-S1 and stated that claimant had this for "the past two to three weeks." While claimant states in his appeal that medical evidence shows that the lumbar problem was caused by the injury to the shoulder in September 1992, Dr. M stated: in January 1994 that there was no relation between the shoulder and back condition; in April 1994 that upon careful questioning claimant indicated he had both shoulder and back injuries together--Dr. M then said that within reasonable medical probability claimant incurred both injuries at the same time; in May 1994 that he is really not sure about the cause, citing his January 1994 statement and his April 1994 statement.

Claimant testified that he mentioned some back pain to Dr. H and Dr. K but that his back did not really trouble him for about one and one-half months. Dr. Ma, who claimant also saw about his low back, said in a letter in May 1994 that it is possible that Dr. K only saw claimant sitting down so did not see his gait (which would have indicated a condition other than the shoulder); he explained the lack of an entry of claimant's complaint of his low back by stating that it was possible for Dr. K to be focusing on the shoulder. In addition, Dr. I who examined claimant for carrier provided an impairment rating for the low back, indicating that it was part of the compensable injury.

Carrier called attention to the lack of any physician's entry as to low back pain prior to Dr. M, the conflicts in Dr. M's opinions as to cause, and the opinion of Dr. O, who stated upon examining claimant in June 1994 that in his opinion the back injury did not occur on _____; he said that it would be unusual to have no complaints of low back pain sooner given claimant's condition. (An MRI showed an extruded disc at L5-S1.)

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. The hearing officer could weigh claimant's assertion of some pain almost immediately and significant pain after one and one-half months in his low back against claimant's own claim filed almost three months after the event that only listed the shoulder and find, as he did, that claimant felt "no sudden pain in his low back at the time he injured his shoulder." He could consider Dr. M's January 1993 entry that claimant had an acute low back problem of short duration as not indicating a problem since September 1992. Similarly, he could consider Dr. M's statements as equivocal as to causation when taken together. Whether or not Dr. O's opinion was given weight, Dr. Ma's statement could be viewed as speculation considering why Dr. K did not record any back complaint that claimant asserted he made.

Claimant also objects to the admission of Dr. M's January 1994 statement that found no relation between the shoulder and back conditions, saying that he did not receive a copy until the day before the hearing. Carrier asserted in response to the objection at the hearing that a complete copy of Dr. M's records had been provided to another lawyer in the same firm as claimant's counsel at the benefit review conference (BRC). With carrier adamant that a copy of the disputed document had been provided at the BRC, and claimant's counsel at the hearing unable to say what occurred at the BRC, the hearing officer ruled that the document had been timely exchanged and was admissible. As fact finder, the hearing officer's determination in this regard was reasonable and not an abuse of discretion. The evidence of record was admitted without error, and such evidence is sufficient to support the determination that the low back condition is not causally related to the _____, shoulder injury.

The hearing officer noted that claimant had been found to be at maximum medical improvement (MMI) on January 7, 1994, and that is why the determination as to disability is worded in regard to the time period after January 7, 1994. Prior to that time temporary income benefits (TIBS) were said to have been paid for claimant's inability to work based on the shoulder injury. With no compensable injury to the low back, the determination of no disability is sufficiently supported by the evidence. See Section 401.011(16) which defines disability as being based upon the compensable injury. We note that a claimant could have disability from the shoulder injury after MMI was reached, but would be entitled to no TIBS. See Section 408.102. The hearing officer correctly stated in his decision and order that claimant is entitled to no benefits for the claimed low back injury.

Finding that the decision and order of the hearing officer found at the end of his opinion is sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge