APPEAL NO. 980049

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 1, 1997, with hearing officer. The issues at the CCH were whether appellant (claimant) aggravated his preexisting avascular necrosis of the left hip in the course and scope of employment on _____, and whether claimant had disability from May 24, 1997, through the date of the CCH. The hearing officer determined that claimant had preexisting avascular necrosis, that claimant did not aggravate the avascular necrosis "such that the condition became permanently worse," and that claimant did not have disability. On appeal, claimant contends the hearing officer's decision was not fair because he improperly accepted the representation of the respondent (carrier) that he had preexisting avascular necrosis when there was no evidence to prove this alleged preexisting condition, that his attorney at the CCH should have objected to such a representation, and that the hearing officer erred in determining that he did not have a compensable injury and disability. Carrier responds that we should affirm the hearing officer's determination.

DECISION

We affirm.

Claimant contends that the hearing officer erred in determining that he did not sustain a compensable injury. He asserts that he sustained an avascular necrosis injury but that he never claimed he had an aggravation injury and that no doctor said he had preexisting avascular necrosis.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ).

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he was working for Company (employer) on _____, doing demolition work, when he was injured. He said he was breaking up sheetrock and carrying it out that day, that his left hip began to hurt suddenly, that he was taken to the hospital, that he was told that he has had "this" condition for "some time" and that it was caused by lifting, and that he was told he may need a hip replacement. Claimant indicated that he had sprained his leg shortly before his _____, date of injury, but said that this was a different injury, that the pain was in his ankle, that he had done it lifting boxes, and that the pain he felt on _____, was more intense and in a different area. Claimant said he had never had hip problems before _____.

A June 18, 1997, MRI report signed by (Dr. ST) states under "impression":

1. Extensive focus of avascular necrosis involving left femoral head, without MR evidence of collapse of femoral head. Extensive reactive marrow edema is present throughout the left femoral neck . . . .

2. Milder changes of avascular necrosis involve right femoral head.

In a November 26, 1997, letter, (Dr. RE) stated that claimant has osteonecrosis in his left hip, that "the patient was asymptomatic prior to his current employment which requires him to do heavy lifting," and that "the timing of his pain and collapse of the femoral head strongly suggest that his osteonecrosis is a result of these lifting activities."[1]

Regarding the hearing officer's determination that claimant's avascular necrosis is a preexisting condition, at the CCH, claimant's attorney specifically stated that claimant's avascular necrosis was preexisting and claimant did not state anything to the contrary. The benefit review conference (BRC) report reflects that one issue at the BRC was whether claimant aggravated his "preexisting" avascular necrosis. Claimant does not contend that he objected to the issue as stated in the BRC report and the record does not reflect that claimant made such an objection. Claimant also did not object to the same issue at the CCH, which also referred to "preexisting" avascular necrosis. Further, claimant said that (Dr. KL) told him that "this" is a "condition that [he had] had for some time" and that it had not been symptomatic. Dr. KL stated in a September 29, 1997, letter, that claimant had preexisting avascular necrosis, that it had not been symptomatic, that claimant took a job that stressed his hip, that his new exposure to lifting stressed the blood vessels to the hip and caused him to be symptomatic, and that his job injury exacerbated his preexisting condition "to the point where it became symptomatic."

We cannot say that the hearing officer erred in stating that claimant had preexisting avascular necrosis because this was undisputed and was asserted by both parties at the CCH and because there was sufficient medical evidence to support a finding in that regard.

[1]The decision and order indicates that the hearing officer admitted this November 26, 1997, letter into evidence.

We affirm the hearing officer's determination that claimant did not sustain a compensable injury. Although there was evidence supporting claimant's contention on appeal that his lifting at work caused the avascular necrosis, the hearing officer was the sole judge of the credibility of the medical evidence. The hearing officer apparently did not find the medical evidence supporting this theory of recovery to be credible. The hearing officer found that claimant's avascular necrosis was a preexisting condition, as set forth above, and there is medical evidence supporting this determination. We will not substitute our judgment for the hearing officer's regarding credibility determinations. We conclude that his determination that claimant did not sustain a compensable injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We note that claimant does not contend on appeal that he sustained a compensable injury by aggravating the preexisting avascular necrosis. Although claimant did make that contention at the CCH, on appeal he denies that the avascular necrosis was a preexisting condition. Therefore, even though claimant contends he has a compensable injury, we will not address whether claimant has a compensable *aggravation* injury, because that is not claimant's contention on appeal.

Claimant contends that the hearing officer erred in determining that he did not have disability. Because there was no compensable injury, there can be no disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16).

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Christopher L. Rhodes
Appeals Judge