APPEAL NO. 980290
FILED MARCH 19, 1998

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (City 1), Texas, on January 20, 1998, with (hearing officer) presiding as hearing officer. She determined the respondent/cross appellant (carrier) waived the right to contest the compensability of the appellant/cross-respondent's (claimant) depression and fibromyalgia by not contesting the compensability of either condition within 60 days of being notified of them; that medical records do not show by reasonable medical probability that the claimant suffers from fibromyalgia or depression as a result of the compensable injury of _____; that the claimant's compensable injury does not extend to and include depression and fibromyalgia; that the claimant was not unable to work between July 20, 1994, and May 25, 1995, as a result of her compensable injury or as the result of fibromyalgia or depression; and that the claimant did not have disability between those dates. The claimant appealed, stating that she disagreed with certain findings of fact, conclusions of law, and other specific matters regarding the decision of the hearing officer. She stated her disagreement with findings of fact that medical records do not show by reasonable medical probability that she suffers from fibromyalgia or depression as a result of the compensable injury; that she worked and earned $184.70 per month between July 20, 1994, and May 25, 1995; and that medical records do not show that the claimant was unable to work between those dates as a result of her compensable injury or as the result of fibromyalgia or depression. She asked the Appeals Panel to consider her credibility, stating that she was in an extremely stressful situation because of a last-minute change in the ombudsman assisting her. The claimant requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in her favor. The carrier filed a document that is an appeal and a response. It appealed the determination that it waived the right to contest compensability of the claimant's fibromyalgia and depression and requested that the Appeals Panel reverse that part of the decision of the hearing officer and render a decision that it did not waive the right to contest the compensability of the claimant's fibromyalgia and depression. In its response, the carrier urged that the evidence is sufficient to support the findings of fact that the claimant appealed, stated that the claimant did not appeal any conclusions of law, urged that they should become final, and requested that the findings of fact and conclusions of law concerning extent of injury and disability be affirmed.

DECISION

We affirm in part and reverse and render in part.

We first address the requests for review filed by the parties. In her request for review, the claimant said that she disagreed with certain findings of facts, conclusions of law, and other specific matters and states why she disagrees with three findings of fact. Reading the entire request for review indicates that it is sufficient to be an appeal of the

conclusions of law that are based upon the three findings of fact set forth earlier in this decision.

In its request for review, the carrier states that it received the decision of the hearing officer on January 30, 1998. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was distributed to the parties on January 29, 1998, with a cover letter dated that same day. Commission records indicate that the carrier, through its (City 2) representative, acknowledged receipt of the decision on January 29, 1998. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 156.1 (Rule 156.1) states that notice from the Commission to a carrier's (City 2) representative is notice to the carrier. Also, receipt by the party, not receipt by the attorney representing the party, controls. Texas Workers' Compensation Commission Appeal No. 941695, decided January 27, 1995. Pursuant to Section 410.202 and Rule 143.3(c) a request for review is timely if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision. In this instance, the 15th day after the date of receipt was Friday, February 13, 1998. The carrier's request for review is dated February 17, 1998; was delivered to the Commission on that day; and is untimely to be considered as an appeal. It was timely filed as a response to the request for review filed by the claimant.

The Decision and Order of the hearing officer contains a summary of the evidence and a detailed summary will not be repeated in this decision. The claimant was diagnosed with fibromyalgia and medical reports on whether it was a result of the compensable injury were conflicting. Dr. B, a rheumatologist, was selected by the Commission as a neutral doctor to render an opinion whether the claimant's fibromyalgia was related to her compensable injury. In a letter dated November 30, 1994, Dr. B wrote:

> It should be emphasized that current medical knowledge with regard to the etiology and pathogenesis of fibromyalgia is extremely limited. It should be emphasized that fibromyalgia is <u>not</u> due to a patho-anatomic alteration as a tissue or body part, and therefore is not a direct physical result of her accident or injury. Fibromyalgia rather appears to be a condition with a neuro-biochemical basis, and is closely associated with psychological and/or emotional stress. It should be noted that her previous medical records clearly reflect a number of psychological stresses occurring and physicians have previously both identified this as well as recommended psychiatric and/or psychologic counseling.
>
> The issue of causation is an extremely difficult one to address, as the causative factors for fibromyalgia are not known or established in the medical and scientific literature. Given that this represents a systemic, neuro-biochemical condition and is not due to a patho-anatomic alteration in tissue, I do not believe it was a physical or direct result of the trauma, accident or injury that she sustained.

* * * *

> However, it should be noted and appreciated that fibromyalgia is certainly associated with chronic widespread pain and that the treatment she has received for these subject symptoms appear both appropriate and indicated.

The hearing officer is the trier of fact and is the sole judge of the relevance and materially of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer judges the credibility of witnesses and resolves conflicts and inconsistencies in the evidence. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. Where causation is not in an area of common knowledge or experience, expert medical evidence is required to establish by reasonable medical probability that the injury caused the claimed condition. Texas Workers' Compensation Commission Appeal No. 92202, decided July 6, 1992. In a case such as the one before us where both parties presented evidence on the disputed issue on whether the compensable injury includes fibromyalgia, the hearing officer must look to all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). That a different determination could have been made based upon the same evidence is not a sufficient basis to overturn a determination of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not in this case, that the hearing officer's determination that medical records do not show by a reasonable medical probability that the claimant suffers from fibromyalgia as a result of the compensable injury is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination of the hearing officer. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Medical records indicate that the claimant had depression prior to the compensable injury, that she experienced marked depression in reaction to the chronic pain from the compensable injury and life changes that resulted from the accident, and that she had other stress factors. The issue of whether a compensable injury includes depression is a factual question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 961122, decided July 26, 1996. In Texas Workers' Compensation Commission Appeal No. 951754, decided December 8, 1995, the Appeals Panel wrote:

> Because the claimed depression injury in this case is in the nature of an aggravation of a preexisting condition, the necessary expert evidence must establish to a reasonable medical probability not only the causal connection between the reaction to the rabies vaccine and the depression episode, but also that the claimed compensable injury "is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not completely resolved [citation omitted], but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury. [Citations omitted]."

That a different determination could have been made based upon the same evidence is not a sufficient basis to overturn a determination of a hearing officer. Appeal No. 94466, *supra*. The hearing officer's determination that the medical records do not show by a reasonable medical probability that the claimant suffers from depression as a result of the compensable injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Pool, *supra*; King, *supra.*

The hearing officer determined that the carrier waived the right to contest compensability of the claimant's depression and fibromyalgia by not contesting compensability of either condition within 60 days of being notified of the problems. The carrier did not timely appeal that determination and it has become final under the provisions of Section 410.169. We were required to review the record of the CCH. Had the carrier timely appealed that determination, the evidence is sufficient to support it. In Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994, the Appeals Panel held that if the compensability of a claimed injury is not timely contested, the injury becomes a compensable injury as a matter of law. We reverse the hearing officer's conclusion of law that the claimant's compensable injury of _____, does not extend to and include depression and fibromyalgia and render a decision that the claimant's compensable injury does extend to and include depression and fibromyalgia.

The hearing officer made a finding of fact that the medical records do not show that the claimant was unable to work between July 20, 1994, and May 25, 1995, as a result of her compensable injury or as the result of depression or fibromyalgia. The finding of fact is broad enough to cover the compensable injury as it is after we reversed the conclusion of law and rendered a decision that the compensable injury extends to

and includes depression and fibromyalgia. In the Statement of Evidence in her Decision and Order, the hearing officer wrote:

> Turning to the question of disability, I see nothing in the records to support the Claimant's assertion that she was unable to work between July 20, 1994, and May 25, 1995. Moreover, she testified that she did some bookkeeping work for her husband's business during that period and was paid $184.70 a month. I did not find the Claimant to be a credible witness whatsoever.

The hearing officer concluded that the claimant did not have disability between the dates of July 20, 1994, and May 25, 1995. At the CCH, the claimant testified that she did bank statements for her husband's business. In Texas Workers' Compensation Commission Appeal No. 94874, decided August 8, 1994, the Appeals Panel wrote that from the decision of the hearing officer it appeared that he believed that medical evidence was required to prove disability and that disability can be established by a claimant's testimony alone, even if contradicted by medical evidence. In the case before us, the Decision and Order of the hearing officer does not indicate that the hearing officer required medical evidence to establish disability and the hearing officer stated that she did not find the claimant to be a credible witness. It may have been preferable for the hearing officer to have made an additional finding of fact on disability; however, the failure to do so did not result in reversible error. The hearing officer's determination that the claimant did not have disability between the dates of July 20, 1994, and May 25, 1995, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Pool, *supra*; King, *supra.*

We affirm the finding of fact that the claimant's depression and fibromyalgia are not a result of her compensable injury. However, the determination that the carrier waived the right to contest the compensability of the claimant's depression and fibromyalgia was not timely appealed and has become final. Therefore, we reverse the conclusion of law that the claimant's compensable injury does not extend to and include depression and fibromyalgia and render a decision that the claimant's compensable injury of _____, extends to and includes depression and fibromyalgia. We affirm the determination that the claimant did not have disability between July 20, 1994, and May 25, 1995.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge