APPEAL NO. 990195

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 20, 1998, a contested case hearing (CCH) was held. In Texas Workers' Compensation Commission Appeal No. 982307, decided November 12, 1998, the Appeals Panel noted that Carrier's Exhibit No. 5, which had been excluded on the basis of lack of timely exchange, was listed in the hearing officer's decision as having been admitted and more importantly, the hearing officer, in her Statement of the Evidence, relied on contradictions in the excluded exhibit in reaching her decision. The Appeals Panel reversed the hearing officer's decision on the basis that she relied on evidence that had been excluded and remanded for the hearing officer to consider the evidence in this case without regard to the excluded recorded statement. The Appeals Panel indicated no further evidentiary hearing on remand was necessary but the hearing officer could, at her discretion, allow additional oral or written argument. The hearing officer apparently believed no further argument was necessary, reconsidered her decision without reference to the excluded statement and again determined that appellant (claimant) did not suffer a compensable back injury on _____ (all dates are 1997 unless otherwise stated) and that claimant did not have disability as defined in Section 401.011(16).

Claimant appealed, again stressing her testimony and Dr. H testimony and reports. Claimant also submits another report dated January 13, 1999, from Dr. H, 22 months after the alleged injury, that claimant had complained of a work-related injury on (alleged date of injury). Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Appeal No. 982307, *supra*, sets out the facts. Briefly, claimant was a 16-year-old high school student who alleged that she injured her back lifting some 50-pound bags of dog food while employed at a food market on _____. Claimant testified her mother called Dr. H who told claimant to stay in bed and rest. Dr. H first saw claimant on (alleged date of injury) and progress notes of that date indicate back pain radiating into claimant's right leg. The notes, generated at that time, do not indicate a history of a work-related injury. Subsequent progress notes of Dr. H all reference back pain but none reference a work-related injury. Dr. H first noted claimant's complaints as being work related in a September 3rd report. Claimant was examined by Dr. F, a Texas Workers' Compensation Commission-appointed RME doctor on September 30th. In a report of that date, Dr. F recited the _____ lifting history and noted that it was unusual for a 16-year-old to have a ruptured disc from "lifting." Dr. F recommended further testing to rule out systemic problems. The recommended testing has not been performed.

Claimant subsequently changed treating doctors to Dr. B, who first saw claimant on November 12th. Dr. B testified telephonically at the CCH and was of the opinion that

claimant's condition correlates with her complaints and the mechanism of the alleged injury. An MRI performed on April 20, 1998, showed the "L5-S1 disc is mildly desiccated with a right-sided disc herniation." In a report dated June 25, 1998, Dr. H stated that claimant has been unable to work from _____ injury to August 20th "at any kind of labor." Claimant was released to "light duty with modified lifting" after August 20th.

The hearing officer's exhibit list shows the transcript of claimant's recorded statement as "not admitted" and the "Statement of Evidence" makes no reference to the excluded statement. Although the hearing officer does not specifically state the reason for her finding that claimant had not sustained a compensable injury, the hearing officer does note that Dr. H's initial notes do not indicate any history of a work-related injury and the first notation of a work-related injury was in a September 3rd report by Dr. H.

Claimant in her appeal attaches another report dated (22 months after the injury) where Dr. H states that his failure to mention the work-related nature of her injury one and one-half years earlier was "secondary to an oversight by me." As we mentioned in Appeal No. 982307, *supra*, we generally do not consider evidence not submitted into the record at the CCH but raised for the first time on appeal. In Appeal No. 982307 we held that another report generated by Dr. H after the CCH did not meet the circumstances which might require a remand and directed the hearing officer to reach her decision based on the record before her at the CCH. Similarly, we do not consider Dr. H's latest report, clearly made in response to the hearing officer's prior holding, to be so material that it would probably produce a different result. In any event, we are unable to remand this case again. *See* Section 410.203(c).

On the merits, Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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 trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer apparently gave greater weight to the report of Dr. F, and the inferences raised by Dr. H's failure to initially mention the work-related nature of claimant's complaints, than to claimant's testimony. Although another fact finder may have drawn different inferences from the evidence, which could have supported a different result, that does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Given our affirmance of the hearing officer's determination that claimant had not sustained a compensable injury, we likewise affirm the finding that claimant did not have disability as the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

Accordingly, the hearing officer's decision and order are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge