APPEAL NO. 990440

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 9, 1999, a hearing was held. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease. The hearing officer did find that the date of injury of the alleged occupational disease was _____, so that claimant's notice to his employer on September 22, 1998, was timely; he also found that claimant's claim was timely filed and that claimant was not barred from pursuing a workers' compensation claim because of an election of remedies, but that claimant has no disability. Claimant asserts that his duties included making fuels which are "known contributors to Airway Lung Disease"; he added that his employment did cause his disability. Respondent (carrier) appealed the determination of date of injury (which affects notice), whether a timely claim was made, and the election of remedies issue; it replied to claimant's appeal.

DECISION

We affirm.

Claimant worked for (employer). He testified that he stopped working for employer on April 13, 1998, because he was sick. He related a history of breathing problems, including asthma diagnosed at least as early as 1987. Claimant stated that the first time a doctor related his breathing problem to his job was in _____, when he received a letter from Dr. M and Dr. S. Claimant agreed that in 1996 he had asthma and that his medical record showed that as he got older his "wheezing" had gotten worse. Claimant also testified that in May 1997, when he sought medical care, he told the doctor, "I said, you know, I think that working in that environment out there and working around that is probably what's making me sick. He said, well, we're going to find out." While that exchange could have been the basis for a determination that the date of injury was in 1997, it did not compel the hearing officer, as fact finder, to reach that conclusion. Had the date of injury been in 1997, then the notice to employer would not have been timely and the claim would not have been timely. Had the date of injury been found to have been in _____, when claimant quit working because of sickness, then the notice to employer would not have been timely, but the claim, found to have been filed in October 1998, would still have been timely.

The question of date of injury is a factual one which the hearing officer makes. Section 410.165 assigns the responsibility of weighing the evidence to the hearing officer. The evidence in a case may provide more than one date which the hearing officer may determine was the date of injury; that is, when the claimant knew or should have known that his injury may be caused by the work. Whether another fact finder may have chosen an earlier date as the date of injury is not a valid basis for overturning the factual determination made by any hearing officer. The date of injury of _____, the determination that notice was timely, and the determination that a claim was timely filed are all sufficiently supported by the evidence.

While carrier says that claimant made an election of remedies because he had been using health insurance to pay for medical care relating to his breathing problems for years, there was no showing that claimant knew the various remedies of the two types of coverage and then made a knowing election. His workers' compensation claim was not barred by an election of remedies.

Claimant relied chiefly on the medical opinion of Dr. M and Dr. S. Dr. M did state in _____ that claimant has "hyperactive airway disease which is most probably caused by his environment, especially the work environment." Dr. S, also in _____, said that claimant has "severe asthma and allergies" which he said can be made more severe when exposed to fumes and chemicals.

Prior to these 1998 opinions, Dr. C in May 1997 noted that claimant's asthmatic bronchitis was resolving; Dr. C noted in July 1997 that Dr. M concurred with the diagnosis for "asthmatic bronchitis, hyperactive airway disease"; on April 13, 1998, when claimant quit working, Dr. C said that claimant had sinusitis and bronchitis; on April 16, 1998, Dr. C diagnosed asthmatic bronchitis. Dr. M in both March and May of 1997 stated that claimant had "post infectious hyperactive airway disease." Dr. M also noted in May 1998 that claimant was working for employer with "exposure to many chemicals"; he diagnosed hyperactive airway disease.

Mr. W testified that he is the employer's manager for safety, environment and health. He said that claimant works in a warehouse for employer that is located in a building in which one of his hygienists is located. He said he knew of no chemical releases in that building since 1996, when he began working at this plant. He added that a warehouseman works with deliveries of valves and other equipment and chemicals that are in containers. He added that this plant has been recognized by OSHA as one of the safer plants in the country. (Claimant testified that he has worked as a warehouseman since 1983, with his primary work being computer work, but added that he did unload trucks at times and from time to time cleans up after spills, but he did not describe any particular spill or state that any particular product or chemical had ever spilled; the only thing he identified by name was "NMP," which he said was on some "slings" which he indicated will cause burns on the skin.) The record contained no testimony about making fuels.

Dr. W, Ph.D in toxicology, testified that he reviewed the records, that no blood work of claimant was done, that no damage from chemical exposure was shown, and that he does not find from the records that claimant has hyperactive airway disease. Carrier also had Dr. Me provide a review of the documents, including medical documents in this case; he reached several conclusions, such as that claimant's condition did not improve after being away from the plant since _____ and that claimant received allergy desensitization shots, in stating that it is "not medically probable" that there is any association between claimant's respiratory condition and his work. He adds further that it is medically probable that ordinary diseases of life, including infections and environmental allergens, have caused his condition.

The hearing officer weighs medical evidence just as he does lay evidence. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997. He gave more weight to the testimony of Mr. W about the environment at the work site and to the medical opinion of Dr. Me, along with the expert opinion of Dr. W, than he did to the opinion of Dr. M. The evidence sufficiently supports his findings and conclusions that say claimant did not show that he has an occupational disease. The Appeals Panel is not a fact finder and does not weigh evidence as the hearing officer does. Only if the hearing officer's factual determinations are found to be against the great weight and preponderance of the evidence will the Appeals Panel overturn a fact finder's determination. In this case, the medical evidence was conflicting and it was for the hearing officer to weigh it as he saw fit. The decision is not against the great weight and preponderance of the evidence and will not be reversed. With no compensable injury, there can be no disability. *See* Section 401.011(16).

Finding that the decision and order are 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:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge