APPEAL NO. 990462

Following a contested case hearing (CCH) held on February 17, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the sole disputed issue by concluding that deceased employee (decedent) did not sustain an injury in the course and scope of his employment on or about _____, that resulted in his death. Appellant (claimant beneficiary) has appealed findings that the etiology of the decedent's underlying illness is unknown and that she failed to prove by a preponderance of the medical evidence that the decedent's underlying illness was a result of inhalation of smoke in the course and scope of his employment. The claimant beneficiary asserts that the hearing officer, in commenting on the absence of evidence of particulate matter in the decedent's lungs, imposed his own medical standard in reaching his conclusion and that the medical evidence was more than sufficient to establish that the decedent's illness and death was caused by smoke inhalation while at work. The respondent (carrier) responded that the evidence amply supported the determination that the etiology of the decedent's fatal illness was undetermined and that the claimant beneficiary failed to meet her burden of proof.

DECISION

Affirmed.

The parties stipulated that the claimant beneficiary is the surviving spouse of the decedent and an "eligible spouse" as defined by Section 408.182(3), and that, if the decedent sustained an injury in the course and scope of his employment on or about _____ (all dates are in 1998 unless otherwise stated), which resulted in his death, the claimant beneficiary is the sole legal beneficiary under the 1989 Act.

Not appealed is a finding, supported by the death certificate, that the decedent died on (decedents date of death), from respiratory failure secondary to multiple pneumothoraces, adult respiratory distress syndrome (ARDS), and acute interstitial pneumonia (AIP). DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (28th ed. 1994) defines a pneumothorax as an accumulation of air or gas in the pleural space. Interstitial pneumonia is defined as a chronic form of pneumonia with increase of the interstitial tissue and decrease of the proper lung tissue, with induration (hardening). Interstitial is defined as pertaining to or situated between parts or in the interspaces of a tissue.

The claimant beneficiary testified that the decedent worked for the employer for 30 years as a forester before his death; that his duties included fighting forest and brush fires on the employer's land; that between _____ and 31st, she estimated, the decedent was involved in fighting approximately 19 fires; that some time after the first fire on _____, claimant began to complain of cough, headache, swollen eyes, and elevated temperature; that his symptoms became progressively worse; and that on July 31st he sought medical treatment from Dr. T, an internal medicine specialist for whom the claimant beneficiary, an LVN, has worked for 26 years.

Mr. K, the decedent's supervisor, testified that he did not disagree with the estimate that the decedent worked on approximately 19 fires from _____ to 31st because the employer would average about a fire a day at that time; that although the fire on _____ was a large fire, the later fires were small; that he worked on several occasions with the decedent in July and noticed his health deteriorate during that month; that at these fires, the decedent usually drove the truck from place to place while a coworker operated the bulldozer grading fire breaks and another coworker walked behind the bulldozer with a radio; that the crew member driving the truck was not exposed to as much smoke as the other two crew members; that the fire-fighting crews had protective equipment including respirators and used the equipment; and that he thinks the decedent "would wear a respirator all the time" and feels sure "he would have it on."

Mr. T, a coworker of the decedent, testified that he worked with the decedent at all the fires; that he ran the bulldozer which, during the past year, the decedent operated only once for about 15 minutes; that he wore a respirator on the bulldozer and had seen the decedent wear one in the past, though sometimes he did not wear one; and that there was nothing unusual about the _____ fire, which was located in the (River) bottom area. Mr. T further stated that on about July 23rd, he noticed that the decedent was feeling bad; that the decedent never complained about the smoke; and that neither he nor the third crew member, Mr. M, got coughs and headaches in July.

Mr. G, the employer's safety manager, testified that he had no knowledge of any of the fires worked on in July burning chemicals.

The August 6th infectious disease consultation report of Dr. H stated the impression as diffuse interstitial/alveolar infiltrates with subacute presentation. He further stated that "[t]his most likely represents an atypical community acquired pneumonia." The August 17th pathology report of Dr. F, who examined specimens of the decedent's lung tissue, stated the diagnosis as AIP. The report describes what was observed microscopically in tissue sections on slides and does not mention the presence of foreign matter or particles.

The November 17th death summary report of Dr. J states that the decedent's respiratory status acutely deteriorated after admission to the hospital; that his infiltrates and oxygenation problems progressed rapidly; that all cultures were negative for bacteria, virus, and fungus, special stains were negative for acid-fast bacillus, and serologic studies were negative for immunologically or rheumatologically mediated diseases; that an open lung biopsy showed AIP with no specific etiology; that he did not respond to any therapy and no specific diagnosis concerning etiology was made; and that his death (on decedents date of death) was expected as a complication of his underlying illness and lack of response to all conventional therapies.

Dr. T testified that he is specialized in internal medicine with no subspecialty although approximately 50% of his practice involves the treatment of pulmonary and respiratory problems; that when he saw the decedent on July 31st, the date of the decedent's first visit for his respiratory problem, the decedent had already been taking

antibiotics; that the decedent gave a history of fighting forest fires on five or six occasions between July 1st and 31st and of experiencing progressive difficulty in breathing over the past 10 days to two weeks; that he diagnosed acute respiratory infection and allergic rhinitis; that an x-ray was suspicious for pneumonia in the upper lobe of the right lung; and that steroids were not immediately started with the antibiotics but were added. Dr. T's record of July 31st states the assessment as "acute respiratory infection, bacterial vs. allergic irritant." Dr. T further testified that the decedent's condition worsened and he was put on a ventilator and taken to a hospital in another city where Dr. JAM became responsible for his care. Dr. T wrote on October 29, 1998, that "[i]t is a high medical probability that this is caused by and brought on by the fact that he had been exposed to numerous fires with smoke inhalation during the past month." Dr. T testified that "smoke inhalation was at least a partial cause" of the decedent's condition and that the decedent "had the respiratory tract injured either just with infection that was in the community versus injury to his bronchial tubes associated with smoke and chemical inhalation, or a combination of those." He further stated that there was a strong possibility of an inhalation type injury from smoke and/or other chemicals involved in what was burning. Dr. T also stated that he recognized that, although Dr. JAM had the same history, he reached a different conclusion in determining that the decedent's condition was of undetermined etiology.

Dr. JAM wrote on September 21, 1998, that the etiology of claimant's respiratory disease process was never definitively identified despite an open lung biopsy; that the pathologic diagnosis was one of AIP and that the etiology of the AIP was never determined despite an infectious disease consultation and second opinion pathology assessment; that the decedent was apparently exposed to a large amount of smoke and dust from local fires prior to his respiratory deterioration and hospitalization; that he succumbed to respiratory failure related to multiple pneumothoraces as a consequence of ARDS; and that his final diagnosis is one of AIP of undetermined etiology.

Dr. JMM testified that he is board certified in internal medicine and occupational medicine; that he is also specialized in occupational pulmonary diseases with specific expertise in toxicology including chemicals, smoke and fumes; and that he has experience treating firefighters for injuries and illness resulting from fire fighting. Dr. JMM stated that he reviewed the decedent's medical records; that he considered the decedent's history in an effort to assess the amount and duration of the decedent's exposure to smoke and develop a time line; and that in his opinion, in the absence of smoke inhalation, the decedent would nonetheless have developed AIP and ARDS, the two conditions listed as the cause of death on the decedent's death certificate. Dr. JMM noted the decedent's fever when he presented to Dr. T and was hospitalized and stated that, in general, if a patient has a fever, the patient has an infection and that smoke inhalation does not result in fever. He also observed that the x-ray finding of infiltrates in the right upper lobe suggests an infection, noting that the most common x-ray finding with smoke inhalation is a normal chest and the next most common finding is a diffuse process, not a localized process in one lung or one lobe. As for the inability of the hospital laboratory to culture any bacteria from the decedent's biopsied lung tissue, Dr. JMM noted that the decedent had been on

antibiotics since before seeing Dr. T. Stating his disagreement with Dr. T's opinion, Dr. JMM concluded that the decedent had an ordinary disease of life and that his lung condition was not caused by nor aggravated by smoke inhalation in July.

Dr. C reported on February 11, 1999, that he received the medical records and the literature and stated the it was his opinion, in reasonable medical probability, "that the fatal illness sustained by this patient is not toxic etiology and not a consequence of his involvement with forest fires."

The claimant beneficiary had the burden of proving by a preponderance of the evidence that the decedent sustained an injury in the course and scope of his employment that resulted in his death. Whether or not the decedent sustained an injury in the course and scope of his employment on or about _____, that resulted in his death presented the hearing officer with a question of fact to resolve. As noted, the claimant beneficiary has appealed findings that the etiology of the decedent's underlying illness is unknown, and that the claimant beneficiary failed to prove by a preponderance of the evidence that the decedent's underlying illness was a result of inhalation of smoke in the course and scope of his employment. The hearing officer is the sole judge of the weight and credibility of the evidence and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could consider the biopsy report and credit the opinions of Dr. JAM, Dr. JMM, and Dr. C to the effect that the decedent's AIP was of unknown etiology. Dr. T was the only expert witness who felt that smoke inhalation, alone or in combination with an infection, was at least a partial cause.

The hearing officer, in discussing the evidence, noted that, despite there being biopsies, there was no mention in the medical evidence of the existence of particulate matter in the lungs; that had the decedent been exposed to enough smoke to trigger the AIP, "it would seem that some indication of foreign matter would have been noted in the tissue samples"; and that none of the medical evidence seems to attach any significance to the absence of particulate in the lung tissue.

The claimant beneficiary asserts on appeal that these comments by the hearing officer "clearly" show that the hearing officer assumed that, had the decedent's illness been caused by smoke inhalation at work, particulate matter should have been present in the lungs; that there was no medical evidence that such is the case; and that the hearing officer, who is not a medical expert, thus imposed "a requirement" on claimant beneficiary that even the medical experts did not require and, in effect, imposed a medical standard of his own, rather than basing his determination on the medical evidence in the record.

While we regard the hearing officer's comments concerning the expectation of finding particulate matter in the lungs as ill-advised, given the absence of any expert evidence concerning whether smoke inhalation would result in finding particulate matter in the lungs on biopsy, we do not regard the hearing officer as having committed reversible error by deciding the issue on some basis not supported by the evidence of record. In our view, the hearing officer's questionable comments are more in the nature of surmise and comment on a technical matter and we note he concludes by observing that the medical evidence did not appear to attach any significance to the absence of particulate matter in the lungs.

Even if the hearing officer was more than just influenced by but reached his determination on the absence of particulates, we can and do find the expert medical evidence sufficient to support the finding that the etiology of the decedent's underlying illness was unknown. We may affirm the hearing officer's determination if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge