

APPEAL NO. 990879

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 6, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) had not sustained a compensable injury on _____ (all dates are 1998 unless otherwise noted), that claimant did not have disability because he had not sustained a compensable injury, that claimant had timely reported his claimed injury to his employer on November 20th and that the date of the claimed injury is _____. The hearing officer's findings on notice to the employer and the date of injury were not appealed and have become final pursuant to Section 410.169.

Claimant appealed, reciting his theory of events, contending that the hearing officer was wrong in saying that there was a lack of sufficient medical evidence to support claimant's theory, pointing out that "issues of injury and disability may be established by testimony of the claimant alone" (if believed), citing Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) and asserting the hearing officer's decision is against the great weight and preponderance of the evidence. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds that claimant's problems "were long standing and had intensified" shortly before _____, states that the hearing officer's decision was correct and urges affirmance.

DECISION

Affirmed.

A complicating factor in this case is that claimant had neuroma surgery on his right foot in 1970 and arguably since then has had off and on again complaints regarding the surgery site of his right foot. An August 1989 note indicates that claimant had "severally [sic] hypersensitive feet," that he "doesn't really like wearing shoes," and does not want anyone even touching his foot. On October 20th (three days before the alleged injury), claimant saw Dr. S, his regular treating doctor, for complaints of "[c]ramps in Rt. foot" and that the foot "is tender to the touch the more he is on his feet the worse it gets." Dr. S noted "really can't even touch his foot, he discusses cramping, burning, pain, waking him up at night, etc."

Claimant was employed as a computer repairman working for (employer). Claimant testified that on _____, while moving some computer equipment in the course of his employment, he "felt what seemed to be a muscle pull or a tear in [his] back." Claimant said the pain went down his right leg and his "foot started hurting at that point." Claimant said that he finished the job, made sure the computer was working and went home. Claimant testified that his foot became increasingly painful and that he went to the hospital emergency room (ER). An ER record (date is illegible) shows complaints of right foot pain. Claimant was given medication. Claimant saw Dr. S on October 26th. A progress note of

that date notes claimant has seen a psychologist in the past (presumably due to ongoing foot pain). Another progress note also of October 26th notes claimant was seen in the "ER several times," and that claimant "continues to complain about the pain, the burning, the cramping in his foot." Dr. S noted the pain "is very suspicious of RSD." Claimant distinguished his pre-_____ foot complaints as cramping at the site of the 1970 surgery while after the injury his entire foot "has problems," "there is [sic, are] knots and bumps" there now, and he has "extreme pain" which "is hot," "is burning" and "is sharp." Claimant says the foot was swollen and gets worse with standing or sitting. Dr. S took claimant off work and referred him to Dr. O, a pain management specialist. In a report dated October 28th, Dr. O recites claimant's history, including the fact that claimant's right foot pain returned "a few weeks ago," and that "the pain is very similar to his initial pain that he had back when he had the neuroma." Dr. O assessed "[r]ight foot pain, etiology unknown, possible return of the neuroma versus chronic regional pain syndrome, Type I." Dr. O continued claimant off work. An MRI of the lumbar spine was performed on November 17th with an impression of degenerative disc disease at L5-S1 "with diffuse posterior bulging associated with narrowing of the neuroforamina at L5-S1 on the left." A lumbar sympathetic block was performed on December 2nd. In a report also dated December 2nd, Dr. O remarked:

Upon further testing, it was found that he has degenerative disc disease with disc bulge in the lumbar spine which is probably what is causing the pain in the lower extremities and in the foot to be severe and excruciating.

In another report dated December 16th, Dr. O writes:

This patient continues with severe and excruciating pain in the lumbar spine with lower extremity radiculopathy. His primary complaint has been with foot pain, and in further evaluation, we performed an MRI which revealed disc pathology. It is possible that his pain is the consequence of the type of work that he was performing as he states he was having to lift heavy equipment from one place to the other, and this could have irritated his spine.

Initially, he was diagnosed with probable Complex Regional Pain Syndrome, Type I, of the lower extremity. Upon further evaluation and therapeutic procedures that were performed, he obtained minimal relief. At this point, I was suspicious that the etiology of his pain was from another source, and we performed the MRI that revealed degenerative disc disease.

Claimant's testimony on both direct and cross-examination makes clear that claimant is alleging a specific incident on _____, rather than any kind of repetitive trauma injury.

Subsequently, claimant was seen by Dr. D, a neurosurgeon, who in a report dated January 25, 1999, recites the following history and assessment:

His primary complaint right now is that he has severe disabling right foot pain. The

pain began in October when he suffered a lifting injury at work. It began as back pain which radiated down the right leg through the posterior thigh and calf to the severe pain in the right foot. The pain is primarily on the dorsum and medial plantar surface. He has had some temporary relief from epidural injections by [Dr. O]. They were very short lasting.

* * * *

Although this severe foot pain is an unusual presentation for an L5 radiculopathy, I think it is certainly possible considering his MRI scan and history. I would like to have him evaluated by [Dr. Di] in the next couple of days with an EMG study to determine if there is a root origin to his pain. If that is the case, then obviously addressing the disk problem in the lumbar spine would need to be considered fairly soon.

Dr. Di, in a report dated January 27, 1999, noted claimant was "having significant low back pain with right leg and foot pain" and concluded:

The patient is having profound asymmetrical motor nerve conduction changes. He's having profound atrophy and intractable pain. It is impossible for this to be reflex sympathetic dystrophy. I believe this is definitely lumbar radiculopathy. I believe the only treatment for him will be that of surgical intervention. It appears to be an actively ongoing progressive process. It is very disabling and needs acute intervention.

Mr. M, employer's service manager and claimant's immediate supervisor, testified that claimant did not report his foot injury until November 20th, after claimant learned from the employer's human resources office that claimant's sick leave and medical benefits were going to expire. (Claimant has not worked since _____.) Carrier also points out that the history Dr. D received is at odds with the ongoing history recorded in Dr. S's progress notes over the years.

The hearing officer, in his Statement of the Evidence, remarked that there is "a lack of sufficient recorded medical evidence to establish that the event of _____ resulted in the alleged injury" and made a factual finding that the "incident on _____ did not result in harm to the physical structure of Claimant's body." Claimant's appeal emphasizes that we have held that "[i]ssues of injury and disability may be established by testimony of the claimant alone," citing Pegues, *supra*. While it is true that we have generally held to that cited proposition, there is an exception to that general rule that where the matter of causation is not in an area of common knowledge or experience, expert medical evidence may be necessary to establish causation. See Texas Workers' Compensation Commission Appeal No. 94107, decided March 10, 1994. We believe that the hearing officer's comment about lack of sufficient recorded medical evidence just meant that he was not persuaded that claimant was hurt as he alleged on _____. Further, as carrier points out, the hearing officer could consider that the reports of Dr. D and Dr. Di recite a history somewhat at odds with Dr. S's progress notes throughout the years. The hearing officer could believe that

claimant was having ongoing foot pain, as reflected in Dr. S's progress notes of October 20th and the hearing officer could judge how, or if, the preinjury foot complaints compared to the post-injury complaints. The hearing officer obviously believed that claimant did not sustain an injury, as that term is defined in section 401.011(26), on _____ and the computer lifting incident is not the source of claimant's problems.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. 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). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at 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 own judgement for that of the trier of fact even if the evidence could 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

In that we are affirming the hearing officer's decision that claimant has not sustained a compensable injury, claimant cannot, by definition in Section 401.011(16), have disability.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, *supra*. We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge