APPEAL NO. 990943

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was commenced on April 6, 1999, and concluded on April 9, 1999. With regard to the issues before him, the hearing officer determined that appellant (claimant) had not sustained a repetitive trauma (occupational disease) injury on _____ (all dates are 1998 unless otherwise noted), and that claimant has not had disability.

Claimant appeals, contending that medical evidence supports her position that the hearing officer "cannot make medical decisions or replace valid medical opinions with his own," that she has bilateral stress fractures, and that two letters which were excluded on the basis of untimely exchange "should have been admitted." Claimant, for the first time on appeal, changes her theory on disability. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds urging affirmance.

DECISION

Affirmed.

The crux of this case appears to be exactly what claimant did at work. Claimant was employed as a "customer service/clerical support" person for (employer). Claimant testified that her duties required repetitive and constant fast walking, bending, standing, stooping, kneeling, and twisting while filling orders. Claimant's detailed testimony is contradicted by the testimony of her supervisor, Mr. W, a written "ergonomic study of [claimant's] job duties," a surveillance tape of claimant at work, and a demonstration video of claimant's job duties. Our review of the demonstration video showed the worker walking at a leisurely pace from one area to another and, in the 10 to 15 minutes of the video, only bending over once or twice. Claimant contends that was not an accurate portrayal of how she worked. It is undisputed that at least a portion of claimant's duties included doing data input at a computer and that claimant had a good deal of flexibility in the performance of her job (described as a "fix-it person") and did not have any production quotas. After viewing the demonstration videotape, claimant agreed that about half of her walking was on carpeted areas. It is also undisputed that the employer had a contract with the union that prescribed fairly strict attendance policies.

Claimant had been given a first written warning on excessive absences in April 1998 and a second written warning on September 8th with the caution that "any subsequent unexcused absence would result in automatic termination." It is relatively undisputed that claimant had complained to Mr. W, and perhaps others, that her legs hurt prior to September 16th, but did not indicate that the pain was work related. Claimant testified that on September 16th, the pain in her legs become so bad that she left work to go to the doctor. Claimant went to (KP clinic) and missed work on September 16th and 17th.

Claimant returned to work (not clear on what date) and on _____, had either a seizure or some intestinal problem which resulted in her being taken to the KP clinic by ambulance. Claimant subsequently met with Ms. R, employer's human resource supervisor, on _____ and was advised that, pursuant to employer's union contract and personnel policies, claimant was suspended pending termination unless she could get medical documentation that the absences on September 16th, 17th, and/or 24th were either work-related or came under the Family Medical Leave Act (FMLA). Claimant contacted the KP clinic but was unable to obtain such documentation. Claimant also contacted the union president, who referred claimant to Dr. B, D.C., who has become claimant's treating doctor. Carrier challenges Dr. B, offering into evidence a flyer where Dr. B lists himself as "a patient advocate doctor" who will "defend you until you win your case." The hearing officer comments that carrier's contention of Dr. B's "bias has some merit, but does not influence the outcome of this BCCH." On January 29, 1999, employer and the union entered into an agreement (in evidence) that the employer will return claimant "to active service without back pay" when claimant "provides a statement from her treating physician confirming that she is fit for duty and medically able to maintain regular attendance." No such release has been given. Claimant, at the CCH, asserts that she has had disability since January 29, 1999. Claimant appeared to agree that her unemployment prior to that time was due to her suspension.

The KP clinic record of September 16th, signed by Dr. S, diagnoses "leg muscle sprain" and takes claimant off work for two days. The KP clinic record of September 28th diagnoses gastroenteritis and also takes claimant off work for two days. Dr. S, in a handwritten note dated October 1st, states claimant "Here to fill a form[,] still bothered [with] leg pain [with] difficulty walking[.] Put on suspension because she was off work 9/16-9/18. Ran out of sick days." Claimant was offered physical therapy which the note indicates she declined. In a handwritten report dated October 8th, Dr. T, another doctor at the KP clinic, notes "overuse injury blat [bilateral] lower legs." A history of "do excessive fast walking, 8 hr a day" is noted.

Dr. B apparently first saw claimant on October 16th but did not begin treatment until January 4, 1999, when he began electrical stimulation, ultrasound, cold packs, and leg wraps. Dr. B continued to administer treatment every few days from January 4 through March 16, 1999. In an undated report, Dr. B comments:

> It is my understanding [claimant's] job duties are that she walks several miles a day on concrete floor. It is further my understanding that this excessive walking also involves repetitive stooping, lifting, bending, twisting, and carrying in order to locate and transport certain prescriptions. It is my opinion, after examining the patient and all the medical records including the x-rays and bone scans, that the stress fractures which [claimant] suffers from are the direct result of excessive walking, bending, twisting, stooping and carrying. Specifically, the standing and walking alone without the repetitive bending, twisting, stooping, lifting and carrying would in reasonable medical probability not have led to the injury from which she now suffers. It is the

> combined effect of standing, walking, bending, stooping, lifting, and carrying that have caused her injury. This injury makes her unable to perform the aforementioned tasks at this time. It is my opinion that, since _____, she has been unable to work in any capacity that requires her to stand or walk as a result of the injury outlined hereinabove.

Claimant was seen by Dr. SB for diagnostic studies and, in a report dated November 18th, he diagnosed "overuse syndrome to the point of stress fracture of the legs and feet." Carrier submits a peer review (record review) report dated February 10, 1999, from Dr. C who states:

> One does not normally develop an "overuse syndrom [sic]" from walking; however if it did occur, it should resolve spontaneously within a few days of rest. Just as we all may experience soreness from exercising, it is a self-limiting process as the anabolic process of muscle recovery occurs. Even if one develops "sore legs", it would be very difficult to link it to any certain activity that is not of an acute nature that could be pinpointed in time. While it may be true that not everyone can tolerate walking and standing 8-10 hours a day repeatedly, I would not really conclude that this would be considered an injury as much as it is an intolerance to certain activities.

Claimant sought to admit from letters from Dr. S and Dr. T (KP clinic), dated March 11, 1999, but the hearing officer sustained carrier's objection on lack of timely exchange due to claimant's lack of diligence in obtaining the opinions of the doctors by subpoena or deposition by written questions.

Other evidence includes a statement and testimony by carrier's adjuster, who took a statement from claimant on October 5th where claimant told the adjuster she had been to the State Fair for 12 hours shortly after September 16th. Claimant explained that she had been to the fair but had used a wheelchair. Carrier's adjuster testified that no mention had been made of a wheelchair on October 5th. The hearing officer, in his discussion, comments:

> Claimant's duties required many repetitive activities, and she argues that the intensity of her work is beyond ordinary standing and walking. However, Claimant is not persuasive that her duties exposed her to harm beyond ordinary standing and walking. Medical evidence is not persuasive. . . . Claimant who is credible is simply not persuasive. Diagnostic studies are not conclusive whether Claimant has stress fractures or osteomyelitis. There is blood testing which may indicate an absence of osteomyelitis as argued by Claimant, but there is no reliable medical opinion supporting Claimant's conclusion that she does not have osteomyelitis or some other degenerative condition.
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> Claimant asserts the hearing officer "cannot make medical decisions or replace valid

medical opinions with his own." 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). We have frequently commented that the hearing officer may give greater weight to some medical evidence over other medical evidence. Further, in this case, Dr. B's opinion, and to some extent Dr. T's opinion, is based on excessive fast walking, eight hours a day on concrete floors. In this regard, we have noted that a fact finder is not bound by the testimony (or evidence) of a medical witness when the credibility of the testimony is manifestly dependent on the history given to the doctor by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). The hearing officer could well believe, and apparently did, that claimant's duties only required ordinary standing and walking, as depicted in the demonstration video. While the hearing officer found claimant credible, he did not find her testimony persuasive. Even Dr. B states that the "standing and walking alone" without the other repetitive bending, etc. "in reasonable medical probability [would] not have led to the injury. . . ." The evidence showing what claimant actually did is certainly in conflict and, as previously mentioned, the demonstration video does not show the constant repetitive bending and twisting that claimant maintains that she performed. Claimant, in her appeal, states that she does "not argue for a retreat from the general rule that ordinary walking and standing does not qualify as a compensable injury." The hearing officer could, and possibly did, discount claimant's testimony regarding the extent of her bending, twisting, etc. The hearing officer's findings on this issue are supported by the evidence.

Claimant contends that the March 11, 1999, letters of Dr. S and Dr. T should have been admitted as having been promptly exchanged, pursuant to Tex. W.C. Comm'n. 28 TEX. ADMIN. CODE § 142.13(c)(2)(Rule 142.13(c)(2)). Evidentiary rulings by the hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary and will be reversed only if there is an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. In determining whether there was an abuse of discretion, the Appeals Panel looks to see if the hearing officer acted without reference to any guiding rules or principles. Appeal No. 941414. To obtain reversal of a judgment based upon error of the hearing officer's admission or exclusion of evidence, the appellant must show, first, that the determination was in fact error, and, second, that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992. In this case, the hearing officer pointed out that claimant had made no attempts to obtain the letters by subpoena or in a deposition by written questions, choosing to rely on verbal requests. We do not find that the hearing officer abused his discretion.

Claimant, for the first time on appeal, seems to assert disability "from _____, to the present. . . ." Testimony and representations made at the CCH consistently asserted disability beginning January 29, 1999. Claimant cites Texas Workers' Compensation Commission Appeal No. 962343, decided January 2, 1997, for the proposition that disability "may be established by the testimony of the claimant alone and medical evidence is not necessary to establish disability." That proposition is caveated that claimant's testimony be believed and the testimony of a claimant, as an interested party, only raised an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In any event, disability by definition in Section 401.011(16) requires the existence of a compensable injury. In that we are affirming the hearing officer's decision that claimant had not sustained a compensable injury, claimant cannot 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. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). 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