

APPEAL NO. 991008

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 9, 1999, a contested case hearing (CCH) was held. The issues were:

1. Did the Carrier [respondent] waive the right to contest compensability of the Claimant's [appellant] chronic fatigue syndrome and chronic depression as being related to the compensable injury of _____; and,
2. Was the _____, compensable injury [low back and neck] a producing cause of the Claimant's chronic fatigue syndrome and chronic depression?

The hearing officer determined that carrier had not waived the right to contest compensability of claimant's chronic fatigue syndrome and chronic depression and that the compensable low back and neck injuries were not a producing cause of the chronic fatigue syndrome and chronic depression.

Claimant appealed the adverse findings, emphasizing evidence which supports her position and adding her interpretation and explanation of the evidence. Claimant, in her appeal, also further comments on carrier's closing statement at the CCH. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds, urging affirmance.

DECISION

Affirmed.

Claimant had worked for employer for over 20 years and, at the time of her injury, was a helicopter inspector. The parties stipulated that claimant sustained a compensable (low back) injury on _____. Carrier has apparently accepted liability for a low back and neck injury. Claimant testified that her job required her to travel a great deal and that she traveled 10 or 11 months of the year. Apparently, claimant maintained a home in City 1. It is undisputed that on _____, claimant fell about four feet out of a helicopter, landing on her buttocks. In the ensuing months and years, claimant saw a number of health care providers in a number of states for her injury. It is undisputed that claimant has not had spinal surgery and the consensus opinion of two MRIs is that they were thought to be normal. In May 1995 some efforts were made to have claimant evaluated for purposes of obtaining an impairment rating. Part of claimant's contentions at present are that she has memory loss along with her fatigue and depression. The hearing officer characterized claimant's testimony as "erratic" and we find her testimony vague, especially as to dates and doctors.

In a report dated May 21, 1996, Dr. F, D.C., a (City) chiropractor, indicated that he had been approved as claimant's treating doctor on May 8, 1995, and he had been so listed at an August 9, 1995, benefit review conference (BRC) (not in evidence). It is at that BRC that claimant contends that she exchanged medical reports and documents which indicated that claimant was suffering from fatigue and depression due to the work-related injury. The hearing officer, in her Statement of Evidence, comments:

The Claimant asserted that the Carrier received written notice of the chronic depression and chronic fatigue syndrome in August of 1995 during a [BRC]. I was unable to locate any medical records produced prior to or concomitant with the [BRC] that include the required elements to provide actual notice.

Carrier contends that it received a medical report from Dr. S dated May 19, 1997, on May 27, 1997, and that that report first put carrier on notice that claimant was claiming additional injuries of fatigue and depression. Carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing any injury other than a back strain and contusion of the left upper extremity on May 30, 1997. Claimant contends that she "handcarried and delivered documents from [Dr. W, a Ph.D. psychologist] and [Dr. C] to the Carrier's representative . . . [at the August 1995 BRC]." Claimant's appeal alleges that the documents exchanged had a cover sheet listing everything that was exchanged and referred to "Claimant's Exhibit # 1, 2, & 19." Claimant's Exhibit No. 1 is a report dated August 2, 1995, from Dr. W, which related claimant's depression, insomnia, etc., to the work-related injury; however, nothing in that exhibit indicates it was sent, much less received, by carrier. Claimant's Exhibit No. 2 is a similar report, also dated August 2, 1995, from Dr. C sent to claimant with no indication that it was sent to or received by the carrier. In addition, the hearing officer notes that those reports do not identify the employer or the date of injury. Claimant's Exhibit No. 19 purports to be the document exchange but is a sheet of paper where claimant has listed various items, including "Letter" from Dr. W and Dr. C, identified as "Doc #9" and "Doc #10" and various comments listed as "Fact" by claimant. This was date stamped as received by the Texas Workers' Compensation Commission on August 9, 1995. All the "Facts" relate to claimant's back injury. The hearing officer found that the document sheet merely referring to letters from Dr. C and Dr. W and the reports of Dr. C and Dr. W (presumably the August 2, 1995, reports) did not meet the written notice requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 124.1(a)(3) (Rule 124.1(a)(3)). That rule provides that if no first report of injury has previously been filed by the employer, written notice of injury may consist of any other notification, regardless of source, which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and the facts showing compensability. Whether a document provides such written notice is largely a factual determination within the province of the hearing officer to determine. In this case, the hearing officer could disbelieve that claimant gave the document to carrier or could believe that two reports which do not name the employer or give the date of injury do not meet the requirements of Rule 124.1(a)(3).

On the issue of whether the compensable injury is a producing cause of claimant's fatigue and depression, it appears that claimant continued to work after her injury but had

the assistance of a "partner" or assistant who did all the climbing, lifting and physically strenuous requirements of the job ("the hard part of the job"). Claimant's assistant apparently retired in March or May of 1995. Claimant testified that she continued to work "until after that August [1995] Benefit Review." The employer apparently refused to provide claimant another assistant and claimant was subsequently terminated, apparently in December 1995. There are a number of medical reports which relate claimant's fatigue and depression to the compensable injury, such as Dr. W's August 2, 1995, report, a report dated July 28, 1998, from Dr. S which states:

[Claimant] is under my care for difficulties with chronic low back pain, chronic fatigue syndrome and chronic pain syndrome.

She is currently disabled in association with her current problems and exacerbation of her preexisting degenerative joint disease of the low back, which does date back to the original accident that she experienced in 1993, with respect to the fall that she took in the work related environment.

And Dr. F's August 12, 1998, report, which states:

It is my professional opinion that [claimant's] fatigue and depression is linked to the injuries she sustained on _____.

Also, the reports of Dr. L, a clinical psychologist, indicate claimant has a "depressive mood disorder" and she considers "the work related injury . . . to be the source for [claimant's] reactive mood disorder."

However, carrier points out that claimant was being treated for "memory problems, adjustment disorder and depression" prior to her date of injury. Office notes of Dr. S show treatment for "memory dysfunction" as early as April 8, 1993, and claimant was prescribed Prozac on July 6, 1993, with an impression of "adjustment disorder with depressive features." Dr. Wa, a psychiatrist, in a record review report dated August 5, 1998, comments:

With regard to the question of causality, the records of the neurologist, [Dr. S] were given particular attention, particularly as they predated the _____ injury. It must be noted that in April 1993, the patient presented with memory dysfunction of one year history especially short term in type and fairly frequent headaches. Examination revealed mild dyscalculia and mild short term memory loss. On referral, [Dr. H] diagnosed Adjustment Disorder with Depressed Features. [Dr. S], who was taking care of the patient, prescribed Prozac and antidepressant medication with a dose of 20 mg daily.

* * * *

It seems clear that symptoms of depression, memory deficits and perhaps also some fatigue were noted prior to _____.

Review of the records of [Dr. L], Ph.D, a psychologist relating to the initial exam in August 1996 and follow-up thereafter revealed symptoms of depression in somewhat greater detail than the assessment done by [Dr. S] in 1993 and 1994. However, [Dr. L] failed to display an awareness that much of this symptomatology was present before the accident of _____.

Concerning the other "diagnoses" in the list given above. Most of these are symptoms rather than diagnoses. However, "chronic fatigue syndrome" though commonly used is not a diagnosis recognized by the American Psychiatric Association in its Diagnostic And Statistical Manual, Volume IV. The diagnosis of Post Traumatic Stress Disorder is a recognized diagnosis but the patient does not meet the criteria for this diagnosis.

I find no evidence that the patient requires psychological/psychiatric treatment for any disorder caused by the accident of _____. No treatment is recommended.

In a similar report dated January 4, 1999, Dr. B, a psychiatrist, was of the opinion:

In my opinion, the claimant's memory problems, depression, mood disorder and chronic fatigue does not appear to be related to this accident. It is noted that she was seen by a neurologist on April 8, 1993 and stated the reason for this was a one year history of progressive difficulty with short-term memory and cognitive capacity. This was clearly stating a difficulty that predated the fall on the job.

The hearing officer commented:

A large amount of medical records were received as evidence. Interspersed with the medical records for her back injury are records from mental health specialists. It is evident that the Claimant's depression pre-dated her compensable injury of _____, as she was being treated by a psychiatrist for depression to her date of injury and taking medication I see no medical record that convincingly links the Claimant's current mental health problems or her chronic fatigue with the fall from the helicopter on _____, either as a producing cause of those problems or as an aggravation of those problems. Several doctors of several specialties reviewed the Claimant's records and did not believe that her back injury caused either the problem of depression or the chronic fatigue syndrome. I found their records more persuasive than those stating otherwise.

Claimant in her appeal states that she has memory difficulties and therefore the appeal was prepared by a friend. In that appeal claimant contends that she saw Dr. S as a neurologist for memory problems and argues he did not find claimant depressed, and that she thought the Prozac was "to help my memory." Claimant appeals the hearing officer's decision point by point explaining her position on each point. As carrier notes, much of the

appeal consists of additional unsworn testimony, apparently as related by claimant to someone else, which was not presented at the CCH. Insofar as the appeal deals with allegations and explanations not advanced at the CCH we will refer back to the record of the CCH. In any event, as noted, the medical evidence was in conflict. Certainly several doctors and health care providers expressed an opinion that the compensable injury was a producing cause of the claimant's fatigue syndrome; however, others were of the opinion that those problems preexisted the date of injury and consequently were not work related. The hearing officer made clear that she found the latter reports more persuasive than those stating otherwise.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). In this case, the hearing officer chose to give greater weight to the evidence that claimant's fatigue and depression preexisted her compensable injury as it was the hearing officer's prerogative to do. We find the hearing officer's decision supported by sufficient evidence.

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:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge