

APPEAL NO. 991092

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 26, 1999. He (hearing officer) determined that the appellant's (claimant) compensable right shoulder injury of _____, did not extend to an aggravation of her Arnold-Chiari malformation and associated cervicothoracic spinal cord syrinx. The claimant appeals this determination, contending that it is against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The claimant also filed an "amended" appeal, which was untimely and will not be considered. See Section 410.202(a).

DECISION

Affirmed.

The claimant, a hospital employee, sustained a right shoulder injury while pushing a patient in a wheelchair. The carrier accepted liability for this injury. In the process of treating the shoulder injury, it was discovered that she also suffered from Arnold-Chiari malformation and associated spinal cord syrinx, a congenital abnormality. In July 1997, she underwent a suboccipital craniectomy and cervical laminectomy. The claimant testified that she had no shoulder or neck pain before her injury and contends that the injury caused a compensable aggravation of her congenital abnormality.

The aggravation of a preexisting ordinary disease of life or nonwork-related condition may be a compensable injury in its own right. Texas Workers' Compensation Commission Appeal No. 91094, decided January 17, 1992. The claimant has the burden of proving an aggravation injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Because the claimed aggravation injury is not within common experience, the claimant, as both parties agreed, could only meet her burden of proof with expert evidence to a reasonable degree of medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). Whether the claimant sustained a compensable aggravation injury to her congenital abnormality was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 990382, decided April 5, 1999.

Dr. T, the claimant's surgeon, wrote on September 26, 1997:

It is my opinion that the Chiari malformation and cervical syrinx are unrelated to her injury. However, [claimant] has had right shoulder pain since her injury and presumably this symptom is related to her injury. It is also possible that the injury may have interacted in some way with her underlying congenital condition to produce the pain.

On February 11, 1998, Dr. T wrote that the relationship between the congenital abnormality

and the shoulder pain was "uncertain." He further commented that the pain "may more likely be caused by musculo skeletal type injuries (neck and shoulder) caused by the injury. A good response to shoulder surgery would lend further support to this contention." Arthroscopic shoulder surgery had been performed on February 3, 1998. Dr. T, noting continuing confusion in the relationship between the congenital abnormality and the shoulder injury, commented on June 24, 1998, that "[i]n my opinion your symptoms are the result of the injury, and it is most likely that your underlying congenital abnormality was discovered because of this injury. Because of this, I feel that your disability has been directly attributable to the injury, and should be treated as such." Dr. H examined the claimant on October 19, 1998, at the request of the carrier. He commented in his report of this date that the "symptoms which the patient describes have primarily been muscular, involving the shoulder girdle on the right, although she may have had some mild aggravation of her congenital anomaly."

The hearing officer commented that the medical evidence "did not establish with any degree of certainty that her present pain is related to the congenital defect." He noted that Dr. H wrote that there "may" have been some mild aggravation and Dr. T found the shoulder symptoms unrelated to the congenital abnormality. He further concluded that the medical evidence showed that treatment to the shoulder, not the surgery for the congenital abnormality, produced the greatest relief. The claimant, in her appeal, references this same medical evidence and argues that it supports a finding of a compensable aggravation of the congenital abnormality. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Even if there were some evidence supporting the claimant's position, that would not provide a proper reason to reverse the decision of the hearing officer unless that decision was contrary to the great weight and preponderance of the evidence. While the claimant finds support in Dr. T's and Dr. H's reports, the hearing officer found nothing in these opinions to rise to the level of reasonable medical probability of a compensable aggravation injury and declined to equate the word "may" with "probable." See Texas Workers' Compensation Commission Appeal No. 950710, decided June 8, 1995, for the proposition that the words "reasonable medical probability" do not have to be used by a doctor if the substance of the opinion is one of probability. Under our standard of review, we find the evidence sufficient to support the determination of the hearing officer that the claimant did not sustain a compensable aggravation injury to her congenital abnormality. See Texas Workers' Compensation Commission Appeal No. 94864, decided August 19, 1994.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCUR IN THE RESULT:

Gary L. Kilgore
Appeals Judge