

APPEAL NO. 991237

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 18, 1999, a contested case hearing was held. With regard to the issues before him, the hearing officer determined that the respondent (also referred to as carrier or self-insured, as appropriate) had timely contested compensability of the claimed fibromyalgia and had not waived the right to contest compensability of that condition and that a compensable injury of _____, is not a producing cause of fibromyalgia, agoraphobia and post-traumatic stress disorder (PTSD). The hearing officer's findings regarding the timely contest of compensability have not been appealed and will not be further discussed.

Appellant (claimant) appeals, contending that carrier's doctor, Dr. B, was an experienced psychiatrist who was of the opinion that the claimed conditions were the result of the _____, incident and was supported by other doctors, that doctors to the contrary were "paid guns" of the carrier and that "there is no other possible source" of her conditions. Claimant also alleges that carrier's attorney made an unwarranted vicious attack on claimant's character and asks us to admonish the attorney. Otherwise claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds to claimant's appeal and generally urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

Most of the background facts are disputed. Claimant was employed by the self-insured (apparently as a "cosmetics manager" according to one of the medical reports) and on the afternoon of _____, was involved in an incident with a coworker, Ms. O. According to claimant, she was helping prepare for inventory, exchanged some words with Ms. O and was walking away when she was struck in the middle of the back by "a tremendous thump," fell against a glass display case and fell to the floor, unconscious. Another version, as told to Ms. VB, the assistant store manager, was that claimant was kneeling when Ms. O pushed her. Both claimant and Ms. O were taken to Ms. VB's office within 20 or 30 minutes and counseled that their behavior was unprofessional. Ms. VB testified that no bruises were visible on claimant at that time. Claimant apparently was taken home by her husband shortly thereafter. Either that day or the next day, claimant's husband went to the self-insured and submitted claimant's resignation. Other testimony would indicate that claimant continued working for the self-insured some months after the incident in question. Carrier has accepted liability for a neck and back injury.

Undisputed is that claimant was seen by Dr. HG on July 16, 1996. In an Initial Medical Report (TWCC-61) and narrative of that date, Dr. HG recites that claimant saw her family doctor on July 14, 1996, but did not receive any kind of treatment, and a history that a coworker hit claimant in the back with her fists "knocking her forward into a display case."

Dr. HG diagnosed acute cervical hyperextension, low back mechanical pain, a headache and right arm contusion. In another report and functional capacity evaluation dated July 19, 1996, Dr. HG diagnosed mechanical neck pain, right shoulder sprain/strain and low back sprain/strain. The history recites that a coworker "pushed her forward," claimant's head struck a counter and that claimant "has an enormous amount of bruising around the right arm."

What course of treatment claimant had next is not developed; however, in December 1996, apparently on referral by Dr. HG, claimant began seeing a licensed professional counselor, Ms. COP, who notes that claimant has "panic attacks." Progress notes beginning on December 24, 1996 (a second visit apparently) and continuing through October 13, 1997, recite symptoms of fatigue, helplessness, suicidal thoughts, nervous tension, nightmares, etc.; a trip to (Country) in March 1997; and the death of claimant's parents within five days of each other in July 1997. In a hospital intake report dated January 8, 1997, Ms. COP assigns a DSM IV diagnosis of PTSD, and agoraphobia with history of panic attacks with recurrent nightmares. In a report dated December 29, 1997, Ms. COP diagnoses a severe depressive disorder and "[PTSD] due to her injury on _____."

Claimant was seen by Dr. S, an orthopedic surgeon, on December 30, 1996, and in a report of December 31st he recites a history of claimant being hit in the back, knocked into a cosmetic case and "lost consciousness and fell down." Dr. S's diagnosis was cervical spondylosis with an MRI scan diagnosis of a herniated disc at C5-6. In a report dated December 29, 1997, Dr. S comments on claimant's back pain. In a report dated August 4, 1998, Dr. S reviewed claimant's records, commented that claimant said "I have been diagnosed with fibromyalgia," stated that he saw "no positive objective clinical abnormalities" and concluded:

The patient is upset about the accident but that does not, in my opinion, make for a clinical entity diagnosis of agoraphobia and [PTSD]. There is no casual [sic] relation of the alleged conditions to the compensable injury of _____. Furthermore, the terms of "agoraphobia" and "[PTSD]" are deceptive, somewhat vague and subjective rather than clinically diagnostic. Any psychological effect of the injury per se would have been resolved a long time ago.

Claimant was examined by Dr. DG, the designated doctor, for an impairment rating. In a report dated February 13, 1998, Dr. DG recited claimant's history of being knocked into a display case and commented:

It is difficult to explain her bizarre behavior by this one incident. It does not appear to be significant enough to produce [PTSD] and her very bizarre behavior that she demonstrates. She ambulated with a cane in our office, however she was observed in the parking lot not using her cane when she left the office.

Subsequently, claimant was seen by Dr. E on April 17, 1998, and in a report of that date he recites a history of claimant being struck in the mid back with a fist and knocked into a large display case. Dr. E noted claimant's history, and assessed claimant with having fibromyalgia which "has no known cure." Claimant was sent to Dr. B by carrier for an opinion on ability to return to work, and whether the PTSD and agoraphobia were compensable. In a report dated May 7, 1998, Dr. B is of the impression that claimant "was assaulted by a black man and that she has not been functional since . . . and she is quite frightened of all black men after this event." Dr. B is of the opinion that claimant "is suffering from a [PTSD] syndrome that was developed by a physical attack and augmented by the personnel of [self-insured] attempting to cover it up." (This is denied by Ms. VB.) Dr. B diagnosis PTSD and agoraphobia. Dr. P did a record review and in a report dated May 25, 1998, indicated that in his opinion the medical records "do not support the diagnosis of [PTSD]" and that he agrees with Dr. DG, the designated doctor, that claimant's "behavior shows significant functional characteristics but . . . it would not be possible to ascribe all this to the single incident on _____." Dr. P goes on to state that he believes claimant's "psychological complaints . . . are due to her continued focus on perceived injustices by her employer and her feelings of racial injustice."

The hearing officer, in his Statement of the Evidence, commented on claimant's inability to remember some things, giving examples, and that the opinions of the health care providers diverged. Basically, the opinions of Ms. COP, Dr. B and Dr. E are contradicted by the reports of Dr. S, Dr. DG and Dr. P. The hearing officer further notes that Dr. B assumes claimant "was attacked by a black man." Carrier points out that for whatever reason Dr. B had an incorrect history and therefore his report should be accorded less weight.

The evidence in this case is in conflict, both regarding the facts surrounding the _____, altercation and the medical opinions whether the accepted compensable neck and low back injuries were a producing cause of fibromyalgia, agoraphobia and PTSD. (In effect an extent-of-injury issue.) The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she 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). With the evidence in conflict, the

hearing officer could believe and give greater weight to the reports of Dr. S, Dr. DG and Dr. P than reports to the contrary.

Regarding claimant's allegations of "vicious character assassination" by carrier's attorney, our review of the record indicates that carrier's attorney's conduct was proper and professional. Her questions regarding some aspects of claimant's life were relevant, as ruled on by the hearing officer, to the issues in question. We find no improper conduct and in any event the Appeals Panel is not the proper forum to admonish an attorney for either party.

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

Elaine M. Chaney
Appeals Judge