APPEAL NO. 991388

Following a contested case hearing held in (city 1), on May 25, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on _____, and that claimant did not have disability as a result of the claimed injury of _____. Claimant appeals these determinations on the grounds that they are not sufficiently supported by the evidence. The respondent (carrier) urges in response the sufficiency of the evidence to support the appealed determinations.

DECISION

Affirmed.

Claimant testified that she is a licensed vocational nurse; that in September 1998, she commenced employment with the employer making medical precertifications on medicaid recipients; that nine years previously, she injured her neck when she stretched while sitting in a lawn chair at a garage sale and underwent cervical fusion surgery at C5-6; that after moving to city 1 from city 2 where she had the fusion surgery, she received regular treatment for neck pain and stiffness, which she described as mostly right-sided and due to muscle spasms, from Dr. C and periodic chiropractic adjustments to her neck from Dr. B; that she had also been diagnosed with degenerative disc disease; and that on _____, when she reached across her desk and picked up a medical dictionary to hand to a fellow employee, she felt sharp pain and a burning sensation shoot up the left side of her neck and radiate into her head and shoulder. Claimant further stated that she dropped the book and asked that her supervisor be called and she described the dimensions of the book as being approximately eight and one-half inches by five and one-half inches, being four to five inches thick, and weighing approximately three to five pounds. She also described herself as being 43 years of age, five feet, seven inches tall, and weighing 112 pounds. Claimant further indicated that she sustained a neck injury on (alleged date of injury), apparently while working for another employer, that she saw Dr. C for that injury on February 19, 1998, and that she did not file a workers' compensation claim.

Claimant further testified that she has not worked since _____, and that her employment was terminated by the employer on February 18, 1999. She also said that although she has not been released to return to work, she was recently looking for part-time, light-duty work following a pain-free three weeks but that her pain has returned.

Dr. C's records reflect, among other things, that on _____, claimant was one week post neck injury and that Dr. C assessed muscle strain and spasm; that on February 11, 1999, Dr. C assessed right trapezius muscle pain and inflammation; that on February 16, 1999, Dr. C assessed cervical muscle strain and spasm; that on April 6, 1999, Dr. C assessed right trapezius muscle strain and cervical strain; that on June 29, 1999, Dr. C assessed carpal tunnel syndrome, peripheral neuropathy, and inflammatory arthritis; and

that Dr. C's records of July 7, September 9, October 2, November 13, December 18, and December 30, 1998, reflect varying assessments of right trapezius muscle strain, cervical spasm and strain, and myofascial pain. Dr. C's January 20, 1999, record reflects the assessment of severe cervical strain and myofascial pain; Dr. C's January 27, 1999, record reflects the assessment of severe cervical strain, symmetrical, and myofascial pain; and the _____, note of Dr. C's medical assistant reflects the complaint of "severe pain, cervical pain - from work related injury." Claimant indicated she did not see Dr. C on _____. The February 1, 1999, note of the medical assistant states the assessment as cervical strain with possible radiculopathy, myofascial pain, and cervical disc disease. Dr. C's February 17, 1999, notes reflect the assessment of cervical strain, myofascial pain, and cervical disc.

Dr. C wrote the carrier on February 12, 1999, stating that claimant presented on _____, with complaints of severe cervical pain, left upper extremity pain, and a burning sensation and a sudden onset of headache; that claimant advised that she had just come from her office where this onset was secondary to her picking up a book in an extended and rotated position; and that, within all reasonable medical probability, "this is casualy [sic] related to her work related event." On the copy of the carrier's letter of March 4, 1999, to Dr. C asking if the _____, injury enhanced, accelerated or worsened the underlying cervical and upper extremity condition he had been treating, Dr. C wrote that he had not seen claimant since February 17, 1999, and is unable to answer the question since the case is in dispute.

Dr. B testified that he had been treating claimant before _____, for neck pain and muscle spasm; that his first treatment after her _____, injury was on March 18, 1999, and that in terms of the differences in her symptoms, after _____, claimant complained of a greater degree of pain and also complained of pain and numbness in her elbow area and fingers and had shoulder area muscle spasm. Dr. B further stated that based on his examination and her testimony at the hearing, it was his opinion that the incident she described on _____, caused irritation to her nerve root, given her slight body habitus and the motion of reaching across the desk. He further testified that he would not be comfortable releasing her to return to work before obtaining a functional capacity evaluation.

Dr. B's report of April 1, 1999, states that Dr. C referred claimant to him for treatment on March 18, 1999, and this report, as well as his April 6, 1999, report, states that on _____, claimant sustained an injury to her cervical spine and had pain radiating into her left arm. Dr. B's May 19, 1999, report states that he diagnosed acute, post-traumatic cervical strain of the left levator scapulae muscle resulting in left C6-7 nerve root irritation and radicular pain and numbness following the C6-7 nerve distribution to the left elbow and hand. He also said that in all clinical probability, claimant's low body weight and muscle tone together with an underlying cervical spondylosis put her at greater risk for injury; and that, while the spondylosis and fusion was a complicating factor, it is not a causative factor in her initial presenting complaint.

In evidence is the April 9, 1999, EMG report of Dr. J stating the assessment as "[right crossed out and left written over it] cervical radiculopathy." Also in evidence is the report of an April 15, 1999, MRI exam stating impressions of a large left paracentral osteophyte projecting into the spinal canal and appearing to displace and deform the spinal cord and thecal sac at C4-5 and hypertrophic bone of the posterior body at C5-6 deforming the thecal sac but without evidence of cord compression. Dr. B stated with regard to the cervical spine osteophyte described in the MRI report, that claimant's injury did not cause the osteophyte nor was the osteophyte directly related to her neuropathy.

The records of both Dr. C and Dr. B contain documents taking claimant off work after _____.

Also in evidence, introduced by claimant, is a March 25, 1999, letter to claimant from an attorney representing the employer concerning claimant's allegations of retaliatory discharge which, states, among other things, that claimant had received warnings about her substantial job attendance problems and that on _____, the date of her alleged injury, her managers had planned to meet with her to present her with a final written warning but could not do so because she left work early.

Claimant challenges the hearing officer's findings that she did not show by a preponderance of the evidence that she sustained a compensable injury on _____, and similarly did not show that she had disability as a result of the claimed injury of _____.

It is well settled that the work-related aggravation of a preexisting injury or condition can constitute a compensable injury. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. Claimant had the burden to prove that she sustained the claimed injury and that she had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The carrier had no burden to adduce evidence though it did introduce some documentary evidence. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.).

Further, the hearing officer is not bound to accept the opinions of expert witnesses. In Gregory v. Texas Employers Insurance Association, 530 S.W.2d 105, 107 (Tex. 1975), the Texas Supreme Court, in a workers' compensation case, stated as follows: "While the expert witness' testimony must be taken as true insofar as it establishes facts, the opinions [sic] of the expert as to deductions from those facts is never binding on the trier of fact even though not contradicted by an opposing expert."

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge