

APPEAL NO. 991534

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 15, 1999. She (hearing officer) determined that the deceased's death on (date of death), was not a result of the compensable injury sustained on _____. The appellant, who is the surviving spouse and beneficiary (claimant), appeals this determination, expressing her disagreement with it. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed as reformed.

We consider the appeal timely, based on a distribution date of the decision and order of July 2, 1999; a date of receipt by the claimant on July 7, 1999; and receipt by the Texas Workers' Compensation Commission of the appeal and its supplement on July 21, 1999. The appeal is construed as a challenge to the sufficiency of the evidence. Texas Workers' Compensation Commission Appeal No. 92292, decided August 18, 1992.

The deceased, who was 72 years old at the time of his death, sustained compensable compression fractures at T-12 and L2 and L3 in a fall on _____. Dr. D prescribed an adjustable back brace to further healing and ease the pain. On (date of death), the claimant was admitted to the hospital with severe respiratory distress. He was diagnosed with pneumonia in the right lung and died that day. The claimant had a 50-year history of heavy smoking (one pack per day). Other preexisting conditions included chronic bronchitis and chronic obstructive pulmonary disease (COPD), vasculitis since 1978 for which he was prescribed cortisone, atherosclerotic disease, and diabetes. The certificate of death listed the immediate cause of death as pneumonia with septicemia. Underlying causes listed were multiple compression fractures, chronic bronchitis and COPD, and diabetes.

Section 401.011(26) defines injury as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." The claimant testified that the deceased was not able to breathe or spit up phlegm "as before" when he was given the back brace. She said that he felt "too good" before the injury just to pass away on (date of death). Whether the compensable compression fracture injury played a causative role in the pneumonia and death of the deceased was a question of fact for the hearing officer to decide. The claimant had the burden of proving causation in this case and, because the answer to this question of causation was beyond ordinary experience, it had to be proved by 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.).

The claimant's medical evidence consisted of the opinion of Dr. D. He testified that he had a family practice. He prescribed the back brace to decrease mobility of the back. In his opinion, the pneumonia was a "complication of the [deceased's] traumatic fall" and that the fall set in motion a sequence of events that, had it not been for the fall, the deceased would not have died. In a letter of February 8, 1994, he wrote that "[h]ad he not had the fall with the resulting severe pain and the restrictions of his chest wall due to the multiple fractures, the individual would not have developed the pneumonia at the time that he did." On September 19, 1996, he wrote that the fall "put significant stress on his body combined with the above illnesses that he was not able to maintain his normal respiration rate. He was not able to do adequate clearing of his chest . . . I feel he would have not developed pneumonia at the time he did if these factors were not in place." He also noted that the deceased "had been immunized against pneumonia and he knew how to take care of himself to prevent infection in his chest."

Dr. DV, a cardiologist, reviewed the deceased's records at the request of the carrier, and in a letter of April 20, 1995, summarized the deceased's medical history. He noted no mention of respiratory discomfort in the chart entries of (date of death), and concluded that "the pneumonia could be prevented if [deceased] has had healthy lungs. In all medical probability, the death was caused by the pneumonia which was secondary to his COPD and 50 years of smoking. It was not secondary to his compression fracture." Dr. T, an immunologist and occupational medicine specialist, also reviewed the deceased's records and testified at the CCH at the request of the carrier. He reviewed the claimant's medical history and observed that the pneumonia was confined in the right lung, but that the deceased had little pulmonary reserve with which to fight the pneumonia. He found no neurological basis for a fracture at T-12 to compromise breathing. Nor did he believe that chest wall movement was compromised by the injury some seven weeks before the date of death. He also said he had never heard of a back brace causing pneumonia. In his opinion there was no evidence of a cause and effect relationship between the compression fractures and the pneumonia.

The Appeals Panel has rejected the concept which would make compensable every condition which arguably would not have occurred "but for" the first injury. Texas Workers' Compensation Commission Appeal No. 941575, decided January 5, 1995. As noted above, whether the compensable injury in this case was a producing cause of the pneumonia, or whether the pneumonia naturally resulted from those fractures, were questions of fact for the hearing officer to decide. In her role as fact finder, she was the sole judge of the weight and credibility of the evidence, Section 410.165(a), and could accept or reject in whole or in part any of the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In this case, the hearing officer found Dr. DV's and Dr. T's opinions more credible and persuasive on the causation issue than the contrary opinion of Dr. D. These doctors provided their credentials and rationale for their respective conclusions. It was up to the hearing officer to determine from this evidence what facts had been established. A factual determination of a hearing officer is subject to reversal on appeal 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). Applying this standard of review to the record of this case, we find the opinions of Dr. DV and Dr. T, which were deemed credible by the hearing officer, sufficient to support her determination that the deceased's death was not the result of his compensable injury of _____. We reform Findings of Fact Nos. 4 through 7 to reflect that the death occurred in 1993, not 1994.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge