

APPEAL NO. 991575

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 29, 1999, a contested case hearing was held. With regard to the issues before her, the hearing officer determined that respondent's (claimant) compensable back, fractured hip and left wrist injury also extended to include a left foot injury and that appellant (carrier) had timely contested compensability of the claimed left foot injury.

Carrier appealed, contending that claimant had not met his burden of proving that the left foot injury naturally flowed from the compensable injury, citing authority it believes supports its contention. Carrier requests that we reverse the hearing officer's decision on this point and render a decision in its favor. Claimant responds, urging affirmance on the appealed issue and commenting that carrier had not timely "disputed" compensability of the left foot injury. Claimant's response is timely as a response but it is not timely as an appeal and, therefore, comments regarding carrier's timely contest of compensability are disregarded; the hearing officer's decision on that issue was not timely appealed and, consequently, the hearing officer's decision on the timely contest of compensability issue is final (see Section 410.169) and will not be discussed further.

DECISION

Affirmed.

Claimant testified that he was a "piping designer" for (employer) and as to the circumstances of a fall from a ladder/platform 15 feet to "a concrete grade" on _____. Claimant sustained a fractured pelvis, lumbar spine injuries, right elbow lacerations and eventually had surgery for a left wrist fracture. Claimant testified that he was in the hospital 35 days. Dr. F was claimant's treating doctor. A consultant's report of (the day after the fall), notes that claimant "had no motion in the left leg whatsoever." Claimant was fairly early-on prescribed physical therapy (PT). PT apparently began in July 1996 and a note dated January 7, 1997, notes that claimant had been receiving PT (from this therapist) "since 11/1/96," that "PT now reports no problems with gait using cane during all functional activities" and that claimant's standing and ambulatory balance "has improved but I anticipate pt will need cane for at least 3-6 months for safety." Dr. C, a "second opinion" doctor, in a report of December 11, 1996, recommended claimant "undergo a therapy exercise program to continue to try to progress his gait off of the crutch and to strengthen and give greater confidence with regard to the use of the left leg." In a note dated January 31, 1997, Dr. C noted complaints of swelling in his left foot, that claimant was being treated "for chronic osteomyelitis" and that peripheral edema in such cases was common.

Claimant testified that his "nurse case manager" did not get along with Dr. F, that the case manager recommended the second opinion by Dr. C and that the case manager encouraged claimant to change treating doctors to Dr. L, "even to the point of filling out the change of request and leaving it on my coffee table" Claimant testified that although

the PT Dr. F had ordered allowed him to get some strength back, he changed to Dr. L and saw Dr. L for the first time on April 25, 1997. Claimant testified that he told Dr. L "about the weakness [he] had in [his] left leg." Claimant said that Dr. L ordered him to stop using his walking cane and crutch. Claimant testified that as he was leaving Dr. L's office using his cane, the nurse manager took the cane away, saying "Doctor said not to use this." Claimant testified that without the cane or crutch, his left lower extremity would swell and become painful and that because of the numbness in his left foot and leg he "couldn't judge and [sic] amount of weight, pressure; the integrity between my mind and my foot was not there." On some unspecified date following this visit, claimant had gone to a shopping center, was walking without his cane, when his left foot went sideways and "it just collapsed on me." Claimant returned to Dr. L to tell him what happened. Dr. L, in a report dated May 19, 1997, concluded that "I really doubt that his left foot situation is due to his work related injury."

Claimant testified that he did not want to see Dr. L anymore and instead went to his "HMO doctor," Dr. M. In evidence are medical records from (M Association) where claimant was being treated for other conditions, including diabetes, by Dr. M. A radiology examination dated June 2, 1997, identified "early Charcot joint" of the left foot. An M Association note of August 13, 1997, indicates that testing was necessary to determine whether claimant's "foot problem" was related to his diabetes or his work-related injury. Evidently, testing was done, claimant was diagnosed with a "[l]eft phalanx dislocation with Charcot joint degeneration." In a detailed progress note dated October 6, 1997, M Association commented:

The patient appears to have developed a radiculopathy on top of his diabetic neuropathy subsequent to his fall. With a relative insensate left lower extremity, he has developed a Charcot foot. This appears at least in part related to his work related injury although there is certainly some underlying contribution from his diabetes.

A subsequent report states that there is no information to "support the diagnosis of osteomyelitis of his foot." Claimant was subsequently referred to Dr. B for evaluation. Dr. B, in a report dated December 22, 1998, recites claimant's medical history, including that claimant was examined by Dr. L on April 21, 1997, with a negative examination of the left foot and ankle, and then:

The first notation made by [Dr. L] of a foot deformity is on 5/19/97. [Dr. L] said the man had a severe foot deformity, but did not see how this could be related to his accident. It is interesting to note that about 3-4 weeks prior, [Dr. L] examined the man, examined his foot, examined his leg, and makes no mention of a deformity at all.

Dr. B concluded:

I believe the injury to the lumbar spine and the pelvic area that compromised the lower lumbar nerve roots pushed him over the edge and basically weakened his leg to the point that he had so little muscle function that his foot was at risk for fracture. This occurred sometime in 1997, and is compatible with the patient's history.

I, therefore, believe that the patient has, indeed, a work-related injury to the left foot. This is on the basis of the nerve injury of the lower left extremity, which precipitated the development of fractures of the left foot and subsequent Charcot joint formation.

Claimant's medical records were reviewed for carrier by Dr. H, who referred extensively to Dr. L's records, and concluded that claimant's "foot deformity is not a problem which would have been a natural result of the compensable injury."

The hearing officer, in her Statement of the Evidence, commented:

When the totality of the evidence is considered, Claimant established that his left foot condition was aggravated as a result of the compensable fall. Total numbness and lack of motion was noted in the hospital records of [Dr. F]. [PT] was given to increase Claimant's ambulatory and balance problems and use of the cane was recommended for 3-6 more months. Claimant was advised to stop using the cane during this same time frame and his instability caused a fracture to the left foot. [Dr. C], [Dr. B] and [M Association] relate the fractured foot, in part, from the low leg numbness from the compensable injury.

The hearing officer commented in some detail why she does not find Dr. L's and Dr. H's reports credible. Carrier recites that claimant "did not sustain his burden to persuade the finder of fact by a preponderance of the evidence that his illness came within the 1989 Act entitling him to benefits," citing Holgin v. Texas Employers Insurance Association, 790 S.W.2d 97 (Tex. App.-Fort Worth 1990, writ denied). It appears to us that the claimant did persuade the fact finder as evidenced by her decision and now carrier asks us to substitute our judgment for that of the hearing officer. Carrier cites the diagram in Dr. L's "April 1997 [sic, should be May 1, 1997]" questionnaire, which fails to show complaints about claimant's left foot. On the other hand, Dr. F clearly references lack of motion in the left foot and leg the day after the fall. In any event, all of this information was available to the hearing officer and the hearing officer simply did not find Dr. L's report persuasive. 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). Applying this standard of review to the record of this case, we decline to

substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Carrier cites four Appeals Panel decisions as examples for the proposition that claimant's left foot injury did not naturally flow from the claimed injury. First, we note that in all four cases the Appeals Panel was affirming the hearing officer's decision as not being so weak or so against the great weight of the evidence as to be clearly wrong or manifestly unjust, citing Cain, supra, and/or In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Further, in three of the four cases the so-called follow-on injury or fall occurred years after the initial injury, whereas in the instant case, left foot numbness (or "lack of motion") was noted contemporaneously with the compensable injury and the hearing officer found a relationship between Dr. L's ordering claimant to stop using the cane and the fall in the parking lot about a month later. Finally, the hearing officer quite clearly noted the medical reports of Dr. C, Dr. B and the M Association as supporting claimant's theory and Dr. L's and Dr. H's opinions to the contrary. As we have frequently remarked, Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

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. King, *supra*. We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge