APPEAL NO. 991732

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 19, 1999, a contested case hearing (CCH) was held. With regard to the issues before her, the hearing officer determined that the compensable injury included appellant's (claimant) right hand, right wrist, upper arm and right shoulder, but did not include or extend to the neck, upper back or depression. The hearing officer also found that claimant had disability from January 6, 1999 (all dates are 1999), and continuing. Respondent (carrier) had accepted liability for a right wrist, upper arm and right shoulder injury, and the hearing officer's determination that the injury includes a right hand injury has not been appealed. The hearing officer's determinations on disability also have not been appealed.

Claimant appeals, disagreeing with the hearing officer's Statement of the Evidence, the mechanics of how claimant was injured (which are really not at issue) and alleging a "bias and prejudicial attitude of this Hearing Officer." Claimant cites in some detail portions of the testimony and medical records which he believes support his position that he has neck and upper back injuries, and depression. Attached to the appeal is an undated report from Dr. DL, for evaluations performed on June 9th and July 19th. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier urges affirmance.

DECISION

Affirmed.

At the outset, we note that carrier has accepted liability for certain injured body parts and the findings that the compensable injury includes a right hand injury has not been appealed; therefore, we will not go through a review of the medical records dealing with those body parts. We will also note that the great preponderance of claimant's testimony dealt with the manner in which he was injured (and was not at issue) and the injury to his right upper extremity.

Claimant was employed in a cabinet shop when, on January 5th, a coworker accidently pushed a heavy kitchen cabinet into claimant. Claimant, in his appeal, takes issue with the hearing officer's finding that claimant was hit by a cabinet rather than one cabinet being pushed into another and, therefore, claimant "was struck by two (2) cabinets." We only cite this incident as showing that many of claimant's appeal points, while perhaps correct, are totally irrelevant to the appealed issue, which is the extent of injury.

Claimant testified through a translator that he sought medical care at the (clinic) on January 7th, where his complaints and treatment were only for the compensable right upper extremity. There apparently was some confusion over whether the employer was required to send claimant to the doctor and claimant said he paid for the clinic out of his own pocket. Claimant testified that after consulting with the Texas Workers' Compensation

Commission, he selected Dr. B out of the telephone book as a doctor who would treat workers' compensation injuries. (On appeal, claimant takes offense with the hearing officer because she asked claimant how it was that he chose Dr. B.) In evidence are the progress notes of Dr. B beginning January 11th. On an initial intake form, dated January 11th, in the associated symptoms section, the boxes marked "Problems Falling Asleep," "Pain Waking You Up" and "Anxious" are marked. Claimant contends these are indicative of early signs of depression. Similar boxes (without the "Anxious" box) are marked on a January 13th follow-up visit. The boxes checked on January 20th include those marked on January 13th, plus "Nightmares," "Tired" and "Irritable." Similar markings are on forms dated January 27th, February 17th, March 10th, April 28th, May 15th and June 30th.

Dr. B, as part of his January 11th report, includes a diagnosis of "C sprain" along with several diagnoses of the compensable conditions, and orders a cervical spine x-ray. Dr. B notes pain on palpitation at C5-6. Subsequent forms from Dr. B, as detailed in claimant's appeal, are checked or have one or two-word annotations by items dealing with the neck and upper back. We do note that the overwhelming focus of all those reports is on the compensable right upper extremity injuries. Dr. B, on some reports, lists a diagnosis code of 847.0, which claimant represents is the code for a cervical strain/sprain. Claimant, in his appeal, asserts that references in Dr. B's reports to the "Back Levator Scapulae" and "Rhomoid" actually are references to the cervical and thoracic spine and indicate injury to those areas. On a portion of a Specific and Subsequent Medical Report (TWCC-64) dated June 2nd, Dr. B suggests referral to a psychologist (not Dr. DL).

The most comprehensive report from Dr. B is dated July 2nd. In that report, Dr. B speaks about the injured areas, including the "trapezius muscle extending up into the lower cervical area," discusses the mechanics of the injury and how claimant "is quite frustrated and discouraged over the fact that he is not able to obtain treatment for his work related injury" (a fact that the hearing officer noted appeared to be a medical review issue and not something she had jurisdiction to address). Dr. B further stated:

> On examination, at the time of our first visit, the patient had tenderness at the base of the neck C5-6 level on the right side. *The patient is not sophisticated enough to know where the shoulder ends and the neck begins.* Once the demarcation lines were indicated to him he did agree that there was both shoulder and lower neck pain present. Trigger points were present in the trapezius muscle group on the right side going from the shoulder up into the base of the neck. These findings are consistent with [claimant's] mechanism of injury. [Emphasis in the original.]

Regarding medical evidence of depression, the hearing officer asked claimant if he had seen a psychologist or a psychiatrist and claimant said yes, identified Dr. DL and said that he had seen Dr. DL twice. Claimant's attorney stated that no records from Dr. DL were in evidence because she had not been able to get those records. The only medical evidence of depression is the series of box checks showing sleeplessness, irritability, anxiousness, etc. Claimant, in his appeal, states that "a progression of classic symptoms of depression [included] tired, anxious, irritability and inability to sleep with nightmares."

We note neither claimant's testimony nor claimant's attorney's interpretation of claimant's testimony and checkmarks constitutes medical evidence.

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

> The Claimant asserted that he suffered from depression at the Benefit Review Conference of May 20, 1999; otherwise, an issue concerning whether or not the Claimant's injury extended to and included depression would not have been certified. Interestingly, the first time that depression appeared as a diagnosis in the medical records presented occurred in the June 6 [sic, June 2], 1999, medical records of [Dr. B], D.O. I see no medical evidence to support an injury to the Claimant's neck or back. Although the Claimant stated that he had seen a health care professional for depression, no records other than those of [Dr. B], D.O., discuss this alleged condition.

As noted, claimant takes issue with the hearing officer citing the extensive records of Dr. B. As we have commented several times, the vast majority of the medical evidence dealt with treatment for the accepted, and hearing-officer-determined, compensable right upper extremity injuries, with checkmarked reference to the cervical and thoracic spine (as well as symptoms of tiredness and irritability, etc.) being given almost ancillary mention. Fairly clearly, the hearing officer could, and did, find that most of claimant's testimony dealt with his right hand, arm and shoulder and, only after some leading questions ("did it hurt there?", pointing to the neck) would claimant agree that he had pain in his neck or back. Dr. B explains this by saying that the claimant is not sophisticated enough to know where his shoulder ends and his neck begins. We observe that the interpreting of what claimant meant by his testimony is solely a function of the hearing officer. As we have many times noted, 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). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Claimant specifically appeals a fact finding that finds that the medical records "do not support any assertion" that claimant suffers from depression. While "any assertion" may be something of an overstatement, the hearing officer's decision that the preponderance of the evidence does not support a finding of depression is supportable.

Claimant's attorney further alleges real or perceived bias on the part of the hearing officer because claimant asked her if the hearing officer worked for the employer. Claimant's attorney also referred to "prior hearings" where the attorney "had the opportunity to observe this bias and prejudicial (condescending) attitude against claimants." Our review of the record in this case (prior cases are not before us) discloses no bias or prejudice.

We also comment that we did not consider Dr. DL's undated report submitted with claimant's appeal. As a general rule, the Appeals Panel does not consider new evidence on appeal. Texas Workers' Compensation Commission Appeal No. 93682, decided September 20, 1993. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to an appellant's knowledge after the CCH, whether it is cumulative in nature, whether it was through lack of diligence that it was not offered at the CCH and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case, claimant testified at the CCH that he had seen Dr. DL twice and the undated report shows one evaluation on June 9th. Claimant's attorney, at the CCH, merely represented that she did not have a report from Dr. DL. She did not say a report had been requested, nor did claimant request that the record remain open so that a report from Dr. DL could be included. Under these circumstances, we find no reason to remand the case for the hearing officer to consider Dr. DL's report as a newly discovered and generated medical report.

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:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge