

APPEAL NO. 991738

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 16, 1999, a hearing was held. He (hearing officer) determined that appellant (claimant) did not sustain a compensable injury to his back on _____, and did not have disability. Claimant asserts that it was an abuse of discretion not to admit two exhibits he offered. In addition, claimant states that the decision that no compensable injury occurred is against the great weight and preponderance of the evidence, addressing both the lumbar and thoracic spine. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____. He testified that on that day he attempted to lift up (to open) the rear cargo door of a trailer; it did not rise as expected, and in his attempt to lift it, claimant stated that he hurt his back. Claimant then used a forklift blade to raise the door.

Claimant's low back was first hurt on (prior date of injury). Claimant testified that he has had to continue taking narcotics since 1993. While he had some periods of inability to work in 1994 and 1995, he stated that he was able to work for the last three plus years. Up to the time of the _____ incident, claimant agreed that he was taking as many as six "narcotics" daily. He was taken off work on December 11, 1998, by (Dr. S), D.C., and, claimant said, he has not been returned to work yet. He was awaiting surgery on his low back at the time of the hearing.

Claimant's medical records show that he had an MRI in 1994, another on September 15, 1998 (just less than three months prior to the incident in question), and another on January 13, 1999. In addition, his medical records show that (Dr. P), in May 1998, indicated that claimant was taking six Lortab a day. In April 1998, claimant was noted to have had an "acute lumbar exacerbation" with "pain escalating down to both ankles." Similarly, in early October 1997 there is another reference, said to be from a week before, to a "pain exacerbation" said to have occurred in lifting a ramp at work. During the first 10 days of September 1997 claimant had another "flare-up" in which the pain was said to "radiate up into the upper back and around the ribs."

Claimant testified that it was hard to describe the difference he felt when he injured his back (_____) as opposed to a flare-up. He said "you know it when it happens." He said he knew that something new was wrong in _____.

The September 1998 MRI showed a 3 mm disc protrusion/herniation at L3-4; a 2 mm disc protrusion/herniation at L4-5; and a 2 mm disc bulge/protrusion at L5-S1. The January 1999 MRI showed (both MRIs were reported by the same radiologist) a 1-2 mm disc bulge/protrusion at L2-3; a 2-3 mm disc bulge/protrusion at L3-4; a 2-3 mm disc bulge/protrusion at L4-5; and a 2 mm disc bulge "with more focal left posterolateral disc protrusion/herniation."

(Dr. Pe) testified for the carrier. He said that there was "no difference of significance" between the 1998 and 1999 MRIs. He added that from a "structural standpoint," there was "virtually no difference" between the two. Dr. Pe said that a thoracic MRI provided in January 1999 reported a 2 mm disc protrusion/herniation at T6-7. He added that claimant's records showed no complaints relative to the thoracic area and stated that "over 70 percent of the normal population with no thoracic pain has an abnormal thoracic MRI." He also said about claimant's lumbar spine, "degenerative changes are going to continue" in the years since the 1993 injury. In regard to surgery, Dr. Pe said that claimant was just as strong a candidate for surgery in September 1998 as he is now. While answering questions on cross-examination relative to whether an MRI that reported a herniation in 1998 could report a protrusion in 1999, Dr. Pe said that "[h]erniations do improve. Herniations will retract."

Claimant asserts that the hearing officer should have admitted two exhibits that were rejected. Claimant's Exhibit No. 3 contained reports of (Dr. R), a neurosurgeon; claimant's attorney said the reports were mailed to carrier on May 18, 1999. Carrier replied (including the adjuster who was present) that it never got the records of Dr. R contained in Claimant's Exhibit No. 3 although it had gotten Dr. R's earlier records. The hearing officer pointed out that claimant did not have a cover letter listing the reports being exchanged. Claimant's lawyer then stated that her "green card" was not in her file and asked that she be permitted to call her office to see if it could be located. The hearing officer denied that request, commenting that evidence should be available at the hearing. The hearing officer excluded Claimant's Exhibit No. 3. The record does not show that he abused his discretion in excluding that exhibit.

Carrier also objected to Claimant's Exhibit No. 4. That exhibit involved a facsimile transmission of a medical report of (Dr. B). The fax showed that it was received by carrier, but the hearing officer questioned that it did not refer to the date of the report, and carrier said it did not have the June 3, 1999, report of Dr. B being offered into evidence. Claimant then stated that he had a letter that refers to the June 3rd report by date. Carrier again said it did not have that letter. The hearing officer then commented that he could not tell whether the letter was sent with the fax transmission or not, although he acknowledged that the total number of pages specified would be correct if the letter were included. (The letter and fax cover sheet are included as Claimant's Exhibit No. 14; the letter has no indication of having been received while the fax transmittal does contain a date of receipt of June 9, 1999, stating that seven pages were received [which would be correct if the letter were part of the package].) While a fact finder certainly could have inferred from this evidence that

the documents of Dr. B dated June 3, 1999, were exchanged, there is some evidence that Dr. B's June 3, 1999, documents were not exchanged, based on carrier's denial of exchange of the June 3, 1999, documents and the absence of a showing that a letter listing what was exchanged had been received. We point out, however, that even if it was error to exclude Claimant's Exhibit No. 4, Dr. B's documents show that he performed an EMG on claimant indicating bilateral L4 and L5 radiculopathy, with no attempt to indicate how long such abnormality had been present. As such, exclusion of Dr. B's documents would not be reasonably calculated to cause the rendition of an improper decision in this case, so exclusion was not reversible error. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

As claimant pointed out in his testimony, Dr. R, (Dr. F), his pain management doctor, and Dr. S all indicated that his _____, pain reflected a "new injury." He added that Dr. R compared the various lumbar MRI films in arriving at his opinion. Nevertheless, with Dr. Pe's testimony, including that there was no indication in the medical records that claimant had a thoracic injury even though an MRI showed an abnormality, along with the lumbar MRI reports themselves, plus claimant's medical history of repeated exacerbations, including the year of the asserted injury, and continued significant use of narcotics to control pain from the prior injury, there was sufficient evidence in the record to support the determination that claimant did not show that he sustained a compensable injury on _____.

With an affirmed finding of no compensable injury, there can be no disability. See Section 401.011(16).

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge