APPEAL NO. 991760

Following a contested case hearing held on August 2, 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 concluding that the appellant's (claimant) low back, left shoulder, and neck injuries are not a result of the compensable injury sustained on or about _____, and that the finding of maximum medical improvement (MMI) and the impairment rating (IR) assigned by JDr. T, on April 26, 1995, are considered final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Claimant has requested our review, disputing these conclusions and the factual findings underlying them on evidentiary insufficiency grounds. The respondent (carrier) urges in reply that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

Claimant testified that while at her workplace on _____, she was exiting the building to take a break and that as she pushed the outside door open, a strong wind blew the door back against the building, her left side was slammed against the building, and she was thrown approximately 50 feet where she landed in an awkward position with both feet under her. Claimant, who said she weighed about 170 pounds at that time, also said that this fall involved a drop of about one and one-half feet to the ground. She said she was taken to an emergency room where she complained of hurting all over but mostly below the knees, and that she was treated for a broken left ankle and a sprained right ankle and released. She indicated that she commenced treatment with Dr. T and was off work and receiving income benefits from the carrier; that she hired an attorney who filed a suit for an unsafe workplace and was taking care of her workers' compensation claim; and that sometime in 1995 she changed treating doctors to Dr. K. Dr. T's initial medical report of December 23, 1994, stated the history as claimant's having stepped down and twisted her left foot, losing her balance and falling on her left foot. He diagnosed left ankle lateral malleolar fracture and Grade I sprain of right ankle. None of Dr. T's records, including his last treatment record of April 26, 1995, mention any injury to claimant's neck, left shoulder, or back. The April 26, 1995, report stated that claimant had no swelling or induration; that both ankles felt equally stable and good; that she had tenderness of the fibula and ankle ligaments and very tight calves; that she was to continue strengthening and return to full duty; and that her IR was three percent, secondary to the fracture with loss of motion. Dr. T signed a Report of Medical Evaluation (TWCC-69) on April 26, 1995, certifying that claimant reached MMI on April 5, 1995, with an IR of three percent.

Dr. K's records in evidence reflect his treatment of claimant from September 7, 1995, through July 26, 1996, in (city A) and that his diagnosis was "traumatic arthritis ankle." Neither Dr. T's nor Dr. K's records mention the diagnosis of any injury other than the ankles.

Claimant stated that in 1995 she resided at address in city A and that she did not recall receiving notice of Dr. T's certification that she reached MMI on April 26, 1995, with an IR of three percent. She further stated that she first became aware of Dr. T's MMI date and IR "in June 1995" when she received a large check from the carrier and called her attorney about it; that the attorney told her it was "some kind of final payment"; that she told him she did not agree with Dr. T's determination and was getting a second opinion from Dr. K; and that her attorney told her he was looking into it, that he had to fill out some form to dispute it, and that he would let her know when he found something out, but that he did not get back to her. A Texas Workers' Compensation Commission (Commission) Dispute Resolution Information System (DRIS) note of November 22, 1995, states that an EES19 letter was printed and mailed on that date. Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The Appeals Panel has held that a claimant must have received some writing evidencing such assigned IR.

Claimant further stated that she called the Commission's field office in (city B) and was told that her claim was being handled in (city C); that she called a city C field office and was told by the employee that the employee could not discuss her case with her because she had an attorney and that her attorney needed to file some form; that she again contacted her attorney; and that she again contacted the field office and was told her attorney had filed the wrong form and had been notified to file the correct form, which he never did. She stated at one point that she received Dr. T's certification in December 1998 when she "fired" her attorney. She also said she moved to (city D) in September 1995 and fired her attorney that month and that her lawsuit was settled in May 1999 by another attorney. However, as noted, Dr. K's records reflect that he treated claimant in city A through July 1996. Further, a Commission RLOG record in evidence states that on October 1, 1996, claimant's file was reassigned to city D. The RLOG also shows that on September 17, 1996, the Commission approved claimant's request to change treating doctors to Dr. G in city D.

Claimant further testified that she told both Dr. T and Dr. K, whom she first saw on April 6, 1995, that she had problems with her neck, left shoulder, and low back, as she told all the doctors, but that they both told her she was just bruised. She attributed the absence of diagnoses of her neck, left shoulder, and low back injuries in Dr. T's and Dr. K's records to the fact that they could only treat her ankle injuries and to their failure to note all her comments.

A DRIS note of March 5, 1999, states that claimant called the Commission to inquire about pursuing a claim since the carrier was denying her claim; that her file was reviewed and that issues of extent of injury to the back, dispute of all medical and indemnity, and 90-day finality of the three percent IR were noted; that claimant said that "a lot has happened"; and that Dr. G has submitted medical reports and the carrier still disputes the claim. The DRIS note further stated that claimant was told to bring in copies of her medical records and the Commission would enter a request for a benefit review conference.

Dr. G wrote on July 15, 1999, that claimant has explained to all of her doctors that she hurts all over including her neck, shoulders, and back; that she has had continued back problems since her injury, as well as "some neurologic disturbances" on EMG and nerve conduction studies; that a recent MRI revealed no significant herniated disc and no need for surgery; that she has had continued problems since her injury, which were not addressed because they were not as severe; and that claimant is probably likely to have chronic continued pain in the back and ankles and will need ongoing care by a rehabilitation physician.

Not disputed is the finding that Dr. T certified that claimant attained MMI on April 26, 1995, with a three percent IR. Claimant does challenge the following findings in addition to the aforesaid legal conclusions:

FINDINGS OF FACT

4. The Commission sent the Claimant written notice of the determinations and assessments of [Dr. T] on November 22, 1995.

5. The Claimant disputed the determinations and assessments of [Dr. T] on March 5, 1999.

6. The Claimant is presumed to have received the EES19 letter on or before November 30, 1995.

7. March 5, 1999, is more than ninety (90) days following November 30, 1995.

8. The preponderance of the evidence presented does not show or otherwise establish that the Claimant injured her low back, her neck, or her shoulder when she fell from the Employer's porch on _____.

9. The cause of any problems that the Claimant has experienced with her neck, low back, and her shoulder cannot be determined from the evidence presented.

Whether claimant's compensable injury of _____, extended to her neck, left shoulder, and low back, and whether she timely disputed Dr. T's three percent IR pursuant to Rule 130.5(e) presented the hearing officer with questions of fact to determine. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(e)) and, as the trier of fact, resolves the conflicts and inconsistencies in 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)). The Appeals Panel, an appellate reviewing tribunal, 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:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge