APPEAL NO. 991772

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 July 8, 1999. He (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury, that he did not injure his thoracic spine, and that he did not have disability. Claimant appeals these determinations on sufficiency grounds. The hearing officer's determination that claimant timely reported his alleged injury was not appealed. Claimant also asks the Appeals Panel to consider new evidence from Dr. M, dated after the date of the CCH. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant first contends the hearing officer erred in determining that he did not sustain a compensable injury to his cervical or thoracic spine or shoulders on _____. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act 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." Section 401.011(26). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer adequately summarizes the evidence in his decision and order. Briefly, claimant testified that he injured his neck on _____, while moving compressors onto a cart. He said he thought he had a "crick" in his neck, and he continued to work that day and on Friday, the next day. Claimant said that on Monday, he told the safety manager that his leg hurt and also that he hurt his neck, and that he was sent home. He testified that he later went to a clinic for treatment and that he called in to say he would not be at work. Claimant that said he began treating with Dr. B in March 1999, that the doctor took him off work, and that he has not been released to return to work. The safety manager testified that, when claimant told her that his leg hurt on Monday, she told claimant his leg injury was not covered by workers' compensation insurance because it was due to walking and because he did not have a specific incident that caused it. She said he did not relate his neck "crick" to his work.

In a March 3, 1999, report, Dr. B stated that claimant's diagnoses included a cervical sprain/strain, cervical radiculitis, muscle spasm, and disc degeneration. Dr. B noted spasm and decreased range of motion (ROM) in both claimant's cervical and thoracic spine. Dr. B also stated that the shoulder depression test indicated adhesions of the dural sleeves. A March 5, 1999, cervical MRI report states that claimant has a posterior osteophyte and a small central "HNP" at C5-6.

The majority of claimant's complaints go to the credibility of the evidence and what inferences the claimant believes the hearing officer should have drawn from the evidence. The hearing officer was the sole judge of the credibility of the witnesses and medical evidence. As the fact finder, he considered the issue of whether claimant sustained a compensable injury on _____, and resolved this issue against claimant. The hearing officer was not required to believe claimant's testimony or the "uncontroverted" medical evidence. We will not substitute our judgment for his in that regard because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

We note that Section 409.005(f) provides that the Employer's First Report of Injury or Illness (TWCC-1) may not be considered to be an admission by or evidence against an employer or carrier where the facts are in dispute. Consequently, we did not consider the TWCC-1 as evidence that claimant sustained the injury as alleged.

Claimant contends the hearing officer erred in determining that he did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Because there was no compensable injury, there can be no disability.

Claimant asks the Appeals Panel to consider the August 13, 1999, report of Dr. M for the first time on appeal. Generally, we will not consider evidence not submitted into the record but raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the party's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, 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).

Claimant states that Dr. M examined claimant for carrier. In his report, which was written after the CCH, Dr. M stated that: (1) he examined claimant and there was no muscle spasm noted; (2) a sensory exam showed decreased sensation in the right fingers; (3) it "appears clear" that claimant sustained a legitimate work place injury; (4) claimant had decreased cervical ROM; (5) the protrusion shown on the MRI report is likely preexisting; (6) claimant may have aggravated that condition; and (7) that soft tissue pain is present.

Here, Dr. M gave his opinion regarding whether claimant's symptoms showed a "legitimate" cervical condition. We note that carrier did not dispute that claimant may have a degenerative neck condition, but contended that claimant did not sustain an injury that was work related. Dr. M's evidence does not concern whether an incident occurred at work and the medical evidence of a cervical condition is cumulative of other medical evidence that was admitted at the CCH. Therefore, we do not find that a remand is justified because this evidence is not so material that it would probably produce a different result. Appeal No. 93111, *supra.*

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge