

APPEAL NO. 991780

Following a contested case hearing held on July 16, 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 determining that the appellant (claimant) sustained an injury in the course and scope of his employment on _____, and that he had disability resulting from the _____, injury from October 3 to 13, 1997, and from November 28, 1997, through January 19, 1998. Claimant has appealed the disability determination, contending that he has had disability from _____, through the date of the hearing due to the aggravation of a preexisting condition. The respondent (carrier) urges in response that the evidence sufficiently supports the disputed findings and conclusion.

DECISION

Reversed and a new decision rendered.

Claimant testified that on _____, his employment by (employer) involved the removal of blades from bulldozers; that removal of the blades required his pounding on six 10" to 12" steel pins with a 20-pound hammer; and that while in the process of removing a blade on _____, he felt a sharp pain in his left arm, which restricted his range of motion. He also said he is left hand dominant. Claimant further stated that he informed his supervisor of his injury on _____ and on that day was seen by Dr. LC, who advised him that x-rays showed the presence of loose bodies in his shoulder which needed to be surgically removed and surgery was scheduled for October 8, 1997. He said he resumed working, but only part-time (in the morning), through October 7, 1997, and underwent surgery by Dr. LC on October 8, 1997, a Wednesday. Dr. LC's operative report of that date states the diagnosis as left shoulder degenerative disease with loose bodies and the procedure as left shoulder arthroscopic removal of loose bodies.

Claimant further testified that although he was not released to return to work, he nevertheless returned to work on the following Monday, October 13, 1997, but worked reduced hours, and that he continued such work into late November 1997 despite still having staples in his arm and having pain. He did not testify to any reduction in his earnings during this period. He said that during the last week in November 1997, he contacted Dr. LC because he hurt his arm again doing the same work; that x-rays revealed the presence of another loose body; and that he underwent surgery on December 3, 1997, for removal of the loose body. Dr. LC's operative report of that date states the diagnosis as "loose body left shoulder with degenerative joint disease of left shoulder" and reflects that a large loose body, which was not previously removed because of its location, had re-emerged into the joint and was removed.

Claimant testified that following the second surgery, he was given therapy and pain medication and eventually released for light duty but that the employer had none for him; that during the spring and early summer of 1998 he continued to see Dr. LC, receive therapy, and take medication; and that, following some x-ray studies on a date not

specified, he was referred to Dr. H, who performed left shoulder replacement surgery on June 30, 1998. Dr. H's June 30, 1998, operative report states the diagnosis as osteoarthritis of the left shoulder and status postarthrotomy for loose body removal and the procedure as a left shoulder hemiarthroplasty. Claimant said that following the shoulder replacement, he received therapy and continued seeing Dr. H; that Dr. H released him for light duty on October 16, 1998, but that the employer had none for him; and that when he saw Dr. H on January 21, 1999, Dr. H told him he could not return to work and to continue his therapy.

Claimant further testified that he has not been employed since November 28, 1997, because of the pain in his shoulder, the medications he takes, and the interference with his sleep. He denied having sustained any previous injury to his shoulder, including dislocation, notwithstanding some mention of such in a medical record.

Dr. LC wrote on December 19, 1997, that claimant's work with heavy equipment involves swinging a fairly heavy hammer and that "[a]lthough the work did not cause the arthrosis, it certainly has aggravated it." Arthrosis is defined as a disease of a joint. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, (28th ed. 1994), pg. 142. Dr. LC further stated that claimant's sharp pain when first seen in October "was in addition to his regular type pain"; that this was felt to have been secondary to a loose body in his left shoulder; that claimant had multiple loose bodies and underwent surgery on October 8th for their removal; that one of the loose bodies was not able to be removed arthroscopically and claimant underwent an arthrotomy on December 8th for its removal; that claimant has been completely disabled from October 8th to the present; and that claimant will probably have fully recovered from the December 8th surgery in the next month, but will continue to have some arthritic symptoms.

Dr. H's operative report stated that claimant is a 41-year-old male with osteoarthritis, possibly secondary to shoulder instability, but that this question is unclear; and that even after the loose body was removed in December, claimant continued to have substantial symptoms. Dr. H reported on January 21, 1999, that claimant "is totally disabled from performing his current job and he will never be able to return to that job."

In his closing statement claimant urged, variously, that he had disability from October 8, 1997, to the date of the hearing even though he worked until November 28, 1997, and that he had disability from November 28, 1997, to the date of the hearing. The carrier noted that the work did not cause, but did aggravate the arthrosis; that the condition needing treatment, arthritis, is an ordinary disease of life; and that since there was no injury in the course and scope of employment, there can be no disability.

Concerning the injury issue, the hearing officer made a "finding" (Finding of Fact No. 2) that "[t]he Claimant sustained an injury in the course and scope of employment on _____." The hearing officer then repeated this "finding," virtually verbatim, as Conclusion of Law No. 3. Neither the "finding" nor the conclusion are challenged on appeal. The Appeals Panel has had occasion to comment on the difference between a finding of fact and a conclusion of law, both of which are required by Section 410.165(a)(1).

See e.g. Texas Workers' Compensation Commission Appeal No. 92230, decided July 17, 1992, where the lack of a finding of fact necessitated a remand, and Texas Workers' Compensation Commission Appeal No. 991704, decided September 23, 1999. Since this problem is not raised on appeal, we need not take corrective action.

On the disability issue, the hearing officer made the following two findings, both of which are disputed on appeal:

FINDINGS OF FACT

3. As a result of the injury sustained on _____, the Claimant was unable to obtain and retain employment at his pre-injury wages from _____ through October 8, 1997 and from November 28, 1997 through January 19, 1998.
4. The Claimant's injurious condition in his left shoulder as of January 20, 1998 to the date of the hearing is the result of pre-existing osteoarthritis and not of the work-related incident of _____.

Claimant also disputes Conclusion of Law No. 4 which states that "[t]he Claimant had disability resulting from the _____ alleged injury from _____ to October 13, 1997 and from November 28, 1997 through January 19, 1998."

In his discussion of the evidence, the hearing officer states that the records show that claimant had severe arthritis in the left shoulder before _____; that while Dr. LC did state that claimant's job duties "aggravated" the preexisting arthritis, she did not specifically say just how the job duties accelerated or worsened the condition, nor address the _____, incident as a specific triggering or causal factor; that it stands to reason that the work activities "at the very least were instrumental in bringing about the migration of the 'loose bodies' into the shoulder joint"; and that "to that extent the evidence supports a finding that the Claimant sustained a compensable injury on October 8 [sic], 1997." The hearing officer goes on to state that the preexisting arthritis "was not shown to be caused, accelerated, or worsened by the Claimant's job activities, and the effects of the entry of 'loose bodies' into the shoulder joint."

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). Disability, by definition, depends upon there being a compensable injury. The Appeals Panel has held that the compensable injury need not be the sole cause of disability. See e.g. Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995; Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996; and Texas Workers' Compensation Commission Appeal No. 941012, decided September 14, 1994. It is sufficient to support a finding of disability if a compensable injury is a producing cause of the inability to obtain and retain employment and it need not be the exclusive cause. Appeal No. 960054, *supra*. While claimant had the burden to prove that he had disability and the duration thereof, the carrier would have the burden to prove that a

preexisting condition is the sole cause of claimant's inability to obtain and retain employment at his preinjury wage at some point in time short of the period of disability contended for by claimant. Appeal No. 950264, *supra*.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) 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. 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).

We determine that the challenged findings of fact are against the great weight of the evidence and we reverse them. The report of Dr. LC plainly states that claimant's work activities "certainly has aggravated" the arthrosis and there is no medical evidence to the contrary. The only medical matter in question was whether claimant had previously had a shoulder joint dislocation. Further, the medical evidence does not establish that the effects of the two operations for removal of loose bodies in the left shoulder joint did not contribute to claimant's disability after January 20, 1998. Finally, the evidence did not establish that the preexisting arthrosis or arthritis, even if it were not aggravated and thus not part of the compensable injury, was the sole cause of claimant's disability after January 20, 1998.

We reverse so much of Conclusion of Law No. 4 and so much of the Decision as determines that claimant's disability ended on January 19, 1998, and we render a new decision and order that claimant's disability extended to the date of the hearing.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge