APPEAL NO. 991786

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 June 21 and July 8, 1999, with the record closing on July 26, 1999. He (hearing officer) determined that the appellant's (claimant) compensable injury of _____, did not extend to a right arm lipoma, gall bladder condition, or liver condition, and that the claimant was not entitled to supplemental income benefits (SIBS) for the third quarter. The claimant appeals these determinations, expressing her disagreement with them. The respondent (self-insured) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as an instructional assistant for the self-insured school district. On _____, she was assaulted by a student. The self-insured has accepted as compensable a cervical and lumbar spine injury.

Section 401.011(26) 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." The position of the claimant was that a right arm lipoma (a benign fatty tumor), gall bladder and liver condition naturally resulted from the trauma of the compensable injury. Because the causal connection between the original injury and the alleged resulting injuries is not a matter of common knowledge or experience, the claimant was required to prove the causal connection with expert evidence to a reasonable degree of medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). Whether the causal relation existed was a question of fact for the hearing officer to decide.

The claimant generally complained of right arm pain since the injury. According to the medical records, the pain was radiating from the spine and not generated in the arm itself. She testified that she first noticed the lipoma sometime in 1996; that treatment for it was denied in 1997; and that Dr. H, a treating doctor, told her the lipoma was not related to the injury, but did not say why not. In a report of February 7, 1998, Dr. P noted complaints of a "painful lump along her right shoulder . . ." and wrote that "fullness over the deltoid" felt "as if it is lipomatous tissue . . . ." Dr. M excised the tissue on May 17, 1999, but no records of his treatment were in evidence. Dr. Z, who is apparently the current treating doctor, wrote on May 10, 1999, a brief letter describing the claimant's current complaints and noting that she was referred to Dr. M "for lipoma in arm." He concluded that "[t]his is all related to her injury at work on _____." The hearing officer commented in his decision and order that the claimant "first reported" the lipoma to Dr. Z on February 25, 1999. However, there were medical records in evidence, apparently from Dr. Z, which reflected

this complaint as early as November 1998. In a letter of April 16, 1999, Dr. R, at the request of the self-insured and, based on a records review, commented that a lipoma "is generally thought to result from trauma," but it was "not possible to state with any certainty that the lipoma is related to the incident of _____. However, it might well be." The hearing officer considered this evidence and concluded that the claimant did not prove that the lipoma was caused by or naturally resulted from the compensable injury. In her appeal, the claimant asserts that the records of Dr. H reflect complaints of pain radiating down the right arm and tests show nerve damage. A record of radiating pain does not establish the cause of the lipoma. As noted above, the hearing officer erred in stating that the first record of the lipoma complaint was in February 1999. Evidence showed prior complaints. We do not, however, believe that the time lapse between the date of injury and the lipoma complaint two or three years later was solely determinative, but that the chief reason for the hearing officer's determination was the lack of expert evidence establishing causation to a reasonable degree of medical probability. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determination that the compensable injury did not cause the lipoma.[1]

On August 12, 1998, the claimant presented herself to the Medical Center emergency room with severe right upper quadrant abdominal pain. The diagnosis was acute cholecystitis. The gall bladder with gallstone was removed. No medical reports link this condition with the compensable injury. The claimant was granted a delay and the record of the CCH was held open to obtain such records. She was unsuccessful and the suggestion was made that they were lost in the military system among the installations in San Antonio. We have observed that the difficulty of proving medical causation does not lighten or relieve a claimant of the burden of proof. Texas Workers' Compensation Commission Appeal No. 93665, decided September 15, 1993. The claimant suggested the gall bladder condition was caused by her use of prescribed medications. The hearing officer commented on the lack of medical evidence of causation and found that the gall bladder condition was not causally related to the compensable injury. Under our standard of review, we affirm that determination.

The claimant described her liver condition as elevated enzymes. The initial question raised by the carrier was whether this condition met the definition of injury. Dr. Z wrote on July 11, 1997, that this condition was "likely due to chronic intake of analgesics." The claimant attributes the condition to her use of Darvocet. The medical evidence after July 1997 does not show damage to the liver. As the sole judge of the weight and credibility of the evidence under Section 410.165(a), the hearing officer could accept or reject Dr. Z's opinion of causation. The opinion itself is limited to one sentence and used the word "likely." While use of the phrase "reasonable medical probability" is not required, the

[1]We observe that the better practice is to track the statutory language of "naturally resulting" rather than such phraseology as "direct and natural result."

hearing officer was not persuaded that the claimant's evidence rose to the level of reasonable medical probability that there was a causal connection. Again, under our standard of review, we find the evidence sufficient to affirm that determination.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The third quarter was from May 13 to August 11, 1999. The parties agreed that the filing period was the preceding 90 days. *See* Texas Workers' Compensation Commission Appeal No. 991558, decided September 7, 1999 (Unpublished), footnote 1.

At issue was whether the claimant made the required good faith job search. She testified that she made no job search efforts because Dr. Z had not released her to return to work and she believed she was unable to work at all. The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

Apparently, the claimant has not worked since the injury. On April 13, 1999, Dr. Z wrote that she was to continue off work until further notice. In his letter of May 10, 1999, discussed above, Dr. Z stated that claimant was "unable to work at this time due to continue [sic] pain to neck radiated to right upper extremities with tingling and numbness of right forearm" and back pain. A work capacity evaluation of March 2, 1999, placed her in

the sedentary work category. In a letter of March 11, 1999, Dr. Z wrote that this "shows [claimant] able to do sedentary work only with no lifting above 10 lbs." He nonetheless continued her in an off-work status. In her appeal, the claimant argues that Dr. Z's opinion should carry more weight and that during the filing period the self-insured extended her medical leave. As noted above, whether the claimant had some ability to work during the filing period was a question of fact for the hearing officer to decide. The hearing officer weighed this evidence and considered Dr. Z's off-work comments to be more of a routine nature and found more persuasive the work capacity evaluation, with which Dr. Z also seemed to agree. Under our standard of review of factual determinations of hearing officers, we find the evidence sufficient to support this determination.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge