APPEAL NO. 991812

Following a contested case hearing held on July 30, 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) did not sustain an injury to his left shoulder or to his low back in the course and scope of his employment on _____, and that he has not had disability. Claimant has requested our review, challenging a number of factual findings and the dispositive conclusions. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

Claimant testified that prior to commencing employment with (employer) in _____as a truck driver, he had previously injured his left shoulder and had undergone surgery; that he was on pain medication for his left shoulder, which had pins in it, when he took the pre-employment physical in _____; that he was seeing his treating doctor, Dr. P, periodically for renewal of the medication, Lorcet, which he was taking four times a day for his left shoulder pain, and for Xanax, which he took for sleep; and that Dr. P had been discussing further surgery on the left shoulder. Claimant indicated that in December 1998, he passed the employer's drug test, despite his medications, because, with supervisory knowledge, another employee's urine specimen was substituted for his. He stated that on _____, while out on a location to remove water from tanks, he slipped on a tank ladder while trying to insert a hose into the top of the tank and hyperextended his left shoulder; that he completed his shift and was scheduled to be off work the next three days; that he then reported to work and told Mr. N, the dispatcher and yard manager, that he hurt his left shoulder on location and could neither drive a truck nor work in the shop; that Mr. N told him to go home and rest and he would talk to the safety officer to see what claimant could do; and that later that day, Mr. N called and told claimant the employer could no longer use him given the medications he was taking and to bring in his uniforms and pick up his last paycheck. Claimant further testified that his low back began to hurt about one week after _____; that he received injections for the back pain in February and April 1999; and that on April 9, 1999, he underwent surgery on his left shoulder paid for by his group health insurance carrier.

Mr. N testified that on January 11, 1999, claimant came to his office, gave him a report from Dr. C, and stated that the lawyers and doctors advised him that because of the medications he was taking, he should no longer be driving trucks for the employer; that the employer had no other work claimant could perform given the medications he was taking; and that he regarded claimant as having voluntarily terminated his employment for health reasons. Mr. N further stated that claimant did not report an injury on January 11, 1999, and that when he turned in his uniforms and picked up his paycheck on January 18, 1999,

he first mentioned having hurt his shoulder on location on _____, inserting a hose into a water tank. According to Mr. N, claimant did not mention having also injured his back.

On the new patient information sheet claimant completed for Dr. P on "12/12/94," he wrote, "dislocation in left shoulder, torn ligaments, surgery two times, pins in shoulder." Dr. P's "4/5/95" report states the diagnosis as "internal derangement, shoulder, possible chronic subluxation, rule out disruption, glenoid labrum, chronic tendinitis, etc." On September 25, 1995, Dr. P wrote that "[claimant] is long on complaints and short on resolution to do anything about it," that Dr. P will not comment on claimant's back because he has not examined claimant for it but that claimant has been mentioning his back, and that Dr. P thinks "this is a no win situation" and that he "is going to try to keep it at arms length." Dr. P wrote on February 19, 1996, that claimant's "insurance status is zero" and he mentioned a number of resources claimant might contact in an effort to find some way to remunerate an anesthesiologist so that his shoulder could be examined to see if the staple is protruding into the shoulder. Dr. P's report of "1/14/99," entitled "Old patient - Same problem," states that claimant had not been seen since 1997; that claimant found work as a truck driver and recently injured his left shoulder "retracting some hose and tying the hose off on the top of his vehicle"; that claimant was maintaining himself at work using narcotic medication; and that claimant realizes that, ethically and morally, he can no longer drive. Dr. P further stated: "At this point in time, his complaints are really the same problem that we have been dealing with when we last saw him. He has a retained staple." Dr. P's diagnosis was "subluxation, shoulder, left, recurrent labral tear with secondary impingement, rotator cuff, shoulder left." Dr. P reported on February 8, 1999, that a CT scan/arthrogram revealed the staple to be well-positioned, that the consideration still comes down to persistent instability, possible labral lesion, bicipital tendinitis, etc., and that "some form of psychogenic situation must also be considered."

The April 2, 1998, psychological consultation report from Dr. C, states, among other things, that claimant has been denied Social Security benefits five times, that he originally injured his left shoulder playing high school football in 1978 and underwent the first operation at that time, and that he subsequently reinjured the shoulder many times. The hearing officer found, among other things, that claimant did not prove by a preponderance of the evidence that he suffered a new injury on _____, and that he has been unable "to obtain or [sic] retain" employment at wages equivalent to his preinjury average weekly wage since _____, due to a preexisting left shoulder injury.

Claimant had the burden to prove that he sustained the claimed injury and that he had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel 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:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge