APPEAL NO. 991949

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 August 13, 1999. She (the hearing officer) determined that the appellant's (claimant) compensable injury of _____, was not a producing cause of the claimant's central and right-sided herniation at L4-5 and that the claimant did not have disability from July 2, 1998, through the date of the CCH. The claimant appeals these determinations, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant, who was 74 years old at the time of the CCH, testified that he tripped and fell backwards on _____, while pulling a cable. The carrier has accepted a right wrist injury. The claimant contends, and the carrier disputes, that he also sustained a lower back herniation injury at L4-5 as a result of this fall.

The claimant retired from his job as a heavy equipment operator in 1989 and did not return to the workforce until approximately three weeks before the current injury. He first sought medical care for it on January 16, 1998, from Dr. S. Although the claimant said he complained of back pain, Dr. S diagnosed only a right wrist sprain and released the claimant to return to work. The claimant said that he next saw Dr. S on April 7, 1998, to complain about his back, but the medical records of this visit do not mention complaints of low back pain. The first mention of low back pain is contained in a report of Dr. P, D.C., of a visit on May 19, 1998. In this report, Dr. P stated that the claimant complained of pain for the last two and one-half months and that the claimant had been engaged in "mowing & shredding" activities. Dr. P had been treating the claimant for back pain since 1993. The claimant also saw Dr. T on June 30, 1998, and is recorded as having complained of back pain on June 22, 1998. His current treating doctor is Dr. N. In a report of an October 22, 1998, visit, Dr. N attributed the low back pain to the _____, injury at work. The claimant admitted that he never told Dr. N about his prior history of back pain.

The claimant underwent back surgery on November 5, 1998, and agreed that Dr. N released him to return to work in February 1999. According to the claimant, this was a return to work around the house. He said he had no intention of returning to employment and considered himself retired.

The claimant had the burden of proving he injured his low back when he fell on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. A focus at the hearing was the lack of any mention of a low back injury or

pain for some three months after the claimed injury. There was other medical evidence that reported the complaints of low back pain as developing after the date of the claimed injury. On the other hand, there was medical evidence, based on the history provided by the claimant, that related the low back herniation to the _____, fall and other evidence of treatment of back pain well before the claimed injury. The hearing officer was the sole judge of the weight and credibility to be given this evidence. Section 410.165(a). She was not persuaded that the claimant met his burden of proving a back injury on _____. 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 decline to substitute our opinion of the credibility of the evidence for that of the hearing officer, but find the evidence relied on by the hearing officer sufficient to support her resolution of this issue.

Disability is defined as the inability because of a compensable injury "to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). There was evidence that Dr. S returned the claimant to work the next day as well as evidence that the claimant had voluntarily left the workforce to pursue retirement. Whether disability existed was a question of fact for the hearing officer to decide and could be proved by his testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The claimant tied his claim for disability to a compensable back injury and his surgery. Having affirmed the finding that the low back was not compensably injured, we also find the evidence sufficient to support the finding of no disability.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Judy L. Stephens
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge