APPEAL NO. 991988

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). On August 9, 1999, a hearing was held. He (hearing officer) determined that appellant (claimant) did not sustain an occupational disease on _____, and did not have disability. Claimant asserts that her disease is not an ordinary disease of life in that the general public is not required to sit in a broken chair for eight hours or more each day and write during the "entire time"; she asserts that findings of fact to the contrary are against the great weight of the evidence; she also points out that a finding of fact that said she was unable to work due to the claimed injury is inconsistent with other findings. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____. She testified that she was an underwriter's assistant; she described her duties as involving obtaining and recording information, by telephone, relative to applications for insurance. She had worked for employer since July 1998.

Claimant further testified that she filled out information sheets consisting of several pages based on information she received from the applicant; the number of pages to be filled out varied at times depending on the applicant's history, such as whether there was a history of back trouble or cancer. Carrier provided several examples of such forms, which show questions that require the applicant, claimant or another underwriter's assistant to write out an answer, and others that provide a place to check either yes or no in answer to the question asked. There was no contention that the forms provided in evidence were not representative of what was required of claimant in regard to her writing. Claimant also testified that she used a computer to obtain information but that the number of strokes needed were few; she said she was not claiming that she sustained repetitious physical trauma from her use of the computer. She also said that she did not injure herself from lifting any files or any other traumatic incident at work.

Claimant stated that she injured her low back, her neck, and her right wrist from her repetitious writing and from sitting in a broken chair, in which she could not lean back, at work. She said that the headset she wore to talk on the phone often did not work and that she had to cradle a handheld telephone between her neck and shoulder on the left while she wrote with her right hand.

Claimant testified that she worked overtime several hours a week, up to 10 to 15 hours a week. She did not describe working at night, however. Her normal hours were 8:00 a.m. to 5:45 p.m. from Monday through Thursday and on Friday the hours were 8:00 a.m. to 1:00 p.m.

Claimant testified that she complained of having to sit in a broken chair for several months, in the January into April 1999 time frame. She said that she repeatedly complained to her boss, KB, and that while another chair was substituted for her chair, no new chair was brought in and another employee simply took claimant's substituted chair, and she again had a broken chair. Claimant added that early arrivals took the good chairs.

Claimant first saw Dr. D, D.C., on April 14, 1999. Dr. D immediately made a referral to a medical doctor, Dr. M, and was able to obtain an appointment on April 16, 1999, at which time Dr. M examined claimant. While Dr. D noted a "moderate loss of motion," Dr. M noted that she had "fairly good range of motion." Dr. D noted shoulder spasms and Dr. M noted spasms in her neck. Dr. D diagnosed "cervical radiculitis, lumbar neuralgia or radiculitis, and thoracic muscle spasms," while Dr. M's impression was "neck sprain, lumbar sprain/strain, and right carpal tunnel syndrome." An MRI of the cervical spine found no bulges or herniations but did note "loss of the normal cervical lordosis likely related to paraspinous muscle spasm."

KB testified that she was claimant's supervisor during 1998 and the first three months of 1999. She said that for several years she did the same work that claimant does. She added that much of the application claimant uses to obtain information is filled in already and that the underwriter's assistant is merely "verifying information." She said that claimant was sometimes requested to work overtime, which was generally about five hours a week but at times was up to 10 hours per week, adding that Friday afternoon was usually a source of the overtime. KB also said that she does not remember claimant ever complaining about her telephone headset to her. She said that on one occasion claimant complained about her chair; she said she got an unoccupied chair from another workstation and immediately replaced claimant's chair. KB said that claimant never complained again about her chair. KB then testified that she allowed claimant to come to work early and leave early because she was going to cosmetology school. She said that claimant never told her that she was injured. On cross-examination, KB acknowledged that she has seen claimant and other workers using a handheld telephone rather than the headset, but did not know how often.

CW testified that she was an underwriter, having been over claimant from April 5, 1999, to a few weeks thereafter. She said that once in April claimant told her that her chair was broken and she said she got another chair for her from an unoccupied desk nearby. She said that claimant did not complain about her headset. She said that claimant did not report any back or hand problems to her. She also testified that there was nothing unusual about sitting at the employer's desk, talking and listening on the phone, and writing. She said that she never saw employees switching chairs from one workstation to another but agreed that she placed claimant's broken chair in an unoccupied workstation. She also replied, "definitely not after 5:30" in answer to when phone calls came in. Claimant on rebuttal, said that she complained to KB about the problem with her chair "all the time" and that no new chairs were ever obtained.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In this case, there was a clear conflict in regard to the frequency of claimant's complaints about her chair; as such there was also a conflict as to how long claimant had to wait for a remedy after she complained about her chair. Both KB and CW said that claimant only complained once. The hearing officer stated in his Statment of Evidence, after reciting allegations of a broken chair, a cradled telephone between neck and shoulder, and "constant writing" that claimant did not show that she was exposed to repetitiously traumatic acitivities to an extent greater than the general public.

The Appeals Panel will only overturn the hearing officer, as fact finder, on a factual determination when that determination is against the great weight and preponderance of the evidence. In this case, contrary to claimant's assertions, the hearing officer could give weight to the testimony that claimant "verified" much of the information which was already provided and did not have to find that the amount of writing claimant did each day was more than that to which the general public is exposed. The determination that claimant did not sustain an occupational disease is not against the great weight and preponderance of the evidence.

We cannot agree with the assertion that a finding of fact saying claimant has been unable to work due to the claimed injury is inconsistent with other findings of fact. While some consistency would be more apparent if the hearing officer had indicated that he believed claimant was injured, but simply did not show that such injury occurred at work, this panel believes that an injury may be implied by the finding of fact in question. At any rate, this finding of fact is not necessary to the decision, and a conclusion of law makes it clear that there was no disability.

Finding that the decision and order, as clerically corrected, are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Judy L. Stephens
Appeals Judge