

APPEAL NO. 992939

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 November 3, 1999. The hearing officer's decision and order stated that the issues at the CCH were: (1) whether the "diagnosis of psychotic depression/depression [is] a result of the compensable injury" of the respondent (claimant); and (2) whether appellant (carrier) "waived the right to contest the compensability of the claimant's psychotic depression/depression being related to the _____, injury." The hearing officer determined that the psychotic depression/depression is a result of the compensable injury and that carrier waived the right to contest the compensability of these conditions. Carrier appeals, contending that the evidence is insufficient to support the hearing officer's determinations regarding extent of injury and carrier waiver. Carrier also complains that the hearing officer did not address the correct issue regarding extent of injury and did not state the issue correctly. Carrier asserts that it never disputed the compensability of claimant's depression, but only contested the compensability of the "psychotic depression." Carrier asserts that the issue should have been, "Is the claimant's diagnosis of psychotic depression a result of the compensable injury" The file did not contain a response from claimant.

DECISION

We affirm in part and reverse and render in part.

Carrier contends that the hearing officer erred in determining that the diagnosis of psychotic depression/depression is a result of the compensable injury sustained on _____. Carrier also complains that the hearing officer did not properly state the first issue in this case. Carrier asserts that the issue should have been stated as follows:

Is the claimant's diagnosis of psychotic depression a result of the compensable injury sustained on _____.

Carrier is correct in that this is the way the issue was reported out of the benefit review conference (BRC). Carrier's position at the BRC and at the CCH was that it did pay for pain management, which included treatment for depression, but that it did not accept liability of "psychotic depression."

The parties stipulated that claimant sustained a compensable injury. Claimant testified that she was injured at work on _____, when a dolly rolled over her feet. She was treated for foot pain and later diagnosed with chronic pain syndrome and early reflex sympathetic dystrophy.

Under the 1989 Act, the claimant has the burden of proving that she sustained a compensable injury and the extent of her injury. Texas Workers' Compensation Commission Appeal No. 952208, decided February 12, 1996; Texas Workers'

Compensation Commission Appeal No. 950537, decided May 24, 1995. The 1989 Act defines injury, in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). Extent of injury is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 960407, decided April 10, 1996. An aggravation of a previous condition or injury can rise to the level of a new injury. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. To be compensable, generally, an aggravation must be a new injury and not merely a transient increase in symptoms from an existing condition. Texas Workers' Compensation Commission Appeal No. 983045, decided February 11, 1999. See *also* Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

There was evidence from Dr. K dated in June 1998, that claimant's condition had worsened due to "the ongoing problems of the chronic pain syndrome." He noted that claimant lost consciousness at work in June 1998 and also had a seizure. He noted that claimant may have an unusual sensitivity to her pain medications and even "small doses" of hydrocodone. In a February 1999 report, Dr. M opined that claimant's medication is "adding to her mental confusion." Other medical reports indicated that claimant appeared sedated and, in July 1998, Dr. K noted that claimant's neurontin medication may be causing her to have cognitive disorganization. In a March 1999 letter, Dr. K stated that claimant had been hospitalized in a psychiatric unit and that her "psychotic depression is the result of the severe stress caused by the effects of her work injury." Dr. K said claimant lost the structure of being able to be in the "work world," and that she experienced "a regression into her chronic pain syndrome with the development of depression symptoms."

From the medical evidence, the hearing officer could and did find that claimant's depression and/or psychotic depression is a result of her _____, compensable injury. The hearing officer could have credited the evidence from Dr. K in making her determinations in this case. Carrier contended that the psychotic depression was caused by unrelated stressors, such as the fact that claimant was losing her place to live and her friend had swindled her out of her savings. However, the hearing officer heard the evidence and considered the issue of causation in this case. We will not substitute our judgment for that of the hearing officer because her determination regarding the depression and/or psychotic depression is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

Carrier cites Texas Workers' Compensation Commission Appeal No. 950949, decided July 17, 1995, in support of its contentions. In that case, the Appeals Panel considered the evidence and determined that there was insufficient evidence of causation. In the case before us, we have affirmed the hearing officer's determination regarding causation.

We also perceive no reversible error in the wording of the issue. By considering the issue as written in the decision, the hearing officer still considered the cause of the psychotic depression. There was evidence, as set forth above, to support the causation finding regarding the psychotic depression. The hearing officer heard the evidence, deciding what facts were established, and made her determinations in this case. We perceive no reversible error.

Carrier contends the hearing officer erred in determining that it waived the right to contest the compensability of the psychotic depression/depression. Carrier asserts that it did not have written notice of the diagnosis of "psychotic depression" until November 27, 1998. Carrier asserts that it did not dispute the compensability of claimant's depression in that it agreed to pay for treatment for depression to the extent it was a part of a pain management program. Carrier asserts, however, that it later contested the compensability of "psychotic depression" in December 1998.

A carrier is required to dispute the compensability of an injury not later than 60 days after receipt of notice of injury, or it will waive its right to do so. Section 409.021(c). A notice of injury, for the purposes of starting the time period for contesting compensability, must be written and must fairly inform the carrier of the nature of the injury, the name of the injured employee, the identity of the employer, the approximate date of injury, and must state "facts showing compensability." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a) (Rule 124.1(a)). The writing may be from any source. Rule 124.1(a)(3). Written reports that consider whether a condition is work related may constitute written notice of injury under Rule 124.1, whether or not a concrete diagnosis is made. Texas Workers' Compensation Commission Appeal No. 950522, decided May 11, 1995.

In this case, the waiver issue expressly mentioned "psychotic depression." The diagnosis of "psychotic depression" was not mentioned in claimant's medical records until November 17, 1998, and it is not clear when carrier received this November 17, 1998, medical record. Carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting the compensability of the depression and psychotic depression on December 17, 1998. The hearing officer determined that the October 27, 1997, report from Dr. F was sufficient written notice of psychotic depression/depression. This record did mention depression, but did not mention psychotic depression. Given the facts of this case, we conclude that carrier waived the right to contest the compensability of claimant's depression, but that carrier did not waive the right to contest the compensability of the "psychotic depression." The waiver issue did not refer to an injury to a general body part or a general psychological condition, but instead concerned a specific diagnosis. Carrier stated that it was accepting claimant's treatment for depression in her pain management program. Therefore, carrier expected claimant's medical records to mention

“depression.” However, until carrier received medical records that included the diagnosis of “psychotic depression,” carrier was not on written notice of this condition such that there could be waiver. We note that even though we are reversing the hearing officer’s determination regarding psychotic depression and waiver, the psychotic depression is still compensable.

We affirm that part of the hearing officer’s decision and order that states that claimant’s diagnosis of psychotic depression/depression is a result of the compensable injury. We affirm that part of the hearing officer’s decision that determines that carrier waived the right to contest the compensability of the depression. We reverse that part of the hearing officer’s decision and order that determines that carrier waived the right to contest the compensability of the claimant’s psychotic depression being related to the _____, injury. We render a decision that carrier did not waive the right to contest the compensability of the claimant’s psychotic depression being related to the _____, injury.

Judy Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge