

APPEAL NO. 000084

A contested case hearing (CCH) was originally held on September 15, 1999, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer determined that appellant (carrier) is entitled to reduce the respondent's (claimant) impairment income benefits (IIBS) by 70% because of impairment that resulted from an earlier compensable injury. In Texas Workers' Compensation Commission Appeal No. 992239, decided November 15, 1999, the Appeals Panel reversed the decision of the hearing officer and remanded for the hearing officer to apply the provisions of Section 408.084(b) concerning the cumulative impact of the compensable injuries on the overall impairment in determining a reduction of IIBS and any possible supplemental income benefits. The hearing officer held another CCH on December 28, 1999; did not receive additional evidence; permitted the parties to present argument; and rendered another decision on January 4, 2000, in which she determined that the carrier is entitled to reduce IIBS by 30% based upon contribution from an earlier compensable injury. The carrier appealed; stated that some findings of fact merely repeat the information in medical reports, the hearing officer made no findings of fact regarding how the two injuries overlapped and worked together, and concentrated on the fact that the claimant did not return to work after the second injury; urged that the hearing officer merely relied on the mathematical equation in the report of Dr. M; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that it is entitled to reduce the claimant's IIBS by 70% because of the prior compensable injury. A response from the claimant has not been received.

DECISION

We affirm.

The Decision and Order rendered after each CCH and Appeal No. 992239, *supra*, contain summaries of the evidence. Briefly, the claimant, who was 66 years old at the time of the first CCH, fell and sustained compensable injuries in _____ and _____. The claimant testified that prior to the _____ injury, he had a compensable injury in _____, had recovered from headaches and blurred vision that resulted from that compensable injury, had surgery on his right shoulder as the result of a compensable injury, and had knee replacement surgery that was not related to a compensable injury. The claimant testified that he had some problems because of the _____ injury, that he did not miss work because of it, and that surgery was not suggested before he had the _____ injury. The claimant did not receive an impairment rating (IR) for the _____ injury before he sustained the _____ injury. After the _____ injury, the claimant was unconscious for a short time and remained in a hospital until the next day, had a two-level cervical fusion and surgery on his left shoulder, and has not returned to work. There is some indication that the claimant is capable of performing some work and has not returned to work because of potential liability that could result from employing him.

Dr. RM, the designated doctor for the _____ injury, examined the claimant on November 23, 1996, and on December 11, 1996, certified that he reached maximum medical improvement (MMI) on November 16, 1995, with a 23% IR, consisting of 5% for cerebral function, 13% for loss of cervical range of motion (ROM), 4% for loss of shoulder ROM, and 4% for loss of knee ROM. In a Report of Medical Evaluation (TWCC-69) dated June 26, 1998, Dr. K, the designated doctor for the _____ injury, certified that the claimant reached MMI on January 14, 1998, with a 33% IR, consisting of 10% for a specific disorder of the cervical spine because of a two-level fusion, 8% for loss of cervical ROM, 5% for loss of shoulder ROM, and 15% for head trauma and cerebral function and disturbance. Dr. MM, the claimant's family physician, opined that 70% of the claimant's 33% IR resulted from the _____ injury and that 30% resulted from the _____ injury. Dr. U reviewed the letter of Dr. MM that contains his opinion and the reports of Dr. K and Dr. RM and stated that he agreed with the conclusion of Dr. MM.

At the CCH on remand, the hearing officer stated that she would consider the cumulative impact of the _____ and _____ compensable injuries; each party presented arguments on cumulative impact; and there is no indication that the hearing officer did not consider those arguments or the Appeals Panel decisions cited in Appeal No. 992239, *supra*. In the statement of the evidence in her Decision and Order, the hearing officer stated that the claimant had neck and shoulder surgery after the _____ injury, that after that injury the claimant was assigned impairment for the surgery on the cervical spine, that the impairment for the head injury was 5% for the _____ injury and 15% for the _____ injury, that the claimant had not returned to work after the _____ injury, and that the failure to return to work could have been because of fear of liability by the employer.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). That a different fact finder may have determined a different percentage that IIBS and possible future supplemental income benefits be reduced because of documented impairment from the _____ compensable injury is not a sufficient basis to overturn the percentage found by the hearing officer. The determination that the carrier is entitled to reduce IIBS by 30% is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge