APPEAL NO. 000371

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 January 10, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease (repetitive trauma); that the date of the claimed injury was _____; that the claimant did not have disability; and that the claimant did not make an election of remedies or is not barred from receiving workers' compensation by election to receive group health benefits. The claimant appeals the determinations that he did not sustain a compensable injury and did not have disability, contending that these determinations are against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The date of injury and election of remedies determinations have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

The claimant worked for approximately 30 years as a truck driver for the employer. His duties involved loading and unloading cargo, and he has had numerous work-related injuries over the years. He testified that he had a hernia repair in the 1970s and by the late 1980s was developing radiating low back pain, which he attributed to scar tissue associated with his hernia repair. On August 30, 1995, he presented to Dr. Y with a history of occasional limping and favoring the left lower extremity, but with the greatest pain in the left inguinal region. An MRI taken on August 25, 1995, showed disc degeneration and bulging and/or herniation at L2-3, L3-4, L4-5, and L5-S1. Dr. Y diagnosed spinal stenosis and, according to the claimant, advised him that this was not a work-related condition. The claimant then underwent epidural steroid injections without lasting effect. In the summer of _____, the claimant began experiencing problems with nausea which he related to his prior hernia. He sought treatment for this at the (clinic). The clinic's diagnoses on September 30, 1998, were duodenal ulcer and abdominal pathology with no clear cause. It is noted that the history completed by the claimant for this examination indicated no back, neck, or shoulder problems.

The claimant then attempted to work, but said he was no longer able, at least in part due to his low back pain, after November 2, 1998, when he took himself off work. A second MRI was obtained on December 2, 1998. It showed dessication at L2-3, bulging at L3-4 and L4-5, and herniation at L5-S1. The claimant then began treating with Dr. B, D.C. In a report of _____, Dr. B stated that the 1995 MRI "did not show any disc bulging, or other activities, but rather did show some spinal stenosis." He described the 1998 MRI as revealing "bulging at multiple levels." His assessment was "moderate sprain" of the lumbar

spine and strain of lumbar muscles, along with myalgia/myositis. Dr. B also testified at the CCH. He said that the current diagnoses were lumbar strains, sprains, and bulging, and that the prior MRI showed stenosis, but the later one showed more than stenosis. Specifically, it was his opinion that the second MRI showed "some lateralization" at L5-S1 which was not present previously. He said that the stenosis was not the cause of his current back pain, but indicated he was not aware of the prior treatment for the back in 1995 or of all the claimant's records.

A records review on March 2, 1999, by an otherwise unidentified chiropractor at the carrier's request concluded that the claimant had "a significant pre-existing degenerative lumbar spine with both central and foraminal stenosis" and that there is no reference to a work injury prior to the visit with Dr. B. In the reviewer's opinion, the claimant's current complaints of low back pain "are not work related but are a result of a disease of life due to a progressive deterioration of a pre-existing spinal degenerative process and complaints of a general unresolved abdominal health issue that has been treated for approximately four years."

The hearing officer considered the evidence and made the following findings of fact and conclusions of law, which have been appealed by the claimant:

FINDINGS OF FACT

2. The Claimant did not sustain a new injury to his low back area in _____.

3. The Claimant suffered symptoms from previous low back injuries and sought medical treatment on November 16, 1998.

* * * *

6. The Claimant was unable to obtain and retain employment at his pre-injury wages from _____ through the date of this hearing, due to his low back medical problems.

CONCLUSIONS OF LAW

3. The Claimant did not sustain a compensable injury in the form of an occupational disease.

* * * *

5. Because the Claimant did not have a compensable injury, the Claimant did not have disability.

In his appeal, the claimant argues that the testimony of Dr. B and the two MRI reports show that the claimant "suffered new tissue damage" and "definite changes in the Claimant's back condition." These changes, the claimant argues, were a "[n]ew symmetrical disc bulge" at L2-3, and new herniation at L3-4 and L4-5. A review of the two MRI reports on which the claimant heavily relies, reflect that the earlier MRI refers to "symmetrical disc bulge," not the later report, which described only dessication. Similarly, the earlier MRI refers to herniation at L3-4 and L4-5, while the later MRI refers only to bulging at L3-4 and L4-5.

Whether the claimant sustained a new lumbar injury was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. As fact finder, the hearing officer was the sole judge of the weight and credibility of the evidence, including the medical evidence. Section 410.165(a); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The claimant described the later MRI report as "overwhelming" evidence of a new injury. The carrier argued otherwise. The hearing officer did not find the difference, if any, between the two MRIs or the other medical evidence persuasive that the claimant's current lumbar condition was a new injury. 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 find the evidence sufficient to support this determination.

The claimant also argues on appeal that the findings of fact that the claimant did not sustain a new injury to his back in _____ and continued to suffer the symptoms from previous injuries are inconsistent with the conclusion of law that the claimant did not sustain a compensable injury in the form of an occupational disease. This argument is apparently premised on the fact that the date of injury for an occupational disease is the date the claimant knew or should have known that the disease may be related to his employment *(see* Section 408.007) and that just because symptoms appear before that date does not prevent them from reflecting the actual injury. We do not agree that the hearing officer found no new injury in _____ simply because symptoms preceded this date. Her decision was based on the existence of prior low back injuries, for which medical care was given and reports of injury filed, and her conclusion that the current symptomatology, without regard to the statutorily imposed definition of a date of injury, was caused by the prior injuries or condition of the back. As noted above, we believe the evidence is sufficient to support this determination.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge