

APPEAL NO. 000769

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 March 1, 2000. The hearing officer concluded that the finding of maximum medical improvement (MMI) and the impairment rating (IR) assigned by Dr. WC, on July 21, 1995, should be considered final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)); that the respondent (carrier) did not waive the right to contest the compensability of the claimed fibromyalgia; and that the appellant=s (claimant) fibromyalgia is not a result of the compensable injury sustained on _____. Claimant has requested our review of these legal conclusions and also challenges the sufficiency of the evidence to support the underlying findings of fact. In its response, the carrier urges the sufficiency of the evidence to support the challenged findings and conclusions. The carrier asks that we not consider any of the voluminous documents attached to claimant=s appeal which were not introduced into evidence at the hearing.

DECISION

Affirmed.

As a general rule, the Appeals Panel considers only the record developed at the CCH, the request for review, and the response thereto. See Section 410.203(a) and Texas Workers=Compensation Commission Appeal No. 93536, decided August 12, 1993. We find no basis to consider any of the documents attached to claimant=s request for review which were not admitted into evidence at the CCH.

Claimant testified that she was employed by (employer) as a cruise consultant for nine years when, on _____, the date of her injury, she woke up with back pain and also could not turn her neck due to neck pain. She said was initially treated by Dr. M and was referred to Dr. G, a neurologist, in November 1994; that Dr. G diagnosed chronic pain syndrome, myofasciitis, and a herniated cervical disc but did not discuss fibromyalgia; and that she was treated by Dr. G from November 1994 until May 1995 when she commenced treatment with Dr. L, another neurologist. Claimant stated that Dr. L also did not discuss fibromyalgia and that Dr. L eventually advised her that her condition was not going to further improve and referred her to Dr. WC for the purpose of determining whether she had reached MMI and for an IR.

Claimant stated that Dr. WC=s examination was very thorough; that on August 1, 1995, she received his independent medical evaluation report which diagnosed myofascial pain syndrome and herniated cervical disc and assigned a nine percent IR; that she disagreed with Dr. WC=s report because the IR was too low and did not include a cyst on her wrist; that she called Dr. WC=s office to discuss the IR; and that she expressed her disagreement with Dr. WC=s IR to Dr. WC=s nurse when she called on August 1, 1995, and to the carrier on August 18, 1995, when she called adjuster Mr. T to also inquire about the large amount of a check she had received. Claimant said that Mr. T told her there was nothing she could do because Dr.

WC would not change the IR. In evidence is a handwritten note dated August 1, 1995, which claimant said originated in Dr. WC's office and which was apparently written to Dr. WC, stating that claimant "wants to go over" the IR with Dr. WC; that refers to a cyst on the left wrist; that says "impairment percentage (?)" and "left out [Dr. V] out of report"; and, in different handwriting, that Dr. WC will not change the percentage which is based on exam and medical reports. Dr. WC wrote the carrier on July 22, 1996, stating that claimant called his office on August 15, 1995, wanting him to change the IR because he did not rate a wrist cyst and mention the report of Dr. V (which he never received); and that his staff was instructed to tell claimant that the rating was based on all the information received, that Dr. L agreed with the rating, and that if she did not like it, she needed to contact the Texas Workers=Compensation Commission (Commission) and file a dispute.

Claimant also stated that she did not communicate her disagreement with Dr. WC's IR to the Commission until sometime in late May or early June 1996. In evidence is a June 26, 1996, letter to claimant from the Commission advising her of an appointment with an ombudsman on July 1, 1996. Claimant wrote on that note, on July 1st, "a waste of time," that she was told that due to her ignorance of the 90-day rule she had no grounds to change her MMI or IR unless Dr. C's office has a note on file that she did call in about it; that the ombudsman told her she should have called the carrier if she disagreed with the report; and that she responded to the ombudsman, "why would I do that, they have never helped."

Claimant acknowledged that the carrier's activity log with notes of Mr. T's phone calls does not reflect a call from her on August 18, 1995, but contends that the carrier must have additional logs which were not exchanged and which she tried, unsuccessfully, to subpoena. The carrier's activity log report containing entries for the period August 10 through August 25, 1995, does not reflect a phone call on August 18, 1995, about Dr. WC's IR but does reflect a contact on that date about a \$330.00 check to claimant.

Claimant further testified that she told Dr. L about her disagreement with the IR but never asked him or any other doctor to dispute Dr. WC's IR for her. She also said she did not receive notice from the Commission about Dr. WC's IR. However, a Commission Dispute Resolution Information System note dated August 8, 1995, reflects that on that date the Commission mailed an "EES-19 letter" with the MMI date of "07/13/95" and the IR of "9%."

Claimant further testified that she began treating with Dr. AC, a pain management specialist, who took her off work in April 1996 and admitted her to a hospital for rehabilitation. Dr. AC's diagnosis was chronic cervical pain, history of herniated nucleus pulposus at C6-7, myofascial tenderness to certain muscles, and low back pain.

Claimant stated that she later moved to another state where she was treated by Dr. LC and that Dr. LC was the first doctor to diagnosis her fibromyalgia. However, Dr. LC's records for the period August 7 through October 10, 1997, contain the diagnostic code 729.1 which is stated as myofascial pain syndrome on one record and fibromyositis on another.

Claimant said that she returned to Texas and commenced treatment with Dr. D in April 1998 and that Dr. D diagnosed fibromyalgia. Dr. D's notes of April 20, 1998, the apparent date of claimant's first visit, state the impression as (1) myofascial pain followed by a question mark in front of the word fibromyalgia and (2) hyperreflexion. A May 4, 1998, note of Dr. D states that claimant has "probable fibromyalgia." These records do not bear carrier date stamps or other indicia of receipt by the carrier. Dr. D wrote the carrier on April 25, 1999, stating that she first saw claimant on April 20, 1998, and that after reviewing her chart and completing her work up, it was determined that claimant had fibromyalgia. The carrier introduced a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), dated May 14, 1999, stating that the carrier accepts the diagnosis of chronic neck pain and upper back pain but disputes the recent diagnosis of fibromyalgia in Dr. D's April 25, 1999, report as not related to the accepted compensable injury and not sustained in the course and scope of employment. Dr. D wrote on August 12, 1999, that claimant was diagnosed with cervical pain and strain several years ago; that claimant's concurrent symptoms were also present but she was not diagnosed with fibromyalgia at that time; that this is not uncommon as the symptoms are very non-specific; and that she, Dr. D, completed a panel of tests, conducted a physical exam, reviewed the records, and made the diagnosis of fibromyalgia. Dr. D also said that "[m]ore specifically, this may be a spin-off of her cervical injuries because we know that physical or emotional stress can be a prelude to this disease process." Claimant said she believes the fibromyalgia is job related because her work with the employer required her to sit for long periods of time in that environment and because the medical research she has done on fibromyalgia, which she introduced into evidence, indicates her job was causative.

Rule 130.5(e), then in effect, provided that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. Claimant argued to the hearing officer that she timely disputed Dr. WC's IR in a phone call to Mr. T and that the carrier must have more activity logs which would reflect that conversation. She further maintained that Dr. D established that she has fibromyalgia; that the fibromyalgia was caused by her workplace injury; and that Dr. D's April 20, 1998, report provided the carrier with notice of the fibromyalgia injury but that the carrier did not dispute it until it filed its May 14, 1999, TWCC-21. As noted above, however, this record does not reflect on its face evidence of receipt by the carrier.

In addition to disputing the dispositive findings of fact, claimant challenges the sufficiency of the evidence to support findings that she did not establish that her fibromyalgia condition was a direct and natural result of her compensable injury by reasonable medical probability; that Dr. WC assessed a nine percent whole person IR and an MMI date of July 13, 1995; that this was the first IR certified for claimant's compensable injury; that claimant did not dispute the IR within 90 days of her notification; that the carrier was fairly informed that the fibromyalgia condition was being alleged as part of the compensable injury on April 30, 1999; and that the carrier disputed that the fibromyalgia was related to the compensable injury on May 21, 1999.

Claimant had the burden to prove by a preponderance of the evidence that Dr. WC-sIR did not become final under Rule 130.5(e) because she disputed it within 90 days of receiving written notification of it; that her fibromyalgia resulted from the compensable injury sustained on _____; and that the carrier waived its right to contest the compensability of the claimed fibromyalgia by not contesting its compensability within 60 days of being notified of the claimed injury. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence (St. Paul Fire & Marine Insurance company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King-s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge