

APPEAL NO. 001477
FILED AUGUST 9, 2000

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 30 and June 2, 2000, in _____, Texas, with _____ presiding as hearing officer. The hearing officer determined that the date of injury is _____; that the appellant (claimant) did not timely report his injury to the employer and good cause does not exist for failing to timely report; that the claimant did not sustain a compensable injury in the form of an occupational disease on _____; and that the claimant did not have disability. The claimant has requested our review of these determinations, asserting the evidence he believes met his burden of proof including proof of an injury date of _____. The respondent (carrier) contends, in response, that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

The parties stipulated that on the date of injury the claimant was employed by (employer). The claimant testified that he was employed by the employer as a chemical operator at a plant in his native _____ from 1970 until sometime in 1976 when the employer's plant was closed; that he thereafter worked at the employer's plant in _____ (city 1) from 1984 until _____, his last day of work; that his duties included cleaning equipment, obtaining samples, and so forth; that he worked outdoors about 80% of the time; and that he was exposed to various chemicals including acids, aldehydes, and caustics. The claimant introduced Material Safety Data Sheets (MSDS) for 17 chemicals, including acids, aldehydes, and butanols, but did not identify any particular substance or substances as having caused his claimed lung damage nor did he testify as to the extent to which he was exposed to any of these chemicals and whether his exposure was by inhalation, skin contact, or both. He did state that he has worked around all of the chemicals and that they all can cause respiratory problems.

The claimant further testified that on _____, while on vacation in _____ where he is building a house and plans to live, he saw his family doctor of some 30 years, (Dr. RM), for complaints of chest pain and shortness of breath; that Dr. RM took x-rays and did a heart test; and that it was not until he saw Dr. RM again on _____, that Dr. RM reviewed the test results and told him his lung problem was caused by chemical exposure at work. However, he acknowledged hearing Dr. RM testify at the hearing that he told the claimant on _____, that he felt the lung condition was related to the claimant's work; however, the claimant stated that Dr. RM then "just said he believed, but for certain he told me on _____." The claimant said he returned to city 1 on _____; that on _____, he saw (Dr. AN),

who said his condition was possibly related to the chemicals; and that later that day, he called the night shift supervisor, _____ (Mr. C) and told him he could not come to work due to chemical exposure and that Dr. RM felt his condition was related to the chemicals. He said he took a letter from Dr. AN to the employer on January 26, 1998. The claimant further indicated that Dr. AN had earlier referred him to (Dr. DN), a lung specialist. He testified, variously, that Dr. DN could not say whether his illness was work related and that Dr. DN reviewed the MSDS sheets and said his illness was work related. The claimant indicated having seen numerous other doctors, including Dr. L (Dr. L) who referred him to (Dr. A), and said he disagrees with Dr. A's report because Dr. A did not examine him. He also acknowledged having been treated for allergies and sleep apnea.

The claimant also testified that he receives funds from an asbestos lawsuit even though a biopsy has revealed that he does not have asbestosis and he so advised the attorneys; that he has received both short-term and long-term disability benefits from the employer since having been off work because of his lung condition; and that he has applied for social security benefits. He stated that he originally wrote _____, as the date of injury on his Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) because that was the date his short-term disability benefits, which commenced on _____, ended, but that he later amended the date of injury to _____, after consulting with the ombudsman. The claimant said he claims disability from _____, forward. A July 7, 1998, statement from Dr. AN reflects that the claimant has been totally unable to work since _____, and that he is off work indefinitely.

Dr. RM, a general practitioner, testified by telephone that when he saw the claimant, the latter had chest pain, difficulty breathing, and chronic respiratory problems and that his diagnosis was chronic obstructive pulmonary disease (COPD), related to contamination of refinery gases. Dr. RM further stated that it was his opinion that the claimant's symptoms are "logically" related to his work because they improve when he is away from work but that he, Dr. RM, cannot prove it. According to Dr. RM, when he treated the claimant on _____, he explained to the claimant that his symptoms had to be related to his job. He further stated that the claimant had a history of 22 years of working around a lot of chemicals, exacerbation of the COPD, severe high blood pressure, and asbestosis/pulmonary fibrosis, all of which he explained to the claimant. In his report of April 16, 2000, Dr. RM states his conclusion that "[the claimant's] condition is directly related to his occupational exposure to chemical substances, gases, acids and fumes and I advice [sic] this patient not to return to work until he was [sic] seen by his primary care physician."

(Dr. JM), a specialist in occupational and internal medicine and a consultant in toxicology, testified that he reviewed the claimant's medical records and that the claimant has pulmonary veno-occlusive disease, a relatively rare condition, which was diagnosed by physical exam findings and biopsy. He noted that both (Dr. H), a lung pathology specialist, and Dr. A, an occupational medicine specialist, also made that

diagnosis. Dr. JM stated the opinion, based on reasonable medical probability, that the claimant's condition is not attributable to his employment and that the cause of the disease is unknown. Dr. JM further stated that his conclusions are based on his review of the claimant's medical records, his research, and his application of standard methods of toxic causation. He also commented that he saw nothing in the medical records relating to exposure to the chemicals in the MSDS sheets nor any reference to a one-time chemical spill. In his detailed report of February 27, 2000, Dr. JM states that it is not medically probable that any of the claimant's current conditions (pulmonary veno-occlusive disease and mild obstructive and restrictive pulmonary impairment) nor the claimant's associated impairment and disability are related in any way to his employment with the employer and that the claimant's conditions were neither caused nor aggravated by any work factors, including exposures to dusts or chemical fumes. Dr. JM's report then goes on to detail his reasons for these conclusions.

Dr. DN stated in his October 7, 1998, report that he first examined the claimant in May 1997 and that he believes that the claimant suffers from combined obstructive lung disease of long standing and from interstitial fibrosis confirmed by biopsy. Dr. DN further stated that "[w]ith respect to whether exposure to various chemicals and [the claimant's] working environment has caused pulmonary fibrosis or obstructive lung disease, I find it difficult to be convinced by the substantial evidence gathered to this date one way or the other."

In his detailed report of January 11, 1999, Dr. A, a specialist in occupational medicine, a toxicology consultant, and a medical school faculty member, sets out the findings from records he reviewed as well as his own examination and states the principle diagnosis as "primary venous occlusive disease" with obstructive lung component. Dr. A further states that he sees no evidence that the claimant's health is related to his work environment.

In addition to the dispositive legal conclusions, the claimant challenges factual findings that he knew or should have known that his exposure to chemicals at work may have caused the symptoms he was experiencing no later than _____; that he did not report the alleged injury to his employer until _____, more than 30 days after the alleged injury; that, in delaying the reporting of his alleged injury, he did not exercise that degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances; that the medical evidence does not show a causal relation, based upon reasonable medical probability, between the claimant's pulmonary disease and his exposure to chemicals at work; and that he did not sustain an occupational injury in the course and scope of his employment on _____.

The claimant had the burden to prove that he sustained the claimed injury, timely reported it to his employer or had good cause for not reporting it within 30 days, and that he had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. 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 hearing officer could credit the evidence from Dr. RM that he told the claimant on _____, that he felt the claimant's lung problems were related to his work and the expert opinions of Dr. A and Dr. JM that the claimant's disease was not caused by his work environment. Because we affirm the determination that the claimant did not sustain a compensable injury, we affirm the determination that he did not have disability.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge