APPEAL NO. 001937

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 July 28, 2000. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease with a date of injury of _____; that she timely reported her injury to her employer; and that she has had disability as a result of her compensable injury from July 6, 1999, through the date of the hearing. In its appeal, the appellant (self-insured) asserts error in each of those determinations. The self-insured also argues that the hearing officer erred in excluding the report of its expert witness, Dr. K. In her response to the self-insured's appeal, the claimant urges affirmance. The claimant responds that the hearing officer did not err in excluding the report of Dr. K; however, she argues that the hearing officer erred in permitting Dr. K to testify at the hearing. The claimant's response was not timely to serve as an appeal under Section 410.202, and, as such, only the issue of the exclusion of Dr. K's written report is before us on appeal.

DECISION

Affirmed.

The claimant testified that she began working for the self-insured's zoo in January 1999. She stated that she is an animal keeper responsible for the care of animals in the zoo hospital and that her job duties required her to be exposed to a disinfectant, Roccal-D, for nearly six hours each day because one of her primary duties was to clean and disinfect animal stalls and other areas. The claimant testified that she used a Roccal-D concentrate that she diluted in a gallon bucket of water. She stated that in late March 1999 she began to notice that she had difficulty breathing at work; that her symptoms started out as allergy-type symptoms; that she had an "inkling" this was work related on _____, because every time she mixed the Roccal-D she felt the tightness in her chest; that her symptoms became progressively worse over the next couple of months; that by the end of May 1999, her symptoms had moved to her lungs and included tightness in her chest and difficulty breathing with any exertion; and that at first her symptoms were worse when she was at work and eventually they progressed so that they were the same at work and away from work. The claimant testified that by _____, she told her supervisor, Ms. B, that she thought that the breathing problems she was having at work were related to her use of the Roccal-D. In a document entitled "Supervisor's Investigation," Ms. B states that "[d]uring April or May, 1999, [claimant] mentioned that she thought she was having problems working with a disinfectant (Roccal), specifically that she found it harder to breathe when she used the product."

The claimant acknowledged that she operates a wildlife rehabilitation center where she takes care of injured birds and gets them ready for release back into the wild. She stated that she feeds the birds, cleans their cages, and administers medications. She further testified that on any given day she is exposed to 500 to 600 birds; that she has

owned birds for over 30 years; that she has been rehabilitating them in large numbers for over 20 years; and that she has never had breathing problems similar to the ones she experienced after her exposure to Roccal-D at the zoo in the course of over 20 years of working to rehabilitate birds.

The claimant initially sought treatment with her primary care physician, Dr. C. Dr. C took the claimant off work on July 6, 1999. The claimant's symptoms became progressively worse; thus, Dr. C referred the claimant to Dr. E, a pulmonary specialist. The claimant's initial appointment with Dr. E was on August 2, 1999. In his progress notes from the claimant's initial appointment, Dr. E diagnosed hypersensitivity pneumonitis and noted that the claimant's problem could be related to her exposure to birds or exposure to toxic fumes. Dr. E treated the claimant with a course of corticosteroids. The claimant continued to be exposed to birds on a daily basis while she was being treated with steroids; however, she was no longer exposed to Roccal-D because Dr. E continued to keep her off work from the zoo. In a progress note dated October 21, 1999, Dr. E noted that the claimant was doing well despite her continued exposure to birds. In a "To Whom it May Concern" letter dated October 25, 1999, Dr. E stated that the claimant's hypersensitivity pneumonitis "appears to be related to an exposure to work-related agents which may include various toxic fumes." Finally, in a letter of May 8, 2000, Dr. E addressed the issue of causation, as follows:

> This lady appears to have a hypersensitivity lung reaction. The etiology is not 100% clear. However, her symptoms increased after heavy exposure to toxic fume inhalation while at work and a clinical association can be made. In addition, she has improved somewhat with removal from the environment as well as treatment.
>
> Obviously, it will be difficult to tell if there is any relation to her exposure to pigeons at home and she has been advised to avoid ongoing exposure here. However, her toxic fume exposure certainly has a strong temporal relationship to the development of her symptomatology and removal from the environment seems to have improved her symptoms. In addition, her nasal symptomatology appears to be much more consistent with a toxic fume exposure.

Dr. K testified by telephone on behalf of the self-insured at the hearing. Dr. K stated that he had reviewed the claimant's medical records. Dr. K opined that it is "extremely unlikely" that the claimant's illness is related to her exposure to Roccal-D at work because that substance has low toxicity and, according to the medical literature and in his experience, is not associated with continued hypersensitivity reactions. Dr. K further testified that there were three better explanations of the claimant's illness: pulmonary sarcoidosis; "bird fancier's" hypersensitivity pneumonitis; and compost lung hypersensitivity pneumonitis, and that in order to make a definitive diagnosis between those three the claimant would have needed to undergo a lung biopsy prior to being treated with steroids. On cross-examination, Dr. K stated that he dismissed exposure to Roccal-D as the cause

of the claimant's problems even though the Material Safety Data Sheet on Roccal-D listed breathing difficulty as a sign/symptom of overexposure because it has a temporary irritant effect. Dr. K maintained that the medical literature does not support development of hypersensitivity pneumonitis due to exposure to Roccal-D and that the improvement in the claimant's condition following her removal from Roccal-D does not change his causation opinion because she had steroid treatment and the other conditions would have been expected to resolve also with such treatment.

The claimant had the burden to prove that she sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The causation of the claimant's pulmonary injury is a matter beyond common experience such that expert evidence of causation is required in this instance. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The self-insured contends that the claimant did not sustain her burden of proving that she sustained a compensable injury. Specifically, the self-insured argues that Dr. E's causation opinion does not rise to the level of reasonable medical probability and, as such, it cannot serve as expert evidence of causation under the 1989 Act. We find no merit in this assertion. When the substance of Dr. E's letter is reviewed it can reasonably be interpreted as stating that in his opinion, within reasonable medical probability, the claimant's hypersensitivity pneumonitis was caused by her overexposure to Roccal-D at work. Dr. K provided a conflicting causation opinion. The hearing officer was acting within his province as the fact finder in deciding to credit the evidence from Dr. E over that of Dr. K. The hearing officer's determination that the claimant sustained a compensable injury in the form of an occupational disease is supported by sufficient evidence and our review of the record does not reveal that the hearing officer's injury determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse it on appeal. Pool; Cain.

The self-insured also argues that the hearing officer's determination that the claimant timely reported her injury to her employer is against the great weight of the evidence. The claimant testified that no later than _____, she told Ms. B, her supervisor, that she believed that her exposure to Roccal-D at work was causing her breathing problems. Ms. B's investigation report confirms that in either April or May 1999, the claimant told her that she found it harder to breathe when she used the Roccal-D. This evidence supports the hearing officer's determination that the claimant reported her injury

to her employer within 30 days of the _____, date of injury, which was not disputed. Nothing in our review of the record demonstrates that the hearing officer's determination that the claimant timely reported her injury is so contrary to the great weight of the evidence as to compel its reversal on appeal.

The self-insured's challenge to the disability issue is premised upon the success of its argument that the claimant did not sustain a compensable injury. Given our affirmance of the hearing officer's injury and notice determinations, we likewise affirm his determination that the claimant had disability as a result of her compensable injury from July 6, 1999, through the date of the hearing. While the dissent raises some valid concerns about continuing disability in a case such as this where it appears that the claimant could return to work with the caveat that she not be exposed to Roccal-D, the method for addressing those concerns is not, as the dissent suggests, the imposition of a job search requirement on the claimant in order to establish disability and corresponding entitlement to temporary income benefits. Rather, the 1989 Act provides for this situation through the bona fide job offer provisions of Section 408.103 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5).

Finally, we briefly consider the self-insured's assertion that the hearing officer committed reversible error in excluding Dr. K's written report, which was not timely exchanged. This assertion is wholly without merit. Dr. K was permitted to testify at the hearing. The self-insured does not indicate what evidence is contained in Dr. K's written report, which was unavailable in his testimony, and none is apparent to us. There is no question that the report was not timely exchanged with the claimant in that it was not exchanged until the morning of the hearing. Accordingly, the hearing officer did not err in excluding the report.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I dissent on affirming the extent of disability found by the hearing officer and would reverse and remand for further development and consideration of evidence. When evidence is offered by the carrier that the physical damage caused by an allergic reaction has cleared up, and the sole restriction given to the claimant is not to work around the particular substance causing the reaction, it seems to me that the injured worker bears the responsibility of proving that the compensable injury is still causing an inability to obtain and retain employment in the workplace at large. This burden is not met merely by showing that she cannot return to a specific work site where the chemical is in use, when the substance is one not found in most workplaces. Given evidence here of the ability to perform transferable skills (work in the bird rescue activities) that don't cause harm, and the medical evidence that her lung condition has cleared up, I cannot agree that the finding of nearly a year's worth of disability is sufficiently supported by the record.

_____

Susan M. Kelley
Appeals Judge