

APPEAL NO. 001949

Following a contested case hearing held on July 20, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the appellant (claimant) did not sustain a compensable injury on _____, and that she did not have disability. In her request for review, the claimant challenges these conclusions and certain of the underlying findings of fact, asserting that she injured her neck at work while picking up trash and pieces of metal and throwing them in a wheelbarrow. The respondent (carrier) urges the sufficiency of the evidence to support the challenged findings and conclusions.

DECISION

Affirmed.

The hearing officer's Decision and Order contains a thorough and detailed summary of the evidence with which neither party takes issue. Accordingly, we will set out only so much of the evidence as is necessary for our decision.

The claimant testified that on _____, while working as a laborer for (employer), she felt pain in her neck when she picked up a bag of trash, which included pieces of pipe scraps, to throw into a dumpster. She said she then took a wheelbarrow to the tool room and told Mr. D she wanted to see a doctor; that Mr. D took her to the employer's doctor, Dr. K; and that Dr. K examined her, gave her some medication samples but no prescription, and released her to return to her regular duties. The claimant further testified that she did not return to work because her back was hurting; that she called the employer on March 13, 2000, to advise that she was looking for another doctor because she was still in pain; that her employment was terminated on March 27, 2000, for absenteeism; and that on the recommendation of a friend she saw Dr. ES, on April 3, 2000. She said she has continued to see Dr. ES who examines her and prescribes medications despite the fact that the carrier has denied her claim and has not authorized diagnostic testing requested by Dr. ES. Although her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), dated "4-4-00," states the injured body parts are the claimant's neck, shoulder, and lower back, the claimant stated, responding directly to a question from the hearing officer, that she is claiming an injury to her neck.

The claimant acknowledged that on her application for employment with the employer, she did not, for a variety of reasons, disclose the name of her most recent employer, a home health care agency; that she did not disclose that she injured her neck and shoulder in _____ while working for the previous employer as a home health care aide and caring for an elderly lady; that she was away from that job for approximately two months to heal; and that she had filed a workers' compensation claim in _____ for that injury which was apparently not pursued.

Dr. GS, an orthopedic surgeon, testified that he reviewed Dr. K's records; that Dr. K's clinical exam found the claimant's muscles, strength, sensation, and range of motion within normal limits; and that in his, Dr. GS's, opinion to a reasonable medical probability, the claimant did not have the claimed neck injury because there are no objective findings or evidence to support it. Dr. GS further stated that although Dr. K stated the diagnosis as "strains," this is a common practice by medical practitioners in response to subjective complaints of pain.

Dr. K's record states the assessment as "very mild cervical & thoracic strain." These records also state the following: "Full duty release, no swelling, tenderness, full range of motion, nothing to confirm actual injury, no need for meds or x-rays." Responding to questions in a May 22, 2000, letter from the carrier, Dr. K stated that the claimant indicated that the tenderness was chronic.

The hearing officer sustained the carrier's objection to the admission of Dr. ES's records on the ground that they were not timely exchanged and the records were not admitted into evidence. In the appeal file is a three-page letter dated August 16, 2000, from Dr. ES stating the reasons why he views the hearing officer's decision to be arbitrary, capricious, and against the great weight of the evidence. Since Dr. ES neither represents the claimant nor has any standing as a party in this appeal, his letter will not be considered.

The claimant had the burden to prove that she sustained the claimed injury and that she had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). 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). It is apparent that the hearing officer found unpersuasive the claimant's evidence that she sustained the claimed injury and had disability resulting therefrom.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Robert W. Potts
Appeals Judge