APPEAL NO. 002089

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 in two sessions on July 5 and August 8, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury and that she did not have disability. In her appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that she sustained a back injury due to repetitive activities she performed while working for the employer. Specifically, the claimant stated that her back injury resulted from having to repetitively reach three feet to operate a computer mouse for a period of several months, from packing boxes and moving an office, from lifting several binders from the top of a file cabinet, and from sitting in a chair and taking the minutes of a meeting. The claimant explained that as a result of those activities, she developed intense back pain, muscle spasms, and a "knot" between her shoulder blades.

The claimant initially received medical treatment from Dr. E. In a "To Whom it May Concern" letter dated April 18, 2000, Dr. E details the claimant's treatment; notes that the pain and muscle spasms in the claimant's cervical and thoracic regions "are very consistent with" the repetitive motion and overstretching syndrome the claimant described; and concludes that the claimant sustained a repetitive motion injury to her cervical and thoracic spine. The claimant also sought treatment with Dr. O, an orthopedic surgeon, who testified on behalf of the claimant at the hearing. In progress notes from an October 26, 1999, visit, Dr. O diagnosed thoracic and lumbar strains and stated that "this is most definitely due to her poorly structured workstation at her past job." At the hearing, Dr. O testified that the claimant's activity of leaning three feet to reach a mouse on a repetitive basis was sufficient to cause a muscle strain in her back. Dr. O also stated that lifting boxes can cause a back strain. Dr. O noted that the claimant's MRI revealed degenerative changes in the lower part of the cervical spine. Dr. O opined that the claimant's muscular strain exacerbated the degenerative condition in the claimant's back. Finally, Dr. O testified that within reasonable medical probability the claimant's back pain is caused by her thoracic strain which was caused by her workstation. On cross-examination, Dr. O acknowledged that her opinion that the claimant's back strain was caused by the action of repetitively reaching for the mouse at her workstation is based upon the history given to her by the claimant and that she did not investigate the layout of the claimant's workstation.

The carrier called Ms. B to testify at the hearing. Ms. B testified that the claimant told her that the claimant had injured her back moving boxes in her garage at home with the help of a friend. The claimant denied that she injured her back moving boxes, insisting

that she was not able to help her friend clean the garage and move the boxes because of her back pain. The claimant also introduced a written statement from Mr. S, the friend who cleaned the claimant's garage. Mr. S stated that the claimant told him that she had injured her back at work the day before while packing her supervisor's office in preparation for a move and that the claimant did not assist him in cleaning out the garage because of her back pain.

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(a). The hearing officer resolves conflicts and inconsistencies in the evidence and decides what facts have been established. 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. 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. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant sustained her burden of proving that the claimed repetitively traumatic activities she performed at work caused a back injury. The hearing officer was acting within his province as the finder of fact in so finding. Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not sustain a compensable injury 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 that determination on appeal. Pool; Cain.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge