APPEAL NO. 031848
FILED SEPTEMBER 2, 2003

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 June 13, 2003. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) sustained a compensable left ankle injury on _____; that the claimant did not sustain a compensable left knee injury on _____; and that the claimant did not have disability. The claimant appeals, attaching evidence not offered or admitted at the CCH and disputing the determinations that he did not sustain a compensable left knee injury and did not have disability. The respondent/cross-appellant (carrier) appeals, arguing that the determination that the claimant sustained a compensable left ankle injury on _____, is against the great weight and preponderance of the evidence. The appeal file did not contain a response from either party to the other's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we will only consider the evidence admitted at the hearing. We will not generally consider evidence not submitted into the record and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through a lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). With this in mind, and after reviewing the new evidence attached to the claimant's appeal, we find that it does not constitute new evidence which requires consideration for the first time on appeal. We note that the remainder of the exhibits attached to the claimant's appeal were admitted into evidence at the CCH.

To the extent it can be construed that the claimant complained on appeal of ombudsman assistance, we note that the 1989 Act provides for ombudsman assistance to unrepresented claimants. Section 409.041. Our review of the record exposes no mention by the claimant wherein he voiced dissatisfaction with the ombudsman's assistance and we find no merit in claimant's general complaint regarding assistance. Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994.

It was undisputed that the claimant was flat footed and that he sustained a left knee injury several years ago. The claimant testified that he injured his left ankle and left knee in an incident involving a bicycle while in the course and scope of his employment. The hearing officer noted that he found the claimant credible "insofar as testimony about trauma to his ankle" and further noted that the description of the mechanism of injury was supported by medical evidence. However, the hearing officer was not persuaded that the claimant sustained a compensable left knee injury in the described incident. The hearing officer noted that "the knee seems to get lost in the developing medical evidence" and notes that in a recorded statement in evidence the claimant stated his knee injury occurred during exercises at home. The carrier questioned how the hearing officer could find the claimant credible with regards to an ankle injury but questions his credibility with regards to a knee injury. The carrier contends that the determination that the claimant sustained a compensable left ankle injury was against the great weight and preponderance of the evidence. The claimant had the burden to prove that he sustained a compensable injury as defined by Section 401.011(10). Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Nothing in our review of the record reveals that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We affirm the compensable injury determinations.

The claimant had the burden to prove that he has had disability as defined by Section 401.011(16). The claimant argues on appeal that he was unable to work due to ankle surgery he had on December 4, 2002. The record reflects that the claimant did indeed have surgery to his left foot on December 4, 2002, and was released back to work full duty on March 1, 2003. The evidence reflects that the last day the claimant worked for the employer was September 13, 2002. The claimant's separation of employment does not end the inquiry into disability. We have held that even a claimant's termination for cause does not, in itself, foreclose the existence of disability. Texas Workers' Compensation Commission Appeal No. 990655, decided May 13, 1999. There is no indication that the claimant's surgery was not due to the compensable left ankle injury. Dr. L diagnosed the claimant with tibial dysfunction secondary to trauma and a navicular fracture. The hearing officer specifically found that the trauma to the left ankle on _____, caused an injury to the claimant's left ankle. A compensable injury need only be a cause of the claimant's inability to obtain or retain employment. Texas Workers' Compensation Commission Appeal No. 990655, decided May 13, 1999. We conclude that the determination that the claimant did not have disability for the period related to his surgery and recovery is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

We affirm that part of the hearing officer's decision and order that the claimant sustained a compensable left ankle injury on _____, and that the claimant did

not sustain a compensable left knee injury on _____. We reverse that portion of the hearing officer's decision and order that the claimant did not have disability and render a decision that the claimant had disability from December 4, 2002, through March 1, 2003.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GAR SUDOL, CLAIMS MANAGER
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Edward Vilano
Appeals Judge