

APPEAL NO. 040195  
FILED MARCH 19, 2004

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 November 12, 2003. The hearing officer determined that the respondent's (claimant) \_\_\_\_\_, compensable injury does include left knee osteopenia, reflex sympathetic dystrophy (RSD), and depression. The appellant (carrier) appealed, asserting that the claimant's medical evidence was insufficient to meet her burden of proof, and additionally asserting that the hearing officer went "beyond" the issues certified in reaching his determination that the claimant's "current" condition includes osteopenia, RSD, and depression. In support of its position on appeal, the carrier attached a medical report from a required medical evaluation (RME) performed by one of its doctors after the CCH was conducted. The claimant responded, urging affirmance and objecting to the consideration of the attached medical report, which is being offered for the first time on appeal.

DECISION

Affirmed.

Attached to the carrier's appeal is a medical report from an RME performed on December 18, 2004. We note that we will not generally consider evidence not submitted into the record, and offered 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 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). The carrier offers no explanation as to why the RME could not have been performed prior to the CCH on this matter. The evidence attached to the carrier's request for review does not meet this standard, and we, therefore, cannot consider it.

The hearing officer did not err in determining that the compensable injury of \_\_\_\_\_, extends to and includes osteopenia, RSD, and depression. The determination involved a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In view of the evidence presented, we cannot conclude that the hearing officer's determination 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, 176 (Tex. 1986).

The carrier asserts that the claimant failed to present adequate expert evidence on the disputed issue to meet her burden of proof. As the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 000651, decided April 11, 2000, we are not saying that Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993) and Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997), cert denied 523 U.S. 1119, cited by the carrier, have no place in a workers' compensation proceeding; they can be used by the hearing officer to evaluate the evidence and to assess the weight and credibility he or she will assign thereto. The reliability, weight, and relevance of such evidence rests solely with the hearing officer, and we will reverse a factual determination of a hearing officer only if that determination is against the great weight of the evidence. We do not find that to be the case in the matter currently before us.

Finally, we cannot agree with the carrier's assertion that the hearing officer went beyond the certified issue in making his determination in this matter. The issue at the CCH was whether the claimant's compensable injury includes the disputed conditions, and in Conclusion of Law No. 3, the hearing officer finds that it does. Upon review of the record, we find no abuse of discretion by the hearing officer.

The hearing officer's decision and order are affirmed.

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

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Daniel R. Barry  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge