APPEAL NO. 92166
FILED JUNE 8, 1992

On March 18, 1992, a contested case hearing was held. The hearing officer determined that the claimant, respondent herein, had disability from _____ to December 10, 1991, and has a five percent impairment rating. The hearing officer ordered appellant, the employer's workers' compensation insurance carrier, to pay workers' compensation benefits in accordance with her decision and the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant asserts that the hearing officer's determination on respondent's disability is not supported by the evidence and that it is against the great weight of the credible evidence. Appellant requests that we reverse the disability determination. Respondent requests that we affirm the hearing officer's decision, but alleges that the impairment rating is "underestimated."

DECISION

The hearing officer's decision is affirmed.

The parties stipulated that respondent was injured in the course and scope of his employment with (employer) on _____; that appellant was the employer's workers' compensation insurance carrier on the date of injury; and that Dr. F, D.C., was respondent's treating doctor.

We first address the issue of disability. Under the 1989 Act, "disability" means "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). An employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits beginning on the eighth day of disability. Article 8308-4.23(a).

Respondent testified that he injured his back at work on _____, when he lifted a heavy piece of equipment. He said he has not worked since that day due to his injury; that his back pain increases with the amount of weight he lifts and the frequency of lifting until the pain becomes unbearable; that he is in pain when sitting or standing; and that his condition has regressed from the time of injury. Respondent saw several doctors for his injury. Dr. F, his treating doctor, whom he saw three times a week from June 26 to December 10, 1991, diagnosed "Lumbar facet syndrome L4-L5 moderate to severe" and "disc protrusion L5." In a series of "Work Limitation" slips, Dr. F recommended that respondent remain off work until December 19, 1991. Respondent said he decided to stop seeing Dr. F on December 10, 1991, when he was informed that appellant would no longer pay for his visits.

Respondent's supervisor testified for appellant. He said that the employer had

light duty work available for respondent, but that such work had not been offered to respondent. Appellant also introduced into evidence medical reports from several doctors. In a report dated June 26, 1991, Dr. G, M.D., P.A., stated that respondent "suffered a minor injury to his lower back (a lumbosacral strain) . . ." Dr. G further stated that he felt that respondent could work. Respondent saw Dr. G only one time. In a report dated October 25, 1991, Dr. Q, M.D., P.A., stated that respondent "may have sustained a strain of his low back but there are no clinical or radiological findings of any herniated disc or serious injury." Dr. Q felt that respondent was able to return to his previous employment. Respondent saw Dr. Q only one time.

Both parties introduced into evidence a March 4, 1992, report from Dr. A, M.D., who was the doctor designated by the benefit review officer to resolve the impairment rating dispute. Among other things, Dr. A stated in his report that respondent could go back to his job.

The evidence in this case was conflicting on the issue of disability and it raised an issue of fact to be determined by the hearing officer. In considering a challenge to the sufficiency of the evidence, we recognize that the function of the hearing officer, as the trier of fact, is to judge the credibility of the witnesses, assign the weight to be given the evidence, and resolve any conflicts or inconsistencies in the testimony. Article 8308-6.34(e); Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). We do not substitute our judgment for that of the hearing officer if the challenged finding is supported by some evidence of probative value and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Alcantara, *supra*; Texas Workers' Compensation Commission Appeal No. 92156, decided June 1, 1992. After having reviewed all the evidence, including that which appellant asserts was omitted from the hearing officer's "Statement of Evidence," we conclude that the hearing officer's determination that respondent had disability from _____ to December 10, 1991, is supported by some evidence of probative value, that being respondent's testimony and Dr. F's medical report and off work recommendations, and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992.

We do not find merit in appellant's assertion that the hearing officer erred in not making findings of facts concerning Dr. G's and Dr. Q's assessments that respondent could return to work. Her finding that Dr. F determined that respondent could not return to work together with respondent's testimony sufficiently supported her conclusion as to respondent's disability. The hearing officer's "Statement of Evidence" and "Evidence Presented" indicates that she considered the evidence presented at the hearing. The hearing officer had the responsibility to assign the weight to be given the conflicting evidence.

We next address the impairment rating determined by the hearing officer. At the benefit review conference held on January 7, 1992, the benefit review officer was presented with Dr. F's 12 percent impairment rating and Dr. Q's certification that respondent had reached maximum medical improvement and that he had "no impairment." The benefit review officer set an appointment with a "designated doctor" to resolve the impairment rating issue. The hearing officer found that Dr. A was the doctor designated by the benefit review officer to resolve the issue. In a TWCC-69, Report of Medical Evaluation, Dr. A certified that respondent had reached maximum medical improvement on March 4, 1992, and assigned respondent a whole body impairment rating of five percent. The hearing officer determined that respondent had reached maximum medical improvement on March 4, 1992, and that he had a whole body impairment rating of five percent.

Appellant stated at the hearing, as it does on appeal, that it does not disagree with the five percent impairment rating assigned by Dr. A. Respondent, however, states in his response that "[r]espondent feels Dr. A underestimated impairment compared to Dr. F." Since Respondent's complaint as to the impairment rating determined from the evidence by the hearing officer is actually an appeal of the hearing officer's decision, we cannot consider it since it was not timely filed. *See* Texas Workers' Compensation Commission Appeal No. 92141, decided May 21, 1992. At the close of the hearing the hearing officer explained to the parties that a party that desires to appeal the decision of the hearing officer must file a written appeal with the appeals panel not later than the 15th day after the date on which the decision is received. The hearing officer's decision was mailed to the parties on April 9, 1992, therefore, respondent is deemed to have received it on April 14, 1992. Tex. W.C. Comm'n, TEX. ADMIN. CODE § 102.5(h). Respondent's undated response which certifies that a copy was served on appellant on May 8, 1992, was received by the Commission on May 8, 1992, making the appeal contained therein not timely filed within 15 days as required by Article 8308-6.41(a). Although we have not considered respondent's cross-appeal, we have considered that portion of respondent's filing which actually responds to appellant's request for review since the response portion was timely filed within 15 days of respondent's receipt of the request for review. Article 8308-6.41(a); Rule 143.4(a)(3).

In any event, it is apparent that the five percent impairment rating determined by the hearing officer was based on the report of Dr. A, a designated doctor. We note that an impairment rating made by a designated doctor selected by the Commission has presumptive weight and the Commission must base the impairment rating on the designated doctor's report unless the great weight of other medical evidence is to the contrary. Article 8308-4.26(g).

We do not find merit in appellant's assertion that the hearing officer erred in not making a finding of fact concerning Dr. Q's "no impairment rating" considering that

appellant does not dispute the hearing officer's conclusion that respondent has a five percent impairment rating, and that such conclusion is supported by the findings which are supported by the evidence.

The hearing officer's decision is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge