APPEAL NO. 92400

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On April 27, 1992 and July 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He held that claimant's (appellant herein) selection of Dr. PA was within the provisions of Article 8308-4.62(b) and that respondent is liable for medical care provided by Dr. PA. He also held that since December 13, 1991, appellant does not have disability. Appellant asserts that the evidence shows he has disability and should receive temporary income benefits (TIBS). Respondent objects to exhibits, not admitted at hearing, which appellant attached to his appeal and asserts that the evidence sufficiently supports the conclusions of law and decision that address the disability issue raised by appellant. Respondent seeks to add an appellate issue by asserting that Dr. PA was not a proper choice of physician and urges that the appeals panel affirm as to disability but reverse as to continued liability for Dr. PA's medical care.

DECISION

Finding that the evidence sufficiently supports the decision of the hearing officer, we affirm.

I

The only issue raised on appeal, within the 15 days specified by Article 8308-6.41 of the 1989 Act, was appellant's dispute of the hearing officer's determination that disability ceased after December 13, 1991. The decision of the hearing officer was dated July 23rd and distributed on July 24th. With five days allowed for mailing, Tex W. C. Comm'n, 28 Tex Admin Code §102.5(h) (rule 102.5(h)) deems that the date the decision was received was July 29, 1992. Any appeal must thereafter be placed in the mail no later than August 13, 1992 or be delivered to the commission no later than that date to be timely. The response was dated August 19, 1992, and was electronically transmitted to the commission on that date. It was clearly timely to be treated as a response to the issue raised on appeal by appellant since it was within 15 days of appellant's request, dated August 4, 1992. It was not timely as an appeal. *See* Texas Workers' Compensation Commission Appeal No. 92109 (Docket No. redacted) decided May 4, 1992 and Texas Workers' Compensation Commission Appeal No. 92270 (Docket No. redacted) decided August 6, 1992. No issue regarding whether respondent shall pay for medical care by Dr. PA, addressed in the decision at hearing, will be considered on appeal.

II

Appellant was a "route sales relief person" with a water bottle company when he hurt his back on (date of injury). He delivered water bottles that weighed 30 to 50 pounds. The parties stipulated that respondent accepted liability for the injury. His employer sent him to see Dr. P on (date of injury); appellant did not see this doctor after August 30, 1991.

Although he did not tell appellant that he was released to go back to work, Dr. P notified employer that appellant was able to return to work. Appellant started seeing Dr. M the first week in September, 1991, and continued with that doctor, including physical therapy, through approximately the first week in November, 1991. Appellant said that Dr. M felt he had done what he could at that time and told him to see a specialist if he felt any further treatment were necessary. Appellant then selected and saw Dr. L on November 20th; appellant next selected and saw Dr. B on December 13, 1991. Both Dr. L and Dr. B are specialists. Both said that tests administered were essentially normal and they told appellant, respectively, that he could work without restrictions/return to regular work.

Appellant stated that he no longer worked for employer after hurting his back on (date of injury), because of his pain and "disability." After the December 13th examination by Dr. B, employer asked about appellant returning to work; appellant said he would not return. Appellant started to work for a personnel services company on March 25, 1992, but resigned on May 25, 1992. At the time of the July hearing session, he worked for a copier company making $9.00 an hour for 40 hours a week.

Appellant started to see Dr. PA on January 30, 1992. Dr. PA recommended surgery in March and in April recorded that appellant had a disc protrusion, recommended surgery, and said appellant was medically unable to work. (While not at issue in this hearing, evidence introduced showed that both a second and third opinion as to spinal surgery recommended against it.)

The hearing officer is the sole judge of the weight and credibility of the evidence. While he can rely upon the testimony of the appellant alone to find disability, he is not required to give more weight to the testimony of appellant and to Dr. PA than he is to the evidence generated by Dr. P, Dr. M, Dr. L and Dr. B. *See* Texas Workers' Compensation Commission Appeal No. 92167 (Docket No. redacted) dated June 11, 1992; Texas Workers' Compensation Commission Appeal No. 92259 (Docket No. redacted) dated July 31, 1992; and Texas Workers' Compensation Commission Appeal No. 92300 (Docket No. redacted) dated August 13, 1992. A finding of no disability can be made even though the claimant still has pain. *See* Appeal No 92259, *supra*. The hearing officer could also consider that appellant's employer inquired whether appellant would return to work after the December examination by Dr. B, but that appellant refused to do so. Finally, the hearing officer could consider the circumstances of appellant's work subsequent to December 13, 1991.

Attached to appellant's appeal were 14 documents. Some of these had been admitted at the hearing, such as the evidence of appellant's office visit with Dr. PA on April 13th; others were not offered but predated the hearing. There is no indication that the latter were not reasonably available to the appellant prior to the hearing. One document post-dated the hearing. It was a letter from appellant to the hearing officer. None of the documents require that the case be remanded for further consideration. To constitute "newly discovered evidence," the evidence would need to have come to appellant's knowledge since the hearing; that it was not due to lack of diligence that it came no sooner;

that it is not cumulative; and that it is so material it would probably produce a different result upon a new hearing. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The appeals panel will only consider the record, the appeal, and the response. *See* Article 8308-6.42 of the 1989 Act and Texas Workers' Compensation Commission Appeal No. 92209 (Docket No. redacted) dated July 13, 1992. None of these attachments were considered in this decision except those that were already a part of the record through having been admitted at the hearing.

The decision and order of the hearing officer are not against the great weight and preponderance of the evidence. *See* Gilbert v. Canter, 500 S.W.2d 557 (Tex. Civ. App.-Houston [14th Dist] 1973, writ ref'd n.r.e.). We affirm.

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Joe Sebesta
Chief Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge