APPEAL NO. 92641

This case returns for our consideration after having been remanded for further consideration and development of evidence, as appropriate, pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.42(b)(3) (Vernon Supp. 1992) (1989 Act). Texas Workers' Compensation Commission Appeal No. 92452, decided October 5, 1992. On November 4, 1992, a second contested case hearing was held at the (Hospital), (City 1), Texas, with (hearing officer) presiding, to consider whether (Dr. D) certification of maximum medical improvement (MMI) included appellant and cross-respondent's (claimant) psychiatric injury, and if not, whether claimant's hospitalizations after December 1991 are indications of disability. The hearing officer determined that claimant has not had disability from his (date of injury No. 1) and (date of injury No. 2) compensable back injuries at any time since January 22, 1992, and claimant appeals from such determination. The hearing officer further determined that claimant sustained a compensable back injury on (date of injury No. 1), and a compensable aggravation of that injury on (date of injury No. 2); that these compensable injuries resulted in compensable aggravation of preexisting psychological problems; and that claimant has not attained maximum medical improvement (MMI). Respondent and cross-appellant (carrier) challenges the factual findings and legal conclusions which state that claimant sustained any compensable aggravation of psychological problems. Carrier further asserts that the hearing officer lacked jurisdiction to consider and determine that claimant has not reached MMI because the Texas Workers' Compensation Commission (Commission) Appeals Panel, in its prior decision in this case, lacked jurisdiction to consider such issue since claimant had not raised it as an appealed issue.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm the decision below.

Our earlier decision set forth the factual background for the appealed issues in this case. In that decision we disagreed with carrier's assertion that the hearing officer erred in determining that claimant's compensable back injuries of (date of injury No. 1) and (date of injury No. 2) resulted in a compensable aggravation of his preexisting psychological problems, citing several letter reports of claimant's treating psychiatrist, (Dr. C), and the report of (Dr. M) to the carrier. In the most recent hearing, an additional letter from Dr. C, dated May 29, 1992 and addressed to a peer review entity apparently engaged by carrier to review the necessity for claimant's continued psychiatric hospitalization, as well as testimony from Dr. C, provided still further evidential support for the hearing officer's determination that claimant sustained psychological injury as a result of his compensable back injuries. Dr. C testified, in effect, that prior to his back injuries claimant was functioning satisfactorily and was able to work, albeit recognizing he had been undergoing therapy for psychological problems for some six months prior to his (date of injury No. 1) injury. Dr. C felt that claimant's work-related back injuries "triggered" or exacerbated existing psychological damage from his childhood abuse and neglect, as well as his post-

traumatic stress disorder (PTSD) attributed to his service in Vietnam. Dr. C said that claimant's current psychological problems were caused by his back pain and his anxiety over not being able to work, and that without the psychological backdrop of his child abuse and PTSD, claimant's back injuries would probably have resulted in a short-lived secondary depression, treatable with medications and not requiring the periods of hospitalization. In her May 29, 1992 letter, Dr. C stated that before his (date of injury No. 1) injury, claimant was "functioning extremely effectively, without post-traumatic stress disorder symptoms;" that after such injury claimant "stabilized psychiatrically and was able to resume working;" but that after his (date of injury No. 2) injury, "[h]is PTSD symptoms increased tremendously" and "he has remained relatively incapacitated since that time." We are satisfied that the hearing officer's findings that claimant sustained psychological injury as a result of his compensable (date of injury No. 1) and (date of injury No. 2) back injuries, and her conclusions that claimant's injuries resulted in a compensable aggravation of his preexisting psychological problems, are supported by sufficient evidence. We have previously observed that, under certain circumstances, a mental ailment occasioned in the course and scope of employment is a compensable injury. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. We have also stated that "[i]n reviewing a case, the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deem most reasonable, even though the record contains evidence of or gives equal support to inconsistent inferences. (Citation omitted.) Where sufficiency of the evidence is being tested on review, a case should be reversed only if the finding and decision is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. (Citation omitted.)" Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991.

Upon remand, the hearing officer further found that (Dr. D) (Dr. R), claimant's treating doctor for his back injuries, attempted to certify that claimant reached MMI on October 10, 1991, and to assign a five percent whole body impairment rating; that Dr. R's attempted MMI certification covered only claimant's physical injuries and did not address the psychological component of his injuries; and, that neither Dr. C, nor any other doctor has certified claimant as having reached MMI with regard to "the psychological component, or the entire effect," of claimant's (date of injury No. 1) and (date of injury No. 2) injuries. Based on these findings, the hearing officer concluded that claimant has not reached MMI. Carrier does not challenge such determination on the evidence and indeed claimant introduced a record of Dr. R, dated July 22, 1992, which essentially stated that while Dr. R felt claimant had reached MMI respecting his back injury, claimant "has not reached [MMI] from a psychological standpoint," and noted he was still being treated by Dr. C. However, the carrier asserted at the second hearing, and posits in its subsequent request for review, that the hearing officer lacked jurisdiction to further consider the issue of MMI upon remand, as directed by the Appeals Panel in Appeal No. 92452, *supra*, for the reason that claimant's request for review was limited to the hearing officer's adverse

determination of the disability issue and did not raise an appealed issue concerning whether Dr. R's MMI certification encompassed claimant's psychological injury. Thus, argues the carrier, the Appeals Panel "overstepped its authority and erroneously went into the question of whether the MMI certification was valid because of the possible failure of the certifying doctor to consider the claimant's psychiatric problems." Carrier contends that the Appeals Panel "did not have the jurisdiction to question what was considered in the MMI certification, nor to remand the case to the hearing officer for further consideration of that issue." We disagree. Article 8308-6.42(b)(3) authorizes the Appeals Panel to reverse a hearing officer's decision and remand for further consideration and development of evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.2(b)(3) (Rule 143.2(b)(3)) authorizes the Appeals Panel to reverse and remand to the hearing officer for a second contested case hearing.

Neither the aforementioned statute nor rule constrain the Appeals Panel's authority to remand in the manner asserted by the carrier. Further, we note that in its initial request for review, the carrier itself raised an issue concerning the scope of Dr. R's certification of MMI. The hearing officer, having found that Dr. R had certified MMI as to the (date of injury No. 1) injury but not as to the (date of injury No. 2) injury, concluded that claimant had not reached MMI for that injury. Carrier challenged such determination and asked the Appeals Panel to either infer that Dr. R's certification addressed both injuries or remand for clarification. We agreed with carrier that the hearing officer erred in determining that claimant had not reached MMI with respect to his (date of injury No. 2) injury.

Claimant challenges the hearing officer's adverse determination on the disability issue. Disability is defined in Article 8308-1.03(16) as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." As we pointed out in the prior decision in this case, while an injured employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed (Article 8308-4.61(a)), to be entitled to temporary income benefits (TIBS) not only must claimant not have reached MMI, but he must also have disability (Articles 8308-4.23(a) and (b)). The hearing officer determined that at no time since January 22, 1992 has claimant been unable to obtain and retain employment at his preinjury wage rate due to his (date of injury No. 1) and (date of injury No. 2) injuries. In her prior decision the hearing officer determined that claimant did not have disability after December 30, 1991, and in our remand we queried as to how the hearing officer arrived at the December 30th date, and how claimant's two periods of hospitalization (December 26, 1991 to January 24, 1992, and April 24, 1992 to May 16, 1992) were treated in determining whether he had disability.

In the discussion portion of her decision on remand, the hearing officer states that the earlier disability cutoff date of December 30th date was based on her impression that claimant was paid TIBS through December 30th, but that a subsequent recalculation revealed that claimant was paid TIBS for all periods of intermittent disability through

approximately January 22, 1992. Thus, reasoned the hearing officer, "no alleged disability before that date is relevant to this inquiry." The hearing officer made no specific findings regarding the payment of TIBS. Presumably, such TIBS as were paid were paid because claimant had disability from his back injury and had not yet reached MMI.

As for claimant's having disability during periods of hospitalization after January 22nd, or at any other time after that date, the hearing officer's discussion indicates she was not persuaded by the evidence that claimant met his burden of proof on the disability issue. In her discussion, the hearing officer stated that although claimant was hospitalized for depression, he did not have disability during such periods because his inability to obtain or retain employment resulted not from "his compensable physical injuries," but from his employer's attitude towards him and his frustration with the delays he encountered in the Commission's dispute resolution proceedings. The hearing officer also noted testimony to the effect that employment has a general tendency to ease depression while unemployment has a general tendency to exacerbate depression. The hearing officer stated:

In order for claimant's depression to constitute disability, it would have to prevent him from working. In the case at bar, it appears the opposite situation has occurred: instead of claimant's depression having caused his unemployment, his unemployment, among other factors, caused or heightened his depression. Therefore, the Hearing Officer is not persuaded that claimant suffered disability at any time since January 22, 1992.

The hearing officer commented that although she considered the testimony of both Dr. C and claimant at the second hearing to the effect that claimant could not then return to work, she was also cognizant of "the substantial countervailing evidence in the record," and considered the evidence adduced at the first hearing. Claimant testified in the first hearing that before his injury he was earning $32,000.00 per year, was provided a car, and had the prospect of bonuses; that he could return to the polygraph examination work he had previously done for employers; that when working in that field in 1981, both for the City of (City 2) and on his own time, he earned approximately $2,400.00 per month; that while he felt he could not return to the type of work he had done for the employer--Dr. C having suggested he pursue another line of work--he could do other work, and was then working with the Texas Rehabilitation Commission in that regard. There is no requirement that post-injury employment be precisely the same as that held prior to the injury. Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992.

At the first hearing, claimant also testified that Dr. R released him to return to work on or about August 28, 1991 but restricted him to an eight hour day and from prolonged standing. He had testified to working up to 12 hours per day, seven days per week, and to prolonged standing upon returning to work after his first injury. At the second hearing, claimant testified that Dr. R gave him a release to return to work with restrictions sometime

after October 1991. On a Specific and Subsequent Medical Report (TWCC-64), Dr. R indicated that claimant reached MMI on October 10th and could return to either limited or full-time work on October 28, 1991. That form did not mention any restrictions. Claimant testified that when he obtained his release from Dr. R to return to work with restrictions and limited to eight hour days, he was ready to attempt to do so but that his employer would not take him back. As for his returning to the polygraph examination business, claimant testified that such business prospects were poor due to a 1988 statute regulating employers' polygraph examinations of prospective employees. He said he did not look for a job after being released to work because he already had one with employer, but that employer would not take him back unless the work restrictions were lifted. Claimant also testified that if he had been offered a job at the end of October 1991, he could not have taken it and would still have ended up in the psychiatric hospital for his depression. He said he has been isolating himself in his apartment since November 1, 1991, "becoming a hermit," and that he cannot function. The hearing officer remarked that despite his claim he cannot function outside his apartment, claimant, who represented himself, appeared to function quite well at the two contested case hearings.

We have previously noted that disability is not necessarily a continuing status only and that an employee may have intermittent periods of disability. Appeal No. 91122, *supra*. *See also* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, where we discussed generally evidence of disability. We find the evidence sufficient to support the hearing officer's determination that claimant failed to meet his burden of proving by a preponderance of the evidence that he had disability after January 22, 1992. There was sufficient evidence for the hearing officer to conclude that claimant's unemployment was not due to his compensable back injuries including their compensable psychological component. The hearing officer was free to accept claimant's earlier testimony that his depression resulted from his being certified as having reached MMI, from his employer's refusal to allow him to return to work when Dr. R released him, and from his frustration with the Commission's delay. Claimant, a self-admitted workaholic, said he could not abide inactivity. The hearing officer was not bound by Dr. C's testimony that claimant could not work nor was the hearing officer obliged to accept at face value claimant's testimony that he could not work. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621, 625 (Tex. Civ. App.-Amarillo 1980, no writ.) The hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. Article 8308-6.34(e). It was for the hearing officer to judge the credibility of claimant and Dr. C, assign the weight to be given their testimony, and to resolve the conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). This rule applies as well to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 289-290 (Tex. App.-Houston [14 Dist.] 1984, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we must consider and weigh all the evidence, and we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709

S.W.2d 175 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not find the hearing officer's determination that claimant had no disability after January 22, 1992 to be contrary to the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge