APPEAL NO. 931021

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing, (hearing officer) presiding, was opened in (city), Texas, on September 17, 1993; the hearing was continued and reconvened on October 8, 1993, with (hearing officer) presiding. The issue at the hearing was whether the claimant had disability due to a compensable injury sustained (date of injury). The period of disability sought began February 12, 1993. The hearing officer (hearing officer) determined that claimant had disability from that date until the date the hearing was closed on October 11, 1993. At the time of her injury, the claimant was employed by (employer), which is self-insured through the (carrier).

The appellant (carrier herein) in its request for review disputes the finding of the hearing officer as against the great weight and preponderance of the credible evidence. No response was filed.

DECISION

Finding no reversible error and the decision of the hearing officer not to be against the great weight and preponderance of the evidence, we affirm.

The claimant, a college-educated registered nurse (R.N.), worked for Hospital in direct patient care when she was injured on (date of injury), while lifting a male patient with the help of five other employees. She stated that she hurt her back. She said that she worked on and off with intermittent medical treatment but left work due to her injury on February 12, 1993.

At the first session of the hearing, (Dr. O), an orthopedic surgeon, testified that he examined the claimant on February 12, 1993. He stated that claimant had some tenderness over the L5-S1 part of her lumbar spine. He stated that she had normal range of motion. He found no sensory deficit in her lower extremities, and no muscular weakness in her legs was indicated. He felt that she should have been able to resume normal duties by February 22nd. He stated that she did not show up at his office for follow-up as requested. Dr. O stated he had viewed videotapes made of claimant and that they did not indicate a person with a back injury. He stated that her MRI (taken June 19, 1993, and reviewed by Dr. O) showed moderately bulging discs in two spaces which he would attribute to a prior back injury of eight years ago, and which he felt were not significant. Dr. O's initial medical report and a "slip" completed for the date of his examination indicate a lumbosacral strain, and takes claimant off work, with a next exam scheduled in two weeks. Dr. O completed a TWCC-69 Report of Medical Evaluation stating that claimant had reached maximum medical improvement (MMI) on February 26, 1993, with zero percent impairment.

Claimant said that she consulted Dr. O on recommendation from her employer, but thereafter went to a doctor of her own choosing, (Dr. S). Claimant said in spite of her lack of records, she did consult with physicians between May and October, when carrier indicated that there were no reports. There are no records in evidence from Dr. S.

However, claimant testified that Dr. S has not released her back to work, although he told her she could resume normal duties as tolerated. (It is not clear from claimant's testimony whether normal duties refers to work duties or day-to-day activities, although one may infer claimant meant the latter). Claimant had work hardening physical therapy at least through August 1993, and was discharged for noncompliance by the therapy group on September 2, 1993. The claimant stated that she had stopped going due to Dr. S's suggestion.

Although there is evidence in claimant's therapy records and results of a functional capacity evaluation report that she did not expend full effort, and videotape evidence that claimant was capable of doing (for the periods of time photographed) various activities, including lifting and carrying laundry, she testified that she could not lift over 25-30 lbs., could not stand in excess of 30 minutes, and could not sit for more than 40 minutes. (We should note that one letter from a physical therapist questions whether the person in the videotape is claimant). She stated that Dr. S had not released her to work, and that she had seen him shortly before the hearing. A physical therapist's letter to Dr. S dated August 12th states that claimant's physical capabilities are not compatible with her job description, and notes limitations. Claimant's mother testified that she has had to help claimant drive and do various things. Another R.N. for the employer testified that there were numerous nursing jobs that an R.N. under claimant's limitations could be hired to do which would not involve patient care. Claimant stated that she had not applied for other jobs, although she had asked a person for the employer if there were things she could do that would not involve lifting. There is no evidence that employer ever offered any light duty or modified duty to the claimant.

Section 401.011(16) (1989 Act) states: "'Disability' means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." In the present case the carrier argues that the evidence was insufficient to show that the claimant met this statutory definition between February 12 and October 11, 1993. The carrier points to the lack of evidence showing a disabling injury, and argues that there were various nursing jobs she could seek that did not involve activities she stated she could not do.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well and the weight and credibility that is to be given the evidence. It was for the hearing officer, the trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Fort Worth 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 286 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). In the present case, there is evidence to support the decision of the hearing officer in regard to disability. As we have frequently observed the testimony of the claimant may be sufficient to establish disability. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992; Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992. The hearing officer was in the best position to evaluate Dr. O's testimony in light of his brief examination of claimant, and to evaluate claimant in light of indications that carrier argues show a disinclination to work.

The carrier may be in a plight of its own making with regard to payment of temporary income benefits in this case. Notwithstanding its contention that claimant could have returned to work for the employer, there is no evidence or indication, nor was an issue brought forward, that she received a bona fide offer of employment from the employer. Nor, in spite of an apparent opinion by Dr. O in February that claimant may have reached MMI, was there any issue before the hearing officer on this matter. The hearing officer may only consider those issues brought before him through the benefit review conference or by agreement of the parties. Section 410.151(b). While there is no explicit requirement that all potential issues be brought in a single proceeding, the fact that such is desirable is indicated in Tex. W.C. Comm'n, TEX. ADMIN. CODE § 152.3(b) (Rule 152.3(b)), which states that the Texas Workers' Compensation Commission (Commission) shall consider, in requests to approve attorney's fees, whether the attorney has raised all issues timely and efficiently, given the facts known to the attorney, in order to avoid multiple proceedings on the same claim. We would note that the propensity to bring "piecemeal" disputes through the hearings system consumes not only time and expense but may lead, in a broader sense, to a result that may not reflect all facets of eligibility for benefits. Nevertheless, it is not up to the hearing officer or the Appeals Panel to recast either party's case. On the single issue brought before this hearing officer, his decision is supportable.

For the foregoing reasons, the decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

_____
Robert Potts
Appeals Judge