APPEAL NO. 931062

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). On October 27, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether claimant had disability as a result of his compensable injury of (date of injury), beginning after November 6, 1992. The claimant had been held not to have disability as a result of an earlier proceeding which was held November 4, 1992.

The hearing officer determined that claimant had disability from November 6, 1992, through the date of the October 1993 hearing. He found that claimant was due temporary income benefits (TIBS) from November 6, 1992, through (date) (although the date of statutory MMI was stipulated as August 4, 1993).

The carrier has appealed, arguing that collateral estoppel or *res judicata* apply. It argues that because the evidence presented here was "the same" as that presented in a previous hearing on disability, that this hearing officer must reach the same result notwithstanding the fact that a different time period is under consideration. Carrier argues that the evidence does not show a change in condition. The carrier also argues that the evidence in this hearing does not prove disability stemming from claimant's (date of injury), injury, but its points of error are intertwined with its *res judicata* argument. Claimant points out that a finding against him in a previous hearing on the disability issue does not foreclose his ability to prove disability for a later time period.

DECISION

We strike the hearing officer's finding of fact (as well as comments within the opinion) that the evidence in the hearing was "the same" as the evidence considered in the previous hearing, as both against the plain record in this case and as extraneous to the decision on disability. We affirm the hearing officer's decision, finding sufficient support in the evidence that claimant had disability as a result of his work-related injury of (date of injury), for the period from November 6, 1992, through (date).

The claimant sustained an injury by aggravation to a pre-existing psychological condition on (date of injury). Matters relating to this injury were adjudicated in a previous proceeding which included a hearing on remand from the Appeals Panel. In that previous proceeding[1], the hearing officer determined that claimant did not have disability for the period from January 22, 1992, through the date of the hearing, November 4, 1992. (However, there had been an earlier period of disability following his injury). There was evidence in which (Dr. C) opined, as she did in that previous proceeding, that claimant cannot work because of his injury. The evidence elicited in this hearing was that claimant has been hospitalized for treatment six times on an inpatient basis since that previous

[1]Texas Workers' Compensation Commission Appeal No. 92452, decided October 5, 1992, and Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993.

hearing (as opposed to two or three times in the period disability was earlier asserted in the previous proceeding).

Claimant submitted fact sheets from (employer) on each of three medications he takes: Klonopin, Tofranil, and Tegretol. Common side effects of all three include dizziness and lightheadedness. Two of them also warn against unsteadiness and clumsiness. The sheet for Tegretol cautions the patient to make sure of reactions before driving or operating machinery. A report from Hospital for an admission of October 13-25, 1992, indicated that claimant was taking Klonopin and Tofranil at that time, but Tegretol is not listed among his prescriptions.

The carrier argues that *res judicata* applies, and points to the hearing officer's finding of fact that the evidence in the two proceedings was the same. We agree that two different hearing officers of the Commission cannot take "the same" evidence and decide it differently. Texas Workers' Compensation Commission Appeal No. 93663, decided September 15, 1993. Consequently, the hearing officer's finding of fact that: "except for the period of disability covered, the issue and evidence in this hearing were the same as in the November 4, 1992 hearing" concerns us. However, a cursory review of the evidence elicited in this hearing plainly shows that it was not "the same."

The additional documents that the hearing officer cites as "merely repetitive" indicates that claimant has been hospitalized for psychological problems an additional six times (12 weeks) since the prior hearing. It would have been impossible for the hearing officer, on November 4, 1992, to consider the fact of these additional hospitalizations. The evidence includes statements showing the effects of the medication taken by claimant, which does not appear to have been developed in the prior hearing. He also is now taking Tegretol, a drug that he appears not to have taken as of October 1992 (near the end of disability period considered in the earlier proceeding). Nearly nine months of continuing unemployment passed, which, again, could not have been considered by the previous hearing officer. Moreover, a September 20, 1993 letter from (Dr. G), who states he first examined the claimant July 28, 1993, opines that he could not sustain gainful employment "at this time." There are no letters or opinions from Dr. G that were considered by the previous hearing officer. Finally, in the previous hearing claimant's depression was also attributed to his having been opined to have reached MMI by one previous doctor, and to delays in the hearings process, neither of which was asserted at the present hearing.

In our opinion, the fact that a condition remains unchanged does not foreclose a finding that disability has recurred. We have been consistent in our holdings that injured employees can move in and out of "disability" as that word is defined in the 1989 Act, due to a work-related injury. *See* Texas Workers' Compensation Commission Appeal No. 92299, decided August 10, 1992. 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." A finding that one does not have disability for a certain period does not bind a future finder of fact from considering additional matters in a subsequent time period. Texas Workers' Compensation Commission Appeal No. 93680,

decided September 16, 1993. Appeal No. 93409, cited by the carrier, is inapplicable to the facts here, because in that case the claimant had returned to work and was trying to argue that he had diminished wage. The facts relating to the diminished wage contention were essentially the same in the two hearings.

The hearing officer is correct in noting that the difference in the time period fundamentally changed the issue of disability to be decided in the present hearing. The reason this is true, however, is that there was additional evidence developed bearing on the time period in question. This hearing officer had to consider six additional hospitalizations not before the previous hearing officer, which kept claimant in the hospital for 12 weeks. (And we would note that hospitalization for the effects of a work-related injury does not defeat "disability" because the patient is not available for work. Texas Workers' Compensation Commission Appeal No. 92459, decided October 12, 1992).

One additional matter must be corrected in the decision. Conclusion of Law No. 4 contains an obvious typographical error in the final line. The incorrect phrase currently reads: . . ."as a result of his (date) injury." It should read: ". . . as a result of his (date of injury) injury."

We strike the hearing officer's comments and finding of fact that the evidence in this hearing was "the same," and affirm the determination of the hearing officer on the matter of disability for the period from November 6, 1992 through (date).

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge