APPEAL NO. 931141

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01-11.01) (1989 Act). A contested case hearing was held in (city), Texas, on November 1, 1993, to determine the issues of claimant's maximum medical improvement (MMI), impairment rating, and disability. Hearing Officer (hearing officer) determined that the claimant reached MMI on September 9, 1993, with a zero percent impairment rating, as certified by the designated doctor appointed by the Texas Workers' Compensation Commission. He also determined that the claimant had disability from her injury for the periods October 22, 1992, through February 21, 1993, and from April 27 to September 23, 1993. The carrier contends in its appeal that the hearing officer erred in ordering the carrier to pay temporary income benefits (TIBS) after September 9, 1993, when claimant reached MMI; it also argues that the hearing officer erred in finding disability for any period of time after May 5, 1993, or April 27th, since there is insufficient evidence to support such finding. The claimant filed no response to the appeal.

DECISION

We affirm the decision and order of the hearing officer, as modified.

It was not disputed that the claimant, who was employed as a reservations agent for (employer), suffered an injury in the course and scope of her employment on (date of injury).

With regard to the sole issue on appeal, disability, there was no testimony from the claimant who did not appear at the hearing. Records from employer show she lost time from work from October 22, 1992, to February 21, 1993, and from April 27 to September 23, 1993; they also show her as missing two and one-third days in March 1993. (Ms. F), employer's administrative coordinator, stated that claimant returned to work in February 1993 in order to get a pass so she could fly free on her honeymoon (according to employer's policy, an employee could not qualify for such a pass if he or she were out due to an on-the-job injury). Ms. F stated that after claimant got the pass, she went on leave again.

According to the somewhat limited medical evidence, the claimant initially saw (Dr. S) who on October 22, 1992, gave a return to work date of October 1, 1992. Dr. S apparently referred claimant to (Dr. G) and also to (Dr. D). On May 17, 1993, Dr. D certified that the claimant had reached MMI on that date with a zero percent impairment rating. His report noted that claimant had gone to physical therapy per Dr. G's orders, and had returned to work in February; he also stated that claimant returned to Dr. G on April 26th and 29th, at which time claimant's pain and the need for further therapy were discussed. Dr. D stated he would not recommend further therapy in the absence of any objective findings of lumbar herniated nucleus pulposis, and said, "she does not have any objective evidence to keep her from being in the work place if she is motivated to be there. In answer to the questions asked to me regarding whether this patient could return to a normal occupation and that is yes (sic)."

One letter from Dr. G, dated April 29, 1993, was introduced into evidence, which stated, "[t]his patient has attempted to return to work but is having significant increasing pain in her back without muscle spasms or restriction of motion." Noting that further therapy had been denied, Dr. G said, "[t]his patient is now incapable to work (sic) and will be held out of work." An accompanying off-work slip from Dr. G stated no work for April 27-28, 1993, giving a return to work date as "undetermined."

The report of the designated doctor states only that the claimant's "employability" will not change significantly over the upcoming year.[1]

Carrier's sufficiency argument appears to be that two doctors' certifications of MMI, which contain no restrictions on claimant's working, constitute a greater degree of probative evidence than Dr. G's determination that claimant could not work. The carrier also argues that merely because claimant did not return to work for employer during the period in question does not support a finding of disability, and that the hearing officer's construction of the term incorrectly requires the claimant actually to be earning her preinjury wage.

The 1989 Act defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). We have previously held that disability is a separate issue from MMI. Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991. We have further held that there is no limit on the type of evidence that may be considered in determining whether a claimant has disability. Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992.

Under the facts of this case, Dr. G determined that claimant was unable to work and took her off work, effective April 27, 1993, for an indefinite period. In contrast, Dr. D felt claimant could return to work if she were so motivated (although his report does note her continued complaints of pain, which caused her to return to Dr. G). Such conflict in the evidence is a matter for resolution by the hearing officer, who is the sole judge of the relevance and materiality of the evidence and of its weight and credibility (Section 410.165(a)); he is entitled to resolve conflicts and inconsistencies in the evidence, including medical evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). While his finding as to claimant's inability to earn her "preinjury wage" does not precisely track the statutory language, we do not find, from a reading of his decision as a whole, that he misconstrued or misapplied the statutory intent. We have previously stated that we do not perceive the intent and purpose of the 1989 Act to impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his or her injury unless such employment is

[1]The designated doctor's opinion on matters other than MMI and impairment, which he was appointed to determine, is not entitled to presumptive weight. *See* Texas Workers' Compensation Commission Appeal No. 93784, decided October 18, 1993.

reasonably available and fully compatible with his or her physical condition and generally within the parameters of his or her training, experience and qualifications. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Thus the claimant was not required to show that other jobs existed which she could have performed, as a prerequisite to disability; here, the evidence showed she was still employed by employer during the period in question.

However, even if a claimant is found to have disability, entitlement to TIBS ceases when the individual reaches MMI. Section 408.102(a); Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. Thus the hearing officer's decision finding MMI as of September 9, 1993, disability until September 23, 1993, and TIBS due for "the period of disability" is, at a minimum, misleading. We accordingly modify the hearing officer's decision to provide that TIBS are to be paid for the periods of disability, but ceasing on September 9, 1993.

Our review of the record in this case does not convince us that the hearing officer's decision was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We accordingly affirm the hearing officer's decision, as modified herein, and order.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge