APPEAL NO. 93943

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) On August 24, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She held the record open until September 14, 1993, and then determined that appellant (claimant) reached maximum medical improvement (MMI) on November 28, 1992, with 16% impairment; she also found that claimant did not have disability either from November 9, 1991, to December 2, 1991, or from February 10, 1992, through March 8, 1992. Claimant appeals the determination in regard to disability and asserts that impairment income benefits (IIBS) should be paid from the date of MMI without an offset for such benefits previously paid. Respondent (carrier) replies that the evidence supports the hearing officer's decision and that there was no issue as to credit for (IIBS) paid.

DECISION

We affirm.

Claimant worked for (employer) on (date of injury), when he hurt his elbow. He described the injury as, "I fell off a bicycle at work while I was on the clock." He saw (Dr. P) through July 1991 and then was referred to (Dr. B). Dr. B, in November 1991 notified claimant in writing that he would no longer participate in his medical care. Claimant then saw (Dr. H) from December 1991 to February 10, 1992, when Dr. H released him from his care. Claimant also first saw (Dr. M) in December 1991. (The record contains no records of Dr. M in 1991 or 1992, however.) The last medical report in the record is a letter from Dr. M dated June 3, 1993. In addition to these doctors, claimant saw (Dr. Q) in March 1993. Claimant also saw (Dr. Bl) in April 1993; Dr. Bl had been designated to determine an impairment rating.

The designated doctor, Dr. Bl, said that MMI occurred on November 28, 1992, with 16% impairment; Dr. M said that MMI occurred on November 28, 1992, with 12% impairment; Dr. Q said that MMI occurred on March 15, 1993, with eight percent impairment; and Dr. H said that MMI occurred on February 10, 1992, with three percent impairment. While the carrier did not appeal, and claimant does not take issue with the determination as to MMI and impairment rating, we note that Texas Workers' Compensation Commission Appeal No. 93710, dated September 28, 1993, considered a designated doctor's opinion as to MMI as not being accorded presumptive weight where the appointing orders indicated he was designated only to provide an impairment rating.

Claimant worked as a car salesman from September 5, 1991, until October 28, 1991. While an issue at hearing was phrased as, "Did the claimant have disability after November 9, 1991 . . . , " the claimant agreed at the hearing that the question of disability only applied to November 9, 1991, through December 2, 1991, and February 10, 1992, through March 8, 1992. Dr. B on November 5, 1991, returned claimant to "full duty" with no restrictions. No doctor's record in evidence indicates that claimant was taken off work during either of the time periods in question, although Dr. M in hindsight in 1993 indicates that claimant

never should have lifted more than 5 to 10 pounds from the time of injury to MMI. Dr. H, on February 10, 1992, in a Specific and Subsequent Medical Report indicates that claimant was released to return to work on February 7, 1992; he adds that he released claimant from his care and stated, "(t)his patient should return to work and stop seeing the acupuncturist."

Claimant testified that he could not do unlimited work in the time periods in question and that Dr. B had erroneously returned him to full duty. According to claimant, the hearing officer should have given more weight to Dr. M's 1993 statement as to his condition in 1991 and 1992; claimant refers to Dr. M as his treating doctor and argued that next to the designated doctor, the treating doctor's opinion should be given more weight than others.

The ability of a claimant to work is to be determined from all the evidence, including all medical evidence and that given by the claimant. *See* Texas Workers' Compensation Commission Appeals No. 91024, decided October 23, 1991, and No. 92147, decided May 29, 1992. The 1989 Act does not give preferential weight to evidence from a treating doctor as to whether a claimant has disability. The only time the report of a designated doctor may have presumptive weight is when it addresses MMI and impairment rating. The designated doctor is entitled to no presumptive weight in the determination of disability. *See* Texas Workers' Compensation Commission Appeals No. 93290, decided June 1, 1993, and No. 93383, decided June 30, 1993. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She could give more weight to the opinions of Dr. B and Dr. H than she did to those of Dr. M and the claimant. *See* Jackson v. Killough, 615 S.W.2d 274 (Tex. App. -Dallas 1981, no writ). As an interested party, the claimant's testimony is not required to be accepted. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App. -Texarkana 1977, no writ). The evidence sufficiently supported the findings of fact that said claimant did not have disability in the periods in question.

The assertion made by claimant in his appeal questioning how many additional payments for IIBS will be made was not an issue at the hearing; it was not raised by the claimant at the hearing; it was not addressed in the findings or conclusions of the hearing officer. As a result, it will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. In addition, the claimant attached six pages of documents to his appeal. While four of these pages were introduced at the hearing and are part of the record, the other two are not. The record has been considered by this Appeals Panel (which includes the majority of the submitted material contained with the appeal), but the Appeals Panel cannot consider material from outside the record. Only were we to determine that the submitted material came to claimant's knowledge after the hearing, that it was not due to lack of diligence that it came no sooner, that it was not cumulative, and that it is material enough to probably change the outcome of the hearing, would we remand for it to be considered by the hearing officer. We do not find it necessary to remand. *See* Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The decision and order are sufficiently supported by the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge