APPEAL NO. 93993

This appeal arises under 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 4, 1993, a contested case hearing was held in (city), Texas, with (Hearing officer) presiding. He determined that appellant (claimant) did not have disability from the (date of injury), injury sustained when a student kicked him. Claimant asserts that he had surgery on October 21, 1993, and is entitled to income benefits from the injury. More specifically, he asks for benefits "due from Sept. 4, 1993, through October 20, 1993." Respondent (carrier) replies that the evidence supports the decision of the hearing officer, pointing out that claimant's "off-work" slips are not supported by any medical evidence as to the basis for being off work.

DECISION

We affirm.

Section 410.202(a) provides a 15-day limitation on the time for an appeal, and Section 410.202(b) provides a 15-day period for response from the date the appeal is served. As a result, claimant's appeal, dated November 2, 1993, was considered as within the time limit after distribution of the hearing officer's decision, which was October 21, 1993. Similarly, carrier's response dated November 19, 1993, was also considered timely based on time allowed for mailing. Additional submissions dated November 26, 1993, December 1, 1993, and December 6, 1993, were not considered.

Claimant worked as a teacher in special education and was in his first year of teaching on behalf of (employer). He had been counseled prior to the date of injury, (date). According to (JE), the special education director, claimant had been counseled on "more than two" occasions about job performance prior to the injury.

Claimant testified that since his injury he has been paid his regular salary under a state law that provides for such payment when on leave resulting from being assaulted. He testified that he no longer received pay for having been assaulted because he had resigned his position. Claimant further testified that the school informed him before his contract expired that he would not be renewed. After some discussion, the school offered a contract for the next year, but claimant resigned, "after they offered me the contract." Claimant added, "I just didn't want to go back to the situation that I was in this past school year, not relating to my injury, but other problems at the school district." The hearing officer then queried, "[s]o unrelated to your injury, you resigned?" To which, claimant answered, "yes." While claimant did not specify exactly when the resignation occurred, JE stated that claimant "resigned about June, somewhere around there."

Claimant testified that a student kicked him four times. In his statement, dated February 11, 1993, claimant said that the student kicked him in his left knee three times, knocking him to the ground. Claimant saw (Dr. B) on January 19, 1993. Dr. B stated at that time that claimant related an assault five days before; Dr. B noted full range of motion

and "no swelling." No entry as to any bruising was made. X-rays were negative. Dr. B did take claimant off work at this time. According to physical therapy reports to Dr. B dated in February and March 1993, claimant had been placed on physical therapy. On April 6, 1993, Dr. B again saw claimant. He reported that an MRI was negative (stating that he agreed with the radiologist). Dr. B stated he had no treatment to offer, observing, "[h]e should make an effort to return to work." He noted that claimant wished to see (Dr. S). On August 31, 1993, Dr. B replied to an inquiry from the carrier and stated that claimant could have a "meniscal tear" (torn knee cartilage) even with a negative MRI. (The only MRI in evidence was dated March 1, 1993, prior to the time Dr. B referred to an MRI in his entry of April 6, 1993.) Claimant was seen by (Dr. J) at the request of the carrier on April 7, 1993. He referred to claimant having a tear in the medial meniscus of the knee, but also pointed out "symptom magnification." He did not feel that claimant was able to return to work at that time but did not indicate why. Claimant testified that he has not worked since being injured. He added that he cannot stand for a period longer than about 15 to 20 minutes, but said he could stand again after sitting for a period.

Claimant also provided three work release forms. One is stamped as signed by Dr. B and dated April 8, 1993; it states claimant is not able to return to work until further notice because of multiple injuries. Next, Dr. S on July 14, 1993, said that claimant is unable to return to work until further notice, adding that he is pending surgery. Then on September 3, 1993, Dr. S said that claimant was unable to return to work without specifying a time. He did note that claimant would again be seen on September 29, 1993. (Neither of Dr. S's forms states why claimant is unable to work.)

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Although the hearing officer can rely on a doctor's work release statement as evidence that a claimant is unable to work, and therefore has disability, he is not compelled to accept the opinions of experts. *See* Gregory v. TEIA, 530 S.W.2d 105 (Tex. 1975). While the hearing officer is not restricted in the weight to be given particular medical evidence and can determine the existence of disability based on evidence of pain, he may consider the basis or foundation (or lack of it) provided for opinions set forth by physicians. *See* Texas Workers' Compensation Commission Appeal No. 93119, decided March 29, 1993. We note that the off-work slips of Dr. S are accompanied by Claimant's Exhibit 1, Dr. S's progress notes, which refer to complaints of pain, but notes no effusion or instability in the left knee. Some muscle spasm is mentioned but is not described as a problem. Dr. S refers to no limitation in claimant that could be a safety problem or that could possibly cause exacerbation of claimant's injury while at work. In this instance, the hearing officer could choose to give more weight to the April 6, 1993 opinion of Dr. B than he did to the more current conclusions relating to work made by the treating doctor, Dr. S. *See* Texas Workers' Compensation Commission Appeal No. 92259, decided July 3, 1992.

While the hearing officer could make a finding of no disability from the medical evidence, the claimant's appeal limits the dispute to income benefits between September 4, 1993 and October 21, 1993. *See* Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992, in which only the period disputed in the appeal as to

disability was examined by the Appeals Panel. The resignation of the claimant approximately in June 1993, may also support the hearing officer's finding of fact that said it was not the injury that caused claimant to be unable to obtain or retain employment, since claimant only complains of a time period after the resignation. *See* Texas Workers' Compensation Commission Appeal No. 91098, decided January 15, 1992, in which a claimant resigned his job because he had received a warning from his employer. That claimant had an injury too. In that appeal it was noted that the injury did not keep the claimant from working, but that he quit his job. The resignation in this case also lends support for the hearing officer as to that part of his finding that no disability existed from the date of the resignation to the date of the hearing. Claimant also testified that he had applied to B County for work in March 1993 and to Department of Defense Dependent Schools in May, 1993; he is awaiting a reply on the latter, but stated that he stipulated that his application was based on being able to go back to work.

Claimant states that the video (showing claimant standing and walking) should not have been accepted into evidence because "it does not indicate that my condition has been corrected." Videos have been admitted in hearings on numerous occasions under the 1989 Act. For example, *see* Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992. The appeal does not state a basis sufficient to reverse this case based on the admission of the video.

Claimant attached several documents to his appeal. Those documents that had been admitted into evidence were considered as part of the record. Those items not admitted cannot be considered for the first time on appeal; the hearing officer is the fact finder. Part of the documents include a short summary of surgery performed on the knee scheduled for October 21, 1993. The summary provides no opinion as to disability, only noting that some "loose body" was removed from the knee. We note that claimant's surgical plans were in the record and were known at the hearing. No request for a continuance was requested. In addition, claimant specifically points out in his appeal that the time period he is questioning ends before the surgery. Disability as a basis for temporary income benefits can come and go, so that a period of disability can follow a period in which disability is not found. *See* Appeal No. 91122, *supra*. The records of claimant's surgery do not indicate that if known to the hearing officer, they probably would have caused a different decision. Other data provided for the first time was not shown to have been unavailable at the time of the hearing. Claimant's documents do not provide a basis for remand. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 16, 1992.

Finding that the evidence sufficiently supports the decision and order, we affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

_____
Lynda H. Nesenholtz
Appeals Judge

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Thomas A. Knapp
Appeals Judge