APPEAL NO. 950048
FILED FEBRUARY 21, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 8, 1994. Addressing the disputed issues, he determined that the respondent (claimant herein) had disability from April 10, 1993, through the date of the hearing and that the claimant timely disputed the first certification of maximum medical improvement (MMI) and impairment rating (IR). The appellant (carrier herein) requests review of this decision arguing that it is against the great weight of the evidence. The claimant replies that the decision and order of the hearing officer is supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

It was not disputed that the claimant sustained a compensable back injury in a lifting incident on _____. The claimant testified that he went to an emergency room on the next day and was referred from there to (Dr. W). In his first report of April 13, 1993, Dr. W directed that the claimant "remain off work for the present." He continued the claimant in this off work status until July 20, 1993, when he released him to light duty effective July 26, 1993. On July 28, 1993, Dr. W reported that the claimant was still able to do light work, but said the claimant reported to him that he was terminated from his job because of not being released without restrictions. On August 18, 1993, Dr. W again stated the claimant was to remain off work and, after his examination of the claimant on September 8, 1993, certified the claimant to be at MMI with a seven percent IR because as of that time the claimant declined "a surgical option." Dr. W on December 13, 1993, stated the claimant "will continue working." In his final report in evidence, Dr. W on March 24, 1994, stated the claimant still declined surgery. On January 4, 1994, for reasons not clear in the record, Dr. W completed another certification of MMI and IR in which he found MMI to be reached on that date with the same seven percent IR.

On April 18, 1994, the claimant sought treatment from (Dr. S). In a note of May 16, 1994, Dr. S stated that "[a]t the present time [claimant] is unable to return back to any type of work." He determined the claimant reached MMI on August 11, 1994, and assigned a 13% IR. According to the claimant, Dr. S released him to light duty on August 14, 1994.

The claimant testified that he has been unable to work since May 10, 1993, because of his injury. He said that Dr. W returned him to light work in April 1994, but this was unsuccessful because in less than a day, his back began to hurt again and he had to

return to therapy. He said he tried to go back to light duty with his employer in July 1994, but was told he was terminated because he did not have a full duty release.

By letter of November 2, 1993, a disability determination officer of the Texas Workers' Compensation Commission (Commission) notified the claimant of Dr. W's certification of MMI and IR on September 8, 1993, and advised him that he had until December 18, 1993,[1] to dispute this certification or it may be considered final. The claimant testified that he received this letter no later than November 4, 1993. In response to this notice, the claimant testified that he called the Commission field office on December 17, 1993, to dispute the certification. He did not recall the name of the person with whom he spoke, but she reportedly told him to expect a letter in about two weeks which would set the dispute resolution process into motion. Dispute Resolution Information System (DRIS) records of the Commission introduced into evidence reflect no phone call from the claimant that day. Because the claimant had not heard back from the Commission, he said he again called on January 31, 1994, to inquire as to the status of his case. A DRIS note for this date reflects that the claimant wanted to know whether his call of December 17, 1993, was being acted on and was told that there was no record of the call. The claimant was then advised of his right to a benefit review conference.

The hearing officer determined that the claimant had disability from April 10, 1993, through the date of the hearing. Disability is the "inability to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant has the burden of proving disability. Texas Workers' Compensation Commission Appeal No. 93959, decided November 30, 1993. Whether disability exists as claimed is a question of fact for the hearing officer to decide and may be based on the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. We have also held that termination does not in and of itself end disability if the compensable injury continues to be a cause of the claimant's inability to earn pre-injury wages. *See* Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992, and Texas Workers' Compensation Commission Appeal No. 92016, decided February 28, 1992. Obviously in this case, the hearing officer found the claimant credible in his assertions that he was unable to work because of his back condition except for a brief period of less than a day when he tried unsuccessfully to go back to work. The records of Dr. W support the claimant's position on disability. The carrier submits that Dr. S's finding of MMI on August 11, 1994, must end disability. It was the responsibility of the hearing officer to resolve any conflicts or inconsistencies in the medical evidence in this case and judge the weight to be given that testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We note, in this regard, that MMI was not an issue in this case and that a finding of MMI, while relevant to a determination of entitlement to temporary income

[1]We offer no speculation about why this date was selected.

benefits (TIBS) under Section 408.101(a), is not dispositive of the question of disability. When reviewing a hearing officer's decision, we will reverse such a 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, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Based on this standard of review, we find the evidence sufficient to support the decision and order on the hearing officer on the disputed issue of disability and decline to reverse it on appeal.

We now turn to the issue of whether Dr. W's certification of MMI and IR of September 8, 1993, became final. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." If the IR becomes final by virtue of this rule, so does the underlying certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the 90-day time period for disputing a first certification begins when the challenging party receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. It was not disputed that Dr. W's certification of September 8, 1993, was the claimant's first certification of MMI and IR. The uncontradicted testimony of the claimant was that the Commission letter of November 2, 1993, was his first written notice of this certification and that he received it no later than November 4, 1993. The hearing officer's express finding of fact to this effect was not appealed by either party and we consider it binding on the parties. *See* Texas Workers' Compensation Commission Appeal No. 94588, decided June 20, 1994. Thus, the 90-day period for disputing this certification began, not on the date of certification, but on November 4, 1993. Under these circumstances, the question of whether the claimant ever made a phone call to the Commission on December 17, 1993, to dispute the certification becomes somewhat academic, because his phone call of January 31, 1994, was within 90 days of his receipt of written notice of the certification and there was evidence in the record in the form of a DRIS note confirming both the later call and the reason for the call. In any event, whether, and if so, when, a dispute by a party has been made is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 931170, decided February 3, 1994, and Texas Workers' Compensation Commission Appeal No. 931110, decided January 20, 1994. He obviously believed the claimant when he said he spoke with a Commission employee on December 17, 1993, and disputed Dr. W's certification. This account is given some independent verification in the DRIS notes of the January 31, 1994, phone call. Having reviewed the record, we conclude that the hearing officer's decision and order on the disputed issue of the finality of Dr. W's report is supported by sufficient evidence.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Tommy W. Lueders
Appeals Judge