APPEAL NO. 950070
FILED FEBRUARY 24, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 16, 1994. The sole issue at the CCH was whether the respondent (claimant herein) had disability from January 20, 1994, to the present resulting from his injury of _____. The hearing officer determined that the claimant had disability from January 20, 1994, to the present due to his compensable injury. The appellant (county herein) files a request for review contending that the hearing officer's determination is against the great weight and preponderance of the evidence. The claimant does not respond.

DECISION

Determining that the decision of the hearing officer is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The claimant testified that he was injured on _____, working for the county at juvenile boot camp while demonstrating how to do push-ups. The claimant injured his left elbow. The parties stipulate that this was a compensable injury. The claimant testified that he initially thought he had a pulled muscle, but that as his arm continued to hurt and swell he went to the (emergency room).

The claimant underwent follow-up treatment with (Dr. V), D.O., an orthopedic surgeon, who stated in a note of August 11, 1993, that the claimant could return to work with restrictions of no repetitive stressful use of the upper extremities and no lifting more than 20 pounds as well as "no pushing/pushups/ pulling." Dr. V continued to state that the claimant was capable of light duty work in later reports (August 25, 1993; September 15, 1993; November 17, 1993; and December 15, 1993). Dr. V indicated in these later reports that the claimant remained off work because light duty work was not available.

The county placed into evidence a letter dated November 15, 1993,stating that the claimant was being offered light duty employment. There was apparently a controversy over whether this letter constituted a bona fide offer of employment. This issue was taken into the dispute resolution process. The county put into evidence an interlocutory order entered at a benefit review conference (BRC) suspending weekly benefits. Also in evidence is a decision and order from a CCH held on June 13, 1994. The hearing officer at that CCH[1] found that the county made a bona fide offer of employment. The Appeals Panel upheld the decision of the hearing officer in a unpublished opinion--Texas Workers' Compensation Commission Appeal No. 94986, decided August 23, 1994 (Unpublished).

[1]Who is in fact the same hearing officer who presided at the CCH in present case.

In the meantime, the claimant filed an Employee's Request to Change Treating Doctors (TWCC-53) dated November 23, 1993, in which he requested to change treatment from Dr. V to (Dr. B), M.D., a neurologist and psychiatrist. The claimant stated on the TWCC-53 that his reason for requesting the change of doctors was as follows: "The medical treatment [Dr. V] is giving me, has not helped my arm get any better." This request was stamped received by the Texas Workers' Compensation Commission (Commission) on December 2, 1993, and was approved by (Ms. M), DDO (disability determination officer), on December 8, 1993.

Dr. V apparently continued to see the claimant for a period after the approval of the change of treating doctors. Dr. V stated as follows:

> I discussed with [the claimant] the fact that I feel he has minor abnormalities at these sites but no severe findings and that while injections and medications may help I do not feel he needs surgical treatment on these at this time.[2] I would prefer that he was working at light duty or at least going to school. He reports he has his attorney help him to keep from being given a meaningless position at work so that he did not have to go back to light duty.
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> He remains cleared for light duty work with limitations of no lifting over 30 pounds, no heavy pushing, pulling or overhead work. He can do office work.

Dr. B's initial medical report is dated January 20, 1994. Dr. B states in this report that the "patient cannot work for four weeks" and states that the claimant's return to work date is "unknown." In later reports (March 20, 1994; May 20, 1994; September 20, 1994), Dr. B maintains the claimant in an off-work status. Dr. B does state in his September 20, 1994, report that he anticipates that the claimant will be able to return to work "late 1994." On March 9, 1994, the claimant saw (Dr. H), M.D., an orthopedic surgeon, who recommended that the claimant have "the ulnar nerve transposed submuscularly on the left side and undergo the routine postoperative therapy." Dr. H stated that the claimant was not at maximum medical improvement (MMI) and stated the following in regard to work status:

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[2]Dr. V had recommended surgery the previous month in his report dated December 15, 1993, in which he stated:

> It is recommended we proceed with cubital tunnel release and anterior submuscular transposition to remove that pain generating site and then observe him closely for recovery with a cast for one month, the progressive activity and therapy. If not markedly improved, he will likely need carpal tunnel, Guyon's canal and posterior interosseous nerve releases.

> I don't foresee him returning back to the work place to his previous capacity in his present condition. He could do desk work or light duty type work without having to strain the left elbow, but clinically and by his history, his condition is getting worse.

On November 8, 1994, the claimant saw (Dr. M), D.C., who was referred to at the CCH as the designated doctor, and who stated in his report that the Commission had referred the claimant to him for the purpose of determining MMI status and "a percentage of permanent medical impairment." On a Report of Medical Evaluation (TWCC-69) Dr. M certified that the claimant had attained MMI on November 14, 1994, with a 13% impairment rating (IR).

The claimant testified at the hearing that he was unable to work because of extreme pain in his left arm and shoulder. The claimant testified that his doctors had recommended surgery, but that he did not want surgery.

The carrier argues that all doctors other than Dr. B stated that the claimant was able to perform light duty work. Carrier states in its request for review "the fact that the only doctor who opined that [claimant] was disabled is [claimant's] attorney's brother, at best casts doubt on the reliability of [Dr. B's] report." The carrier also contends that the claimant waived the issue of disability by not raising it while the issue of bona fide offer was going through the dispute resolution process, complaining that allowing the claimant to submit his claim repeatedly and in a piecemeal fashion is manifestly unfair and constitutes a waste of administrative and judicial resources.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. In the present case the claimant testified he is not able to work at all due to his injury. This testimony is contradicted by Dr. V and Dr. H who state that the claimant can do light duty work and by the indication in Dr. V's note that claimant was seeking to avoid "meaningless" light duty work. The claimant's testimony is supported by the reports of Dr. B. With the evidence in this posture, we cannot say that the hearing officer's finding of disability is against the great weight and preponderance of the evidence.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony

of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such 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). This is so even though, were we fact finders, we might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

As to the contention of the county that the claimant waived the disability issue, we know of no authority to support this contention and the county cites none. Further, it would appear difficult to imagine how one can waive the issue of disability when we have recognized that changed medical circumstances can bring one in and out of disability. Each party has the right during the dispute resolution process to bring up issues it desires resolved. We see no reason the county could not have requested the issue of disability during the earlier proceeding. While dealing with issues that involve overlapping evidence in separate proceedings may indeed waste administrative and judicial time, we have neither the authority nor the responsibility to dictate how the parties present their cases.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge