APPEAL NO. 950109
FILED MARCH 1, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 15, 1994, a hearing was held. She determined that appellant (claimant) did not have disability from November 9, 1993, to the time of the hearing. Claimant asserts that certain findings of fact and a conclusion of law are not sufficiently supported, citing medical evidence of (Dr. D) as showing disability and implies that the respondent (carrier) provided no evidence of availability of claimant's job after November 9, 1993. Carrier replies that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) as an occupational nurse. She testified that upon returning to work from a three-month period away from the job, she had pain in her thighs. She saw (Dr. A), whom she had previously seen over a period of years, in December 1992. Claimant introduced a medical record dated December 22, 1993, which is neatly handwritten and says, in part, "saw [Dr. A] 12-15-92. Dx diminished lateral compartment Rt knee, early diminished lateral compartment Lt knee, chondromalacia - pain diminishes on weekends - believes walking on concrete aggravates condition---." Claimant retired from her job on February 26, 1993.

Texas Workers' Compensation Commission Appeal No. 931112, decided January 21, 1994, determined that claimant did have a compensable injury based on the failure of the carrier to contest compensability within 60 days; the finding of no disability through the date of hearing, November 8, 1993, was upheld. Claimant is now seeking disability beginning on November 9, 1993, from the same compensable injury.

Claimant testified that she cannot work now. She was able to work at modified duty (an LVN to assist her and a golf cart to ride to distant areas of the plant) from December 1992 to retirement, but believed that such modified duty would not be available to her had she decided to remain indefinitely on the job. She pointed out that Dr. D and Dr. A have said that she has been disabled since November 9, 1993. She stated that she was not seeing Dr. D on November 9, 1993, and was not aware that Dr. D was conferring with him at that time. She never did state when she began to see Dr. D. She agreed that she submitted a request to retire in November 1992, prior to the time she saw Dr A about pain in her thighs or knees. She acknowledged that her retirement in February 1993 was voluntary.

The hearing officer queried claimant about her ability. Claimant agreed that she walks without assistance and walks in doing her daily living activities. She said she does

her shopping and is able to stand for "about an hour at a time" and then sits down; she is able to sit. In pointing out that she cannot do sustained walking and cannot stand for an extended period, claimant referred to a "replacement" in her right knee. Other than this comment, the only other references in the record to treatment are by claimant's counsel, who indicated she had "surgery on one knee;" but no medical record states that surgery was performed and no date was given.

Claimant further answered the hearing officer by describing her work site as an office, with offices conducting related activities adjacent or across from hers. She sat for many tasks, such as filling out forms, and doing some medical procedures, such as hearing tests. Other procedures, such as drawing blood, she preferred to stand, but agreed could be performed while seated. In emergencies she would have to go into the plant (inferring a significant distance) to reach the injured employee. The floors were concrete.

In her appeal claimant primarily relied on her Exhibit No. 1, an opinion of Dr. D. This opinion is dated July 13, 1994, and says, in part:

> She has basically been considered disabled for all activities since November, 1993, due to her on-the-job injuries.
>
> Based on the reports of the prior treating physicians, [claimant's] history, and my physical examination, [claimant] has been disabled since November 9th, 1993.

As stated, claimant was not seeing Dr. D on November 9, 1993, nor did she say when she started seeing him. There is no evidence that Dr. D saw her at any time prior to July 13, 1994. Otherwise, claimant also offered another document of Dr. D, also dated July 13, 1994, (labeled "office note") in which Dr. D reports his examination of claimant as, "[h]er knee is doing extremely well. She has 110 degrees of flexion. She has full extension. She has no pain with that." He later adds, "[s]he says that she is having no pain whatsoever." Dr. D notes that he will see her again in a year.

Dr. A, who claimant had seen in December 1992, in a statement dated February 17, 1994, says that claimant "has been considered disabled since November 1993, for all activities." He then writes more specifically by saying that she has difficulty with "prolonged standing and walking and cannot even sit still for long periods . . ." Claimant also introduced other statements by Dr. A dated in November 1993, which describe pain in an examination and opine that "if she were to return to her usual occupation, there is a reasonable medical probability that she would be unable to tolerate it."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Questions of disability are ones of fact for the hearing officer to determine with or without medical evidence. *See* Texas Workers' Compensation

Commission Appeal No. 92167, decided June 11, 1992. In addition, Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993, stated that the hearing officer in determining that no disability had been shown, was not bound by the medical testimony that claimant could not work and was also not required to accept at face value the claimant's testimony that he could not work. In that case, a claimant's depression was found to stem from the unemployment, not that the unemployment stemmed from the depression.

As stated, the initial notification concerning retirement predated claimant's visit to her doctor concerning her knees. In another Appeals Panel review, Texas Workers' Compensation Commission Appeal No. 94905, decided August 26, 1994, a hearing officer's finding of no disability based on a claimant's prior plan to retire was upheld. That case found that the claimant was out of work because of the retirement; it also noted that the hearing officer could give more weight to medical evidence prepared at the time in question than to an opinion prepared later which addressed events in the past.

The hearing officer could choose to give little weight to Dr. D's conclusionary comment about claimant being "disabled" when Dr. D's statement was prepared months later, when he reviewed "prior treating physicians" records, and examined her. The record does not show what records were reviewed, but the statement of her treating physician, Dr. A, speaks of problems only with "prolonged" standing and walking, even though it, too, states that someone considered claimant to be "disabled" since either February or November 1993. Finally, Dr. D's exam does not provide a basis for concluding that claimant is "disabled" when he writes of no limitation based on flexion and extension and "no pain whatsoever."

In addition, Dr. A's reference to whether claimant could perform her "usual occupation" is not controlling. Texas Workers' Compensation Commission Appeal No. 92198, decided July 3, 1992, stated that "disability" is not based on a claimant's ability to do the type of work previously performed, but rather is based on whether a claimant can obtain and retain employment at equivalent wages.

While claimant states that there was no showing by carrier that employer would provide employment after November 9, 1993, the hearing officer specifically asked (Mr. B), the employer's manager of health and safety, if such would be available, and he replied that based on the history of employer in providing modified jobs, it would be. Previously he had testified that the employer regularly provides modified work and referenced two examples of employees who had been on modified work since 1985; he said employer had no maximum time for modified work.

The hearing officer's decision reflects that she gave more weight to the specific medical comments from Dr. A and Dr. D about prolonged activity and pain free use of her knee than she did to their conclusion that claimant was "disabled." The hearing officer may believe factual determinations from an expert without choosing to accept the

conclusion attached thereto by the expert, even without contradictory expert opinion. *See* Gregory v. Texas Employers Insurance Association, 530 S.W.2d 105 (Tex. 1975). The findings of fact and conclusions of law are sufficiently supported by the evidence.

Finding that the decision and order that claimant has not had disability from the compensable injury is sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge