APPEAL NO. 980168
FILED MARCH 3, 1998

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 29, 1997. The (hearing officer) determined that the respondent (claimant) had disability from August 3, 1995, through the date of the CCH. The appellant (self-insured) appeals this determination, contending that a document offered by the claimant was improperly admitted into evidence and that the decision was against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant, who was 62 years old at the time, sustained a compensable back injury on _____, and has not returned to his prior employment. He retired on April 1, 1996, and reached maximum medical improvement (MMI) on November 26, 1996. The self-insured disputes disability only from April 1, 1996, and both parties recognized that temporary income benefits (TIBS) are not owed for periods after the date of MMI. *See* Section 408.101(a).

(Dr. H), D.C., the claimant's initial treating doctor, in somewhat inconsistent letters, released the claimant to light duty on February 26, 1996, but then wrote on May 31, 1996, that the claimant "has not been released to return to work." (Dr. W), the claimant's current treating doctor, wrote on June 25, 1996, that "I believe that [claimant] could perform his job duties as an assistant director in the materials management department." On November 24, 1997, after facet injections had been approved, Dr. W wrote that the claimant could not return to work for an "undetermined" period. The claimant also saw (Dr. T), D.C., who wrote on April 4, 1997, that the claimant was not able to work "in the future in a productive capacity."

The claimant testified that as early as 1994 he began inquiring about retirement, but did not apply for retirement until January 1996. He said that he did not believe he was able to perform the duties required of him in his former job and that a job description offered into evidence by the self-insured did not accurately reflect what those duties were. He further said that he planned on working other jobs after retirement and, in fact, had a job offer which he was unable to accept because his injury prevented him from doing what the job required. He also admitted that he had done some work for (employer name) for one night per week watching surveillance cameras but quit this job in November 1995 because of his pain. He also works out of his home for the (office name), he said, and earns about $100.00 per month.

(Ms M), the self-insured workers' compensation administrator, testified that the self-insured has a light duty return to work program for injured employees. She was confident that she could have accommodated the claimant in this program, but admits that the self-injured did not tender the claimant an offer of employment and would not have done this in any case after he retired. (Mr. W), the claimant's supervisor, testified that the claimant came to him towards the end of 1996, after he retired, to inquire about his prior job. Mr. W said he considered the claimant unable to perform his old job, but could have found some modified duty for the claimant if the claimant had asked for it. The claimant denied ever talking to Mr. W about returning to work.

Functional capacity evaluations (FCE) done in December 1995 and January 1996 concluded that the claimant could work in the light duty category.

Section 401.011(16) defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The claimant had the burden of proving disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Whether disability exists is generally a question of fact and can be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We also noted in Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, that, although the 1989 Act was not intended to enable an injured employee to claim disability and continue to receive TIBS where the employee is capable of working, but chooses not to do so, nonetheless, the employee is not required "to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his training, experience, and qualifications." It has also been pointed out that an employee who has received only a limited release to return to work, need not actively seek employment consistent with that release in order to prove disability and entitlement to TIBS. *See* Texas Workers' Compensation Commission Appeal No. 950597, decided May 30, 1997.

In the case we now consider, there was evidence from the claimant himself, the FCEs, and, though not always consistent, from various treating doctors that the claimant could not return to work, or at best had restrictions that precluded him from performing the duties of the job where he sustained his injury. The carrier's position, however, was that the reason the claimant was not working from April 1, 1996, was simply because he retired and chose not to work. The fact that a claimant retires does not automatically preclude a finding of disability. This is a proper factor for the hearing officer to consider in evaluating whether a claimant meets the statutory definition of disability, but the retirement from the job where a claimant was injured does not as a matter of law end disability. Texas Workers' Compensation Commission Appeal No. 970089, decided February 28, 1997. Rather, a claimant need only prove that the compensable injury is a cause, not necessarily the only cause, of the inability to earn the preinjury wage. The hearing officer in this case found the claimant credible in his assertions that he could not perform his preinjury job and that he intended to continue doing other work after his retirement, but was no longer able to do the work he planned. Other medical evidence supported findings that he had medical

limitations on his ability to work caused by the compensable injury. Under our standard of appellate review, we will reverse a factual determination of a hearing officer only if it is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Having reviewed the record in this case, we conclude that the evidence was sufficient to support the decision of the hearing officer.

The self-insured also argues on appeal that it suffered prejudice in the introduction of Claimant's Exhibit No. 8, which was a Decision and Order by the State Office of Administrative Hearings which reversed the decision of the Medical Review Division of the Texas Workers' Compensation Commission and found that the claimant was entitled to preauthorization for facet injections. The basis for the objection at the CCH was relevance. The hearing officer agreed that the document was of marginal relevance and would "probably give it minimal weight." On appeal, the self-insured renews this objection. We review evidentiary rulings on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. Even though a hearing officer may abuse his or her discretion with regard to evidentiary rulings, we will reverse the decision only if the error was reasonably calculated to cause and probably did cause in the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, we agree that the document in question was of marginal relevance, but it did present some background information on the claimant's compensable injury. In asserting that the admission was prejudicial, we assume that the self-insured is suggesting that it was inflammatory in nature, rather than simply favoring the claimant's position to the prejudice of the self-insured's position. Considered in this light, we still find no error in its admission and believe the hearing officer accepted it for what it was worth and not as a general indictment of the good faith of the self-insured. In any event, given the hearing officer's pronouncement that the document would likely be given little weight on the issue in dispute, we cannot agree that the claimant's case turned on this document.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge