

APPEAL NO. 980174
FILED MARCH 11, 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 was held on December 30, 1997. With respect to the single issue before her, the hearing officer determined that the respondent (claimant) had disability from August 20, 1997, through the date of the hearing. In its appeal, the appellant (self-insured) challenges the sufficiency of the evidence to support that determination and asks that we reverse the hearing officer's decision and render a new decision that the claimant did not have disability. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, when she struck her left elbow on a counter, while working in the self-insured's customer service booth. On _____, the claimant went to an occupational health clinic recommended by the self-insured. The claimant's treatment notes from the clinic reflect a diagnosis of a left elbow contusion. At the clinic, the claimant was treated by both (Dr. S) and (Dr. B). Some of the treatment notes from Drs. S and B state that the claimant was released to regular duty while others note that she was released to limited duty; however, the claimant continued to work for the employer in her regular position. On December 12, 1996, Dr. B referred the claimant to (Dr. D), for orthopaedic evaluation and treatment, noting that her condition had not improved. In his Initial Medical Report (TWCC-61) of December 13, 1996, Dr. D diagnosed neuralgia/neuritis and an elbow contusion. With respect to work, Dr. D stated:

I want her to be at limited work. She writes all day long and she is left dominant and I do not want her to do that as it is going to aggravate her symptomatology.

The claimant stated that she last treated with Dr. D in June 1997, after the self-insured would not approve an MRI. She stated that, thereafter, Dr. D told her that there was nothing else he could do for her.

As noted above, the claimant continued to work performing her regular duties after her injury. She stated that her pain increased when she was working and that she also began to develop cramping in her left arm. The claimant acknowledged that she continued to work until May 1997, when she was terminated for violating company policy. In addition, she noted that she applied for unemployment compensation after her termination and admitted that she had testified at her hearing at the Texas Workforce Commission (TWC) that she would still be working for the self-insured but for her termination. In response to

questioning from the self-insured's attorney, the claimant stated that she would have attempted to continue working had she not been terminated. However, she also noted that the pain and cramping in her arm was getting worse at the time of her termination and that she is not sure she would have been able to continue working.

On August 20, 1997, the claimant had her initial appointment with (Dr. A), after the Texas Workers' Compensation Commission (Commission) approved her request to change treating doctors from Dr. D to Dr. A. The claimant stated that her condition continued to deteriorate after she was terminated by the self-insured until she saw Dr. A on August 20th. On cross-examination, the claimant acknowledged that she had received Dr. A's name from her attorney along with three to four other names and she had decided on Dr. A because he could give her the earliest appointment. Dr. A took the claimant off work at the August 20, 1997, appointment and continued her in an off-work status through the date of the hearing. In a narrative report of December 17, 1997, (Dr. R), who examined the claimant at the request of the self-insured, opined that the claimant was not "disabled from gainful employment" and that she could be "returned to gainful employment at any time."

The claimant had the burden of proving that she had disability for the period claimed as a result of her compensable injury. That question is a fact question to be resolved by the hearing officer. The hearing officer is the sole judge of the weight, credibility, relevance and materiality of the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility for resolving the conflicts and inconsistencies in the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer can believe all, part, or none of the testimony of any witness and can properly decide what weight to assign to the other evidence before her. *Id.* We will not substitute our judgment for that of the hearing officer where her determinations are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer determined that claimant had disability from August 20, 1997, through the date of the hearing. In Texas Workers' Compensation Commission Appeal No. 931002, decided December 13, 1993, we noted that in most instances "issues of injury and disability may be established by testimony of the claimant alone and the trier of fact may accept or reject such testimony, in whole or in part, and may accept lay testimony over that of medical experts." (Citing Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 495 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.)). The self-insured argues that the claimant performed her regular duties from the date of injury to the date of her termination and that no change in circumstances supports a determination that disability began in August 1997 for the _____, compensable injury. We cannot agree with the self-insured's assertion that there was no evidence of changed circumstances in this instance. The claimant testified that she would have attempted to continue to work if she had not been terminated; however, she also noted that her condition

was worsening with work and that she was not certain that her physical condition would have permitted her to keep working. In addition, Dr. A took the claimant off work, while her other doctors had released her to light duty. The self-insured emphasizes that the claimant was referred to Dr. A by her attorney. Specifically, the self-insured argues "[t]his case involves a return to work at regular duty for an extended period of time followed by a termination for cause after which the claimant is taken completely off work by a doctor to whom she was referred by her attorney. Those circumstances do not support a finding of entitlement to temporary income benefits." We cannot agree, as the self-insured maintains, that those factors preclude a finding of disability as a matter of law. Rather, it was for the hearing officer as the fact finder to consider those factors in resolving the disability issue. The hearing officer was acting in her province as the sole judge of the weight and credibility of the evidence in resolving the admitted conflicts and inconsistencies in the evidence in favor of a determination that the claimant had established disability for the period at issue. Nothing in our review of the record indicates that the hearing officer's disability determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for disturbing it on appeal. Pool, *supra*; Cain, *supra*. The fact that another fact finder may have drawn different inferences from the evidence of record, which could have supported a different result, likewise does not provide a basis for reversing the hearing officer's decision and order. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Christopher L. Rhodes
Appeals Judge