APPEAL NO. 990655

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing was held, on March 1, 1999, with (hearing officer) presiding as hearing officer, to consider the following disputed issues: does the respondent's (claimant) compensable injury of _____, extend to and include his neck, and did claimant have disability from September 15 to November 23, 1998. The hearing officer concluded that claimant's injury did not extend to and include his neck and that he did have disability from October 6 to November 23, 1998. The appellant (carrier) has appealed two findings related to the disability issue, as well as the dispositive conclusion on the disability issue, as being insufficiently supported by the evidence. Claimant's response urges the sufficiency of the evidence to support the challenged determination.

DECISION

Affirmed.

The parties stipulated that the carrier accepted liability for the _____ (all dates are in 1998 unless otherwise stated), injury to claimant's left shoulder. The finding that claimant's _____ injury did not extend to damage to the physical structure of his neck has not been appealed. Accordingly, our discussion of the evidence is limited to the appealed issue, disability.

Claimant testified that on _____, while at work for (employer), a pry bar he was using to pry open a car hood slipped and his shoulder was thrown forward; that he reported the injury two days later to a manager, Mr. R, who sent him to a clinic where he was seen by Ms. E, a physician's assistant; that Ms. E gave him an arm sling and released him to light duty with restrictions against pushing, pulling, or working overhead; that he returned to work that day and performed sales tasks; and that two days later he was seen at the clinic by Dr. S. The clinic records of these visits reflect that claimant was diagnosed with left shoulder strain and given a sling and certain work restrictions. Claimant said that sometime later, Mr. D, another of the employer's managers, instructed him to paint some tall posts and dust a high showcase, tasks which he felt exceeded his restrictions; that he and Mr. D had "gotten into it a few times" since shortly after Mr. D was assigned to that particular facility; that after attending a doctor's appointment, he did not return to work for several days but did come in to pick up his paycheck; that on October 6th, Mr. D gave him some "write-ups," one of which he accepted and the others which he tore up; that he and Mr. D were angry; and that his employment was terminated on that date. Claimant further testified that he stopped seeing the doctors at the clinic the employer sent him to and started seeing Dr. LP and Dr. M; that both Dr. LP and Dr. M had him off work altogether; that he later asked for a release to go to work because he needed the money to support his family; and that he obtained a release effective November 23rd and commenced employment for another employer on that date.

Mr. D testified that he did not assign claimant tasks which exceeded his restrictions; that the employer's corporate human resources office provided the list of light-duty tasks; and that claimant was a "no show/no call for a long time." He further stated that claimant's employment was terminated "for threatening me."

An October 6th Initial Medical Report (TWCC-61) of Dr. DP, who apparently examined claimant for the carrier, reflects that the impression was acromioclavicular joint strain, Grade I, impingement syndrome left shoulder, and left trapezius strain. The report further states that claimant 's work status was "light duty." In an October 7th report, Dr. LP recommended that claimant remain off work through October 19th. In his TWCC-61 dated October 12th, reflecting claimant's visit on October 7th, Dr. M stated that the anticipated date that claimant may return to work could not be determined at that time. A November 4th report of a functional capacity evaluation stated that claimant's occupation as a mechanic is classified at the heavy physical demand level and that he was currently capable of performing at a less than sedentary level. Dr. M's report of November 23rd states that claimant is released from active treatment.

The carrier maintains that following his injury, claimant was assigned light duty at his preinjury wage until October 6th, when his employment was terminated for cause; that he did not thereafter have disability; and that the hearing officer has confused disability with impairment. Claimant asserts that between October 6th and November 23rd his treating doctor had him off all work.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether an injured employee has disability is a question of fact for the hearing officer. The Appeals Panel has stated that the compensable injury need not be the sole cause of the inability to obtain and retain employment (Texas Workers' Compensation Commission Appeal No. 941012, decided September 14, 1994); that the focus of the inquiry is on the inability to obtain and retain employment at the preinjury wage; the fact that a termination was for cause does not, in and of itself, foreclose the existence of disability (Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993); and that the fact that a claimant resigned, retired, or was involuntarily discharged from employment may be considered but does not foreclose the existence of disability (Texas Workers' Compensation Commission Appeal No. 970089, decided February 28, 1997).

The carrier has appealed findings that claimant treated with Dr. M after October 6th, that Dr. M took him off work and finally released him to full-duty work on November 23rd, and that claimant's _____ shoulder injury caused him to be unable to obtain and retain employment at wages he earned before _____ from October 6th until November 23rd.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(e)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508

S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the challenged findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Claimant's medical records adequately support the challenged findings.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge