APPEAL NO. 990672

Following a contested case hearing held on March 5, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant (claimant) did not have disability after September 18, 1998, resulting from the injury sustained on _____. Claimant has appealed, urging, in essence, that his evidence met his burden of proof on the issue. The respondent (carrier) has replied and asserts that the evidence is sufficient to support the hearing officer's resolution of the disputed issue.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, while employed by (employer). Claimant testified that on that date, while working as "a stacker," he was stacking boxes of vacuums weighing about 40 pounds onto a pallet and that he put a box down, stood up, and felt back pain, and that this pain was different from the ache and pain he had long experienced from his scoliosis. In evidence is the May 1, 1998, initial medical report of claimant's treating doctor at the time, Dr. A, which states that claimant, then 30 years of age, hurt his back at work about a month earlier; that claimant complains of back pain and some numbness or tingling down his right leg; that claimant is getting well with therapy; that the diagnosis is lumbar region sprain and possible disc displacement; and that claimant can return to limited-type work. Claimant said that he returned to work performing light duty because his old job required a lot of standing and bending. Dr. A's June 26, 1998, report states that an MRI showed a small annular tear with a slight disc bulge but no nerve root involvement, and, again, that claimant could currently return to limited work. Claimant said he later went to an emergency room (ER) where he was diagnosed with a severe low back strain. The ER record of July 30, 1998, reflects that claimant complained of low back discomfort; that he stated a history of lifting something heavy at work in April and of having pain off and on since that time; that he has no numbness or tingling to the extremities; and that the assessment was acute low back strain and history of chronic back pain.

Claimant further testified that Dr. A said he could not sit or stand for long periods; that he performed the light-duty work for some time but that the standing required just put too much pressure on his back; and that sometime in August 1998, Dr. A took him off work altogether. Claimant introduced an August 28, 1998, "Return to School or Work" form, apparently signed by a physician, stating that he was unable to work pending his next appointment. Claimant further stated that he next saw Dr. A in January 1999; that he took no medications from September 1998 to January 1999; that by January 1999 his condition was unchanged and included low back pain and tingling in his legs; and that Dr. A indicated he could find no explanation for those symptoms and characterized a small disc bulge revealed by an MRI as normal for claimant's age. Claimant also stated that he was unaware he had been scheduled to attend work hardening in October 1998; that when he

was advised that work hardening had been rescheduled for January 1999, he was unable to attend it because he was pursuing a full-time course of studies at a local university. He also stated that, although he has not yet seen him due to the necessity for carrier approval, he has changed treating doctors to Dr. M because he wants " a new outlook" or opinion. Claimant, who indicated he is still a full-time college student, further stated that while he could not perform his old job, "maybe [he] could do a different job if [he] could move around."

Ms. S, an occupational therapist for an orthopedic group, testified that she administered a functional capacity evaluation to claimant on September 14, 1998, and that an earlier request for work hardening had been denied; that work hardening was later approved and that claimant failed to appear for work hardening on October 12, 1998, after being notified by telephone; that the work hardening program, a four-to six-week long program, involves four hours per day for the first week and then full days the second and subsequent weeks; that claimant was advised on January 8, 1999, that his work hardening program was rescheduled to commence on January 18, 1999; and that claimant again failed to show up for it but did come in on January 20, 1999, and said that he cannot participate in work hardening due to his full-time course of studies. Claimant conceded that he had a conflict between pursuing his studies and participating in a work hardening program to get him back to work.

Claimant had the burden to prove his period or periods of disability by a preponderance of the evidence. 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). The Appeals Panel has recognized that disability may be established by lay testimony including that of the injured employee (Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992); that objective medical evidence is not required (Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992); that while doctors' reports returning injured employees to work are evidence to be considered, they do not in and of themselves effectively end disability (Texas Workers' Compensation Commission Appeal No. 92206, decided July 6, 1992); that pain can be considered to the extent that it prevents the performance of work (Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991); and that disability "is not premised on the inability to obtain and retain employment in the type of work the employee was doing when injured, but it is the inability to obtain and retain 'employment' at wages equivalent to the preinjury wage because of a compensable injury" (Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992). The Appeals Panel has also stated that the 1989 Act "does not impose on an injured employee the requirement 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," and, further, that the 1989 Act "is not intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

The hearing officer found that claimant was not unable, due to the claimed injury of _____, to obtain and retain employment at wages equivalent to his preinjury wage beginning September 18, 1998, and continuing through the date of the hearing. In her discussion of the evidence, the hearing officer noted that although claimant could prove disability by his testimony alone, the medical evidence does not support his contention that he cannot work due to his compensable injury, noting that claimant failed to seek any medical attention from August 28, 1998, to the date of the hearing, and that it appears that claimant chose to attend school instead of engaging in a program designed to get him back to work. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) 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)). As an appellate reviewing tribunal, the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. 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).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge