

APPEAL NO. 990798

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 March 22, 1999. The issue at the CCH was whether respondent (claimant) had disability from her _____, injury from February 26, 1998, to June 26, 1998. The hearing officer determined this issue in claimant's favor, from which determination appellant (carrier) appeals. Claimant responds that the Appeals Panel should affirm the hearing officer's disability determination.

DECISION

We affirm.

Carrier contends that claimant did not meet her burden to prove that she had disability from February 26, 1998, to June 26, 1998. Carrier asserts that: (1) claimant was never taken off work by her former treating doctor, Dr. W; (2) there was nothing to show that claimant sought to change treating doctors to Dr. K in February 1998; (3) Dr. K did not say why claimant was unable to work during the period before he started treating her in February 1998; (4) claimant admitted she had the physical ability to do some work between February 26, 1998, and June 26, 1998; and (5) a bona fide offer of light duty was made to claimant and there is nothing to show that that job was no longer available.

The claimant has the burden to establish that he or she has disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The testimony of the injured employee, even if contradicted by medical evidence, may establish that the employee had disability. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that she was working as a temporary employee for (employer) in September 1997. She said she began to experience numbness, tingling, and pain in her left upper extremity. She testified that she was working painting, stenciling, and rolling heavy pipe during that period of time. Claimant said she went to the emergency room (ER) in late September 1997 and then she saw Dr. W, who initially placed her on light-duty status. Claimant said she was reassigned and began working for another company stuffing envelopes at that time, but that she was told that job was for injured employees. Claimant said that on October 22, 1997, she saw Dr. P, who worked with Dr. W, that her symptoms had improved, and that he told her she should return to full duty. Claimant testified that employer told her the

job painting pipe was no longer available. Claimant said that, after October 22, 1997, employer told her it would find other employment for her, but it did not. She said she looked for a job and found work with another employer, but that she had to quit after about two months because of pain. She said she then went back to Dr. W in February 1998, and that he told her there is nothing wrong with her. Claimant testified that she then went to see Dr. K and she signed a form requesting that she be allowed to change treating doctor to Dr. K. A copy of a request to change treating doctor form dated in February 1998 is contained in the record. Claimant said she was told that the Texas Workers' Compensation Commission (Commission) had misplaced the request but that she had the green card, apparently showing mailing to the field office. Claimant said she began treating with Dr. K in February 1998 and that she filed a second request to change treating doctors in June 1998, which was granted on June 26, 1998. She said she also looked for and found a job as a waitress in February 1998, that she had looked for work because she was destitute, and that she was unable to work more than about two weeks because of pain in her left hand.

In this case, the hearing officer had before her an April 16, 1998, medical note from Dr. K that claimant was unable to work from October 1997 to April 16, 1998. A June 5, 1998, medical note from Dr. K also said that claimant is unable to work. Claimant said that she was unable to use her left hand to work from February 1998 to June 1998 because of pain. Whether claimant had disability due to the compensable injury involved a fact issue for the hearing officer. She heard the testimony, reviewed the evidence, and determined what facts the evidence established. The hearing officer considered the evidence from Dr. K that claimant had been taken off work along with claimant's testimony that she was not able to do the work she had done before. The hearing officer was the sole judge of the credibility of the evidence. She determined that claimant had disability due to the compensable injury from February 26, 1998, until June 26, 1998, the date that claimant changed treating doctor to Dr. K. We will not substitute our judgment for the hearing officer's because the disability determination is 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).

Carrier asserts that claimant was never taken off work by her former treating doctor, Dr. W and notes that Dr. W told her she could work. However, the hearing officer could find that claimant had disability based on her testimony, alone. Carrier asserts that there was nothing to show that claimant sought to change treating doctors to Dr. K in February 1998. The hearing officer could find from the evidence that claimant attempted to change treating doctors to Dr. K and that the Commission misplaced the request. In any case, the hearing officer could make a disability determination based only on claimant's testimony, even if it conflicted with evidence from her then treating doctor, Dr. W. Carrier asserts that Dr. K did not say why claimant was unable to work before he started treating her. The hearing officer was the sole judge of the weight and credibility of the medical evidence in this case and was entitled to find disability based on the totality of the evidence in this case. Carrier asserts that claimant admitted she had the physical ability to do some work between February 26, 1998, and June 26, 1998. Carrier also contends that a bona fide offer of light duty work stuffing envelopes had been made to claimant and there is nothing to show that that job was no longer available. Claimant testified that she might have been able to do some kind of work that did not involve the use of her left upper extremity during the period in question. She said that she did not know

of such a job; that she tried to work, but was unable; and that employer did not offer her another job that she could do. She said that after the job stuffing envelopes, she was told employer would find another job for her, but it did not. The hearing officer could find from the evidence that claimant had disability based on her testimony and the medical evidence from Dr. K. The hearing officer could also find from the evidence that work was not reasonably available to claimant. We perceive no error.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge