APPEAL NO. 991303

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 26, 1999, a contested case hearing was held. With respect to the issues before her, the hearing officer determined that: (1) Dr. KA was selected by the Texas Workers' Compensation Commission (Commission) as the designated doctor; (2) respondent (claimant) later chose Dr. KA to be his treating doctor; (3) after claimant chose Dr. KA as his treating doctor, she certified, "as the treating doctor," that claimant reached maximum medical improvement (MMI) on February 13, 1995, with an impairment rating (IR) of 10%; (4) at the time Dr. KA certified the 10% IR, she was "no longer an impartial designated doctor"; (5) Dr. KA's 10% IR is not entitled to presumptive weight; (6) claimant's statutory MMI date is February 14, 1996; (7) the IR issue is not ripe for adjudication; (8) claimant reached MMI statutorily on February 14, 1996; (9) Dr. KA can no longer function as designated doctor and a new designated doctor should be appointed; and (10) claimant had disability beginning on February 13, 1995, and continuing until February 14, 1996. Appellant (carrier) appeals the determinations regarding MMI, IR, the selection of a new designated doctor, and disability. Carrier asserts that the hearing officer should have given presumptive weight to Dr. KA's 10% IR certification report. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part and reverse and render in part.

Carrier contends the hearing officer erred in determining that the issue of claimant's IR is not ripe for adjudication. Carrier asserts that the hearing officer should have given presumptive weight to the March 6, 1995, report of Dr. KA. Carrier also asserts that the 44 months claimant waited to dispute Dr. KA's 10% IR was too long, and that claimant could not now contend that the 10% IR is not entitled to presumptive weight. Carrier also contends that claimant, through his own action of changing to Dr. KA as his treating doctor, unilaterally created the problem with according presumptive weight to Dr. KA's IR certification. Carrier contends that claimant should not be able to complain of the designated doctor's IR based on the results of his own behavior, citing Texas Workers' Compensation Commission Appeal No. 960771, decided June 7, 1996.

Claimant testified that he fractured his wrist at work on _____, and underwent surgery on his wrist in 1994. On September 27, 1994, Dr. KA certified that claimant was not yet at MMI. On her Report of Medical Evaluation (TWCC-69), Dr. KA checked the box indicating that she was the designated doctor. Claimant testified that he changed to Dr. KA as his treating doctor in October 1994 and the record reflects that the Commission approved this change on October 26, 1994. After that, on March 6, 1995, Dr. KA certified that claimant reached MMI on February 13, 1995, with an IR of 10%. On that TWCC-69, Dr. KA checked the box indicating that she is the treating doctor rather than the designated doctor. A Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28), apparently sent to claimant, states that Dr. KA certified a 10% IR and that

claimant should contact the field office to dispute this rating. The TWCC-28 does not state that the 10% IR was certified by a designated doctor.

Claimant said that he did not seek medical treatment for his wrist from August 1995 to December 1997, that he had continuing wrist problems, and that he had been told by his doctors that he would continue to have pain. Claimant said he again sought medical care in December 1997 because he could no longer stand the pain. In a January 29, 1998, report, Dr. KA stated that claimant's wrist implant was not properly placed in his 1994 surgery and that he needs corrective surgery. Claimant said that Dr. H performed wrist fusion surgery in June 1998. In a November 4, 1998, TWCC-69, Dr. H certified that claimant reached MMI on October 15, 1998, with an IR of 18%.

The hearing officer determined that: (1) Dr. KA was the designated doctor; (2) Dr. KA, as designated doctor, certified on September 27, 1994, that claimant had not reached MMI; (3) Dr. KA became claimant's treating doctor on October 26, 1994; (4) on March 6, 1995, Dr. KA, "as the treating doctor," certified that claimant had reached MMI on February 13, 1995, and assigned him a 10% IR; (5) Dr. KA, at the time of her March 1995 certification of MMI and IR, was no longer an impartial designated doctor, and could not perform her duties as the designated doctor, "as she was claimant's treating doctor"; (6) Dr. KA's March 6, 1995, certification of MMI and IR is not entitled to presumptive weight; (7) Dr. KA's March 6, 1995, certification of MMI and IR did not take into consideration the subsequently discovered improper treatment and resulting surgical revision; (8) claimant reached statutory MMI on February 14, 1996; (9) the issue of claimant's IR has not been properly processed through the dispute resolution process required by the 1989 Act and rules; and (10) claimant's IR is not ripe for adjudication and a new designated doctor must be appointed to evaluate claimant's IR only.

The report of a Commission-selected designated doctor is given presumptive weight with regard to MMI status and IR. Sections 408.122(b) and 408.125(e). In this case, the hearing officer could determine that, at the time that Dr. KA certified the 10% IR, she was acting as claimant's treating doctor and not as the designated doctor. On her TWCC-69, Dr. KA indicated that she was acting as the treating doctor and she did not check the box indicating that she certified the 10% IR in her capacity as designated doctor. We conclude that the hearing officer's determinations 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).

Regarding whether claimant's own behavior created the problem with the designated doctor's IR, we note that claimant changed to Dr. KA as his treating doctor at a time before Dr. KA certified an IR. Therefore, claimant was not attempting to nullify an existing TWCC-69 by asking the designated doctor to be his treating doctor. We reject carrier's argument in that regard.

Carrier asserts that claimant waited too long to complain that the 10% IR is not entitled to presumptive weight. However, if an IR was not certified by a designated doctor, then it is not entitled to presumptive weight under the 1989 Act. Section 408.125(e).

Whether and when claimant complained is not relevant to the issue of whether Dr. KA was acting as the designated doctor when she certified the 10% IR. There is evidence to support the hearing officer's determination that Dr. KA was not acting as the "impartial designated doctor" when she certified the 10% IR on March 6, 1995. Therefore, we conclude that the hearing officer did not err in determining that Dr. KA's 10% IR certification is not entitled to presumptive weight and that the Commission should select a second designated doctor. Texas Workers' Compensation Commission Appeal No. 94042, decided February 22, 1994.

Carrier contends that the hearing officer erred in determining that claimant reached MMI on February 14, 1996, the statutory MMI date. Carrier asserts that if there is a new designated doctor, then only that designated doctor may certify the MMI date. Carrier contends that any new designated doctor selected could determine that claimant reached MMI on a date earlier than February 14, 1996. We agree and we reverse the hearing officer's MMI determination. We render a decision that the issue of MMI is premature and cannot be decided.

Carrier contends the hearing officer erred in determining that claimant had disability from February 13, 1995, to February 14, 1996. Carrier asserts that claimant's treating doctor, Dr. KA, released claimant to full duty in February 1995; that claimant had been terminated for cause from his job with his employer; and that claimant was unemployed because of the termination and not because of the compensable injury. Carrier contends that there was no evidence that claimant was unable to earn wages equivalent to his preinjury wage from the date of his February 13, 1995, full-duty release until the date he found a new job at the end of August 1995.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Claimant had the burden of proving by a preponderance of the evidence that he sustained disability because of the compensable injury. The existence of disability is a question of fact to be determined by the hearing officer from all the available evidence. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992; Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. Medical evidence is generally not required to prove disability. Texas Workers' Compensation Commission Appeal No. 92500, decided October 30, 1992. The burden of proof may be met by the injured employee's testimony alone if the hearing officer finds the testimony credible. Texas Workers' Compensation Commission Appeal No. 93858, decided November 9, 1993. Since disability is not necessarily a continuing status, a claimant may have intermittent or recurring periods of disability. In such a case, the claimant has the burden of proving when each period or recurring disability is reestablished. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. When an employee is no longer employed by the employer, the employee has the burden to show disability continues after the termination of employment. Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992.

Claimant said he had been terminated from his employment with (employer) on February 9, 1994. He testified that he did not work from February 9, 1994, until the end of August 1995, but that he was looking for work. The record contains a February 13, 1995, note from Dr. KA that states that claimant "is able to return back to his previous job" and that he "meets the physical capacities of that job." Claimant said that in February 1995, he was having continuing wrist problems that interfered with his ability to do machinist work. He testified that at the end of August 1995, he began working for (employer A), that he was working with smaller parts doing repetitious work, and that this work seemed harder on his hand than working with heavier parts. He said he started having more pain and experienced grinding and popping in his wrist. He testified that this condition worsened and that he was unable to do the job and he quit working in October 1995. He also said that, as of October 1995, he did not think he would have been able to do the machinist work that he had been doing at the time of his injury. Claimant said he decided to do a different type of work and that he obtained a job with a (employer B), for three weeks during December 1995. Claimant said he worked for a short period for (employer C) in January 1996 and that he also worked for (employer D) during that time period. He said he obtained work driving a forklift for (employer E) in March 1996. Claimant testified that he still experienced pain when he changed jobs and began working for employer D. Claimant said that he never earned his preinjury wage at any of these jobs he had in late 1995 and early 1996. Claimant returned to seek medical treatment in December 1997 and he underwent corrective wrist surgery in 1998 for a misplaced wrist implant.

From the evidence, the hearing officer could determine that claimant had disability from February 13, 1995, to February 14, 1996. The hearing officer could have believed claimant's testimony regarding his search for work, his continuing problems with his wrist, and his ability to do the jobs he obtained in late 1995 and early 1996. The hearing officer could have found that, although claimant had a full-duty work release, he was having continuing problems with his wrist that affected his ability to earn his preinjury wage. The hearing officer could find that claimant was attempting to find work that he was able to do and that the reason why he was off work during that period of time was due to his compensable injury and not due to his termination.

Regarding the periods that claimant was working, the hearing officer could find from claimant's testimony that he was not earning his preinjury wage and that the reason was because of his compensable injury. Disability is not established just because a claimant is not receiving his preinjury wage. Texas Workers' Compensation Commission Appeal No. 950962, decided July 26, 1995. The fact that a claimant is unable to return to his former occupation does not automatically establish disability. The focus is, instead, on the claimant's ability to earn his preinjury wage. We have reviewed the evidence regarding disability and we conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

Carrier also contends that the hearing officer erred in finding that claimant had disability after August 1995, when he found a job with employer A. Carrier asserts that claimant's earnings after August 1995 were "essentially the same as the preinjury earnings" and that claimant's average weekly wage was higher only "because of a couple of isolated

weeks of overtime" pay earned during the 13-week period before his injury. Carrier contends that claimant never said that he was unable to work or earn overtime pay.

The hearing officer could find from the evidence that claimant's earnings were less than his preinjury wage. We have already concluded that the hearing officer could find that claimant was unable to earn his preinjury wage due to his compensable injury. Carrier complains that there was no "corroborative" medical evidence to show that claimant was unable to do the work that he obtained. Again, however, medical evidence is generally not required to prove disability. Appeal No. 92500, *supra*. We note that the evidence that claimant was found to need further wrist surgery, and that he had surgery in 1998, supports his testimony about his continuing problems with his wrist. We perceive no error.

We affirm that part of the hearing officer's decision and order that determines that claimant's IR cannot be determined and that claimant had disability from February 13, 1995, through February 14, 1996. We reverse the hearing officer's MMI determination and render a determination that the issue of MMI is premature and cannot be determined.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge