

APPEAL NO. 991355

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 scheduled for June 15, 1999. He (hearing officer) determined that: (1) appellant (claimant) indicated by letter "that he no longer wished to pursue the disputed issue"; and (2) claimant has not had disability from an injury sustained on _____. In the decision portion of the decision and order, the hearing officer stated that the interlocutory order of the benefit review officer (BRO) is "sustained and abated" and that claimant's claim "is dismissed." In the order portion of the decision and order, the hearing officer stated that respondent (carrier) "is ordered to pay medical benefits in accordance with this decision" Claimant appeals, contending that the hearing officer erred in determining that he has not had disability. Carrier responds that claimant had indicated to the hearing officer that "he no longer wished to proceed with the prosecution of his claim," that claimant merely "changed his mind," and that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and render.

Claimant contends that the hearing officer erred in determining that he has not had disability. Claimant contends that he thought the CCH scheduled for June 15, 1999, was to be held for the purpose of stopping his "weekly TWCC checks." Claimant complains that although he returned one of the checks to carrier and "wanted the interlocutory order to be terminated," it was not his intention to give the impression that he is not "disabled." Claimant stated that he still needs surgery and rehabilitation on his shoulder.

The record does not reflect the carrier affirmatively accepted liability for an injury although the only issue at the CCH concerned disability. Claimant was not at the CCH and the CCH was canceled. In a May 27, 1999, letter to the hearing officer, claimant had said:

I am an unrepresented injured worker. I am respectfully requesting that the [CCH] for June 15, 1999 . . . be canceled. I plan on working for myself as an airplane consultant as of tomorrow, May 28, 1999. I wish for my interlocutory order that was issued by the [BRO] be terminated. Please notify me of your action to this request.

The record contains a BRO report with a May 3, 1999, interlocutory order attached. The BRO's recommendation was that "claimant has continuing disability from the date of injury." The BRO stated that claimant is currently awaiting surgery on his shoulder. The order states that temporary income benefits (TIBS) will "continue in accordance with the [1989] Act pending a decision and order from the [CCH]."

In the "statement of the case" portion of the decision and order, the hearing officer stated that: (1) the Texas Workers' Compensation Commission (Commission) received a letter from

claimant on May 27, 1999, “to the effect that claimant no longer wishes to pursue the disputed issue”; and (2) the hearing officer has “canceled the [CCH].” In the decision and order, the hearing officer determined that: (1) the date of injury “for record keeping purposes,” is _____; (2) on May 3, 1999, a Commission BRO issued an interlocutory order for carrier to pay TIBS to claimant; (3) on May 27, 1999, claimant indicated by letter that he “no longer wished to pursue the disputed issue”; and (4) claimant has not had disability from an injury sustained on _____. In the decision portion of the decision and order, the hearing officer stated that the BRO’s interlocutory order is “sustained and abated,” and that “claimant’s *claim* is dismissed. [Emphasis added.]” In the order portion of the decision and order, the hearing officer stated that, “carrier is ordered to pay medical benefits in accordance with this Decision”

In this case, it appears that the hearing officer stated that he was canceling the CCH because claimant indicated he no longer wished to pursue “the disputed issue” (disability). From the limited record in this case, it appears that the hearing officer properly canceled the CCH. However, there was no indication that claimant also wished to withdraw his entire claim. Therefore, we conclude that the hearing officer erred in stating that “claimant’s claim is dismissed.” Texas Workers’ Compensation Commission Appeal No. 951533, decided October 24, 1995. The fact that claimant stated that he did not wish to pursue disability benefits did not establish that claimant wanted his claim dismissed. In his request for review, claimant indicated that he is still pursuing medical benefits on his claim. Claimant’s claim should not have been dismissed in its entirety.

Regarding whether claimant had “disability,” we note that the hearing officer resolved this issue on the merits without a CCH and without the presence of both parties. At the very least, this presents due process problems. We conclude that the hearing officer erred in determining on the merits that claimant has not had disability. See Appeal No. 951533.

Claimant stated in his appeal that he wanted the interlocutory order to be terminated so that he would no longer receive any further payments from (carrier 2).¹ Claimant said he could not “get by” on his “w.c. checks” and that he wanted to work at home and make more money. We conclude that, in his request for review, claimant is stating that, although he believes he is not eligible for workers’ compensation income benefits because he is going to start working (self-employment), he is not affirmatively giving up his lifetime medical benefits for this claim. From his request for review, it appears that the meaning of “disability” is not clear to claimant. In this regard, we would note that “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). Section 408.101 regarding TIBS states, in pertinent part:

- (a) An employee is entitled to [TIBS] if the employee has a disability and has not attained maximum medical improvement.

* * *

¹Claimant said he received weekly workers’ compensation checks from carrier 2 but the carrier listed in the decision and order is (carrier 1).

For the record, we would note that the fact that a hearing officer finds that a claimant does not have “disability” for the purposes of the 1989 Act does not mean that the hearing officer has found that the claimant does not have a compensable injury. A claimant may have a compensable injury and may be entitled to medical benefits paid by carrier for his compensable injury, yet a hearing officer may still find that he or she does not have “disability.” “No disability” does not equate to “no injury.” In deciding a disability issue, a hearing officer would apply the definition of disability from Section 401.011(16). If a claimant was not entitled to TIBS payments because the hearing officer determined that he or she did not have “disability,” that claimant may still be entitled to medical benefits under the 1989 Act for treatment of his or her compensable injury. We would further note that the fact that a claimant is working or is self-employed does not necessarily mean that that claimant does not have disability or is not entitled to TIBS. Such a claimant may still have disability and may still be entitled to TIBS if he is unable to obtain or retain his preinjury wage. See Texas Workers’ Compensation Commission Appeal No. 962512, decided January 27, 1997.

We reverse the hearing officer’s determinations and decision that: (1) claimant has not had disability, and (2) claimant’s claim is “dismissed.” We render an order simply dismissing the CCH.

Judy Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge