APPEAL NO. 991474

A contested case hearing (CCH) was originally held March 26, 1999, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with hearing officer. In Texas Workers' Compensation Commission Appeal No. 990827, decided May 19, 1999, the Appeals Panel reversed the decision of the hearing officer and remanded the issue of whether the appellant (claimant) had disability from the injury sustained on _____, with instructions to reconsider the issue and for specific findings of fact to support his conclusion of law. The hearing officer did not convene another hearing and rendered another decision on June 15, 1999. He determined that the claimant did not have disability resulting from the injury sustained on _____. The claimant appeals, urging that he was unable to obtain and retain employment from _____, through February 25, 1999, and requests that the decision be reversed. The respondent (self-insured) replies that the decision is correct, is not against the great weight and preponderance of the evidence, and should be affirmed.

DECISION

Reversed and rendered.

The parties stipulated that on _____, the claimant sustained a compensable injury in the course and scope of employment. On _____, the claimant was working as a zookeeper in the elephant area, cleaning the exhibits, and lifted a trash container, injuring his lower back. The claimant testified that his job duties as a zookeeper required him to feed the animals, fix things broken by the animals, care for the animals, and lift heavy things. The claimant sought medical treatment with Dr. C on February 17, 1998. The claimant stated that Dr. C took him off work and did not release him to return to work until March 2, 1999. The claimant testified that in September 1998, Dr. C verbally told him that he could return to light-duty work. The claimant stated that he told his employer he had been released to light duty, but was told he had to have a full-duty release before he could return to work.

The claimant testified that he has had a veterinary license in (State) since 1988 and he opened a veterinary practice in state in 1994. The claimant stated that his practice has been advertising in the state telephone book since 1994. The claimant testified that his veterinary practice is small, involves all types of animals, and he performs examinations and vaccinations. The claimant testified he continued his veterinary practice after his compensable injury on _____. According to the claimant, he charges $8.00 a vaccination and he performs approximately eight vaccinations a month. The claimant testified that the veterinary work was much lighter than the zookeeper work, which required him to lift things.

The self-insured presented the testimony of Mr. G, an investigator. Mr. G testified that on December 4, 1998, he brought a parakeet to the claimant's veterinary practice, and the claimant examined and treated the bird for $20.00.

Dr. C diagnosed the claimant with lumbosacral sprain/strain and lumbar disc syndrome. Dr. C's medical records indicate that the claimant was unable to work beginning February 17, 1998. Although the claimant testified that Dr. C verbally released him to return to light duty in September 1998, Dr. C's letter dated September 15, 1998, indicated the claimant was off work and would not be released to return to work until he could return to work without pain and risk of reinjury. On December 18, 1998, when asked if the claimant could return to his job as a zookeeper, Dr. C indicated that he believed the claimant would not be able to resume these duties.

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). The 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.

The hearing officer made the following findings of fact:

FINDINGS OF FACT

2. The Claimant's testimony was inconsistent and non persuasive.

3. As of _____, the Claimant continued to work in his veterinary practice in state and he failed to report earnings to the Self-Insured as required by rule 129.3(2) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.3(2)].

4. On September 4, 1998, the Claimant approached his treating doctor and requested a release to return to work.

5. As of _____, the Claimant was not unable to obtain and retain employment with wages equivalent to his pre-injury wage.

Although the hearing officer found the claimant's testimony inconsistent and nonpersuasive, the uncontroverted medical evidence of Dr. C supports disability beginning February 17, 1998, through February 25, 1999. As pointed out to the hearing officer in our previous decision, the self-insured did not articulate at the CCH what period of disability was in dispute, the claimant asserted disability from December 4, 1998 through February 25, 1999, and the benefit review conference report states that the self-insured's position

was that disability ceased to exist on December 4, 1998. December 4, 1998, was the date that Mr. G brought a parakeet to the claimant's veterinary practice for an examination and treatment. Based on the record, it appears that disability from the date of injury until December 4, 1998, was not disputed by the carrier.

As we stated in our previous decision, Rule 129.3(2) does not apply to income from concurrent employment as long as the concurrent employment income is not increased due to additional efforts by the claimant. In this case, there was no evidence presented that the claimant increased the amount he made from the veterinary job after the injury. Finding of Fact No. 3 indicates that the hearing officer has failed to apply the correct legal standard for determining disability. The claimant's concurrent employment, which was of a much lighter nature than the zookeeper work, and failure to report earnings from such employment, is of no consequence to the determination of disability.

We have already remanded this case one time and cannot do so again. Section 410.203(c). Because the hearing officer applied the incorrect legal standard in his analysis of disability and because we conclude that disability from _____, through December 3, 1998, was not disputed by the carrier, we find the hearing officer's decision that the claimant did not have disability resulting from the injury sustained on _____, to be against the great weight and preponderance of the evidence. We reverse the hearing officer's decision and order, and render that the claimant had disability from _____, through February 25, 1999 as supported by the uncontroverted medical evidence.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge