APPEAL NO. 991493

On June 11, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the CCH was whether appellant (claimant) continues to have disability resulting from the injury sustained on _____. The hearing officer decided that claimant had disability as a result of her _____, injury from May 7, 1997, to September 14, 1998, and that she has not had disability since September 15, 1998. Claimant requests that the hearing officer's decision that she has not had disability since September 15, 1998, be reversed and that a decision be rendered that she has had disability from May 7, 1997, through the date of the CCH. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant testified that on _____, she was working as an "infant teacher" for (employer) when she slipped and injured her lower back. Medical reports state she fell on her buttocks and that she has not worked since her injury. Claimant said that her job with employer required her to take care of five babies, from six weeks old to one year old.

Claimant was initially treated by Dr. F, who diagnosed a lumbar strain. Claimant said Dr. F had her off work. Dr. R reported that an EMG of claimant's lower extremities done in June 1997 was consistent with bilateral lower lumbar radicular irritations, greater on the left. Claimant began treating with Dr. W in June 1997 and he diagnosed claimant as having a lumbar strain, lumbar radiculopathy, and spinal stenosis. Dr. W's reports note that claimant was in an "off work" status through at least June 1998. Dr. W noted in May 1997 that claimant could possibly need surgery. Dr. W noted that claimant complained of lumbar pain radiating into her left leg, bilateral hip pain, and numbness of her left foot.

Dr. WH examined claimant at carrier's request in August 1997 and he noted that claimant was wearing a back brace and using a cane. Dr. W wrote that claimant was not at maximum medical improvement (MMI), that she needs further medical treatment, and that he did not believe that she is able to return to regular work at the time of the evaluation, but could perform sedentary work.

Dr. L examined claimant in December 1997 for a second opinion on spinal surgery and he wrote that he did not agree that surgery was indicated. In June 1998, Dr. L compared myelogram and CT scans of May 1997 with myelogram and CT scans of January 1998 and wrote that they showed no indication for surgery. Dr. B examined claimant in January 1998 for a second opinion on spinal surgery and he wrote that surgical intervention is not indicated. In April 1998, Dr. B wrote that the additional myelogram and CT scan he had recommended the claimant undergo in January 1998 did not show any structural abnormality that would indicate a need for surgery and again concluded that

surgery is not indicated. The Texas Workers' Compensation Commission notified claimant in June 1998 that neither of the second opinion doctors agreed with her doctor's recommendation for surgery. Dr. W noted in May 1998 that claimant does need lumbar surgery.

Dr. WH reexamined claimant on September 14, 1998, at carrier's request and he reported that claimant was not at MMI. Dr. WH noted that claimant told him that Dr. W had told her that she cannot return to work until she has surgery. He also noted that claimant uses a back brace, a TENS unit, and a cane and that she takes pain medications. Dr. WH diagnosed claimant as having a lumbosacral strain with probable mild radiculopathy on the left, generalized facet osteoarthropathy of the lumbar spine, exogenous obesity, and insulin- dependent diabetes. Dr. WH stated that he agreed with Dr. W that a lumbar MRI is indicated and that he agreed with Drs. B and L that the most recent myelogram and CT scan do not indicate a need for surgery. Dr. WH wrote that, if the MRI does not show clear-cut evidence of the need for spinal surgery, then the next step in treatment would be pain management and facet injections.

Claimant began treating with Dr. G, an orthorpedic surgeon, on September 22, 1998, and he noted that claimant complained of severe pain in her low back with radiation down the left leg with numbness in her toes and that she had an antalgic gait and walked with a walker. Dr. G wrote that claimant is to remain off work and prescribed pain medications. Dr. G wrote in October 1998 that claimant is to remain off work in any capacity and recommended a permanent TENS unit. Dr. LE reported that a lumbar MRI done in October 1998 revealed a herniated disc at L3-4, with impingement upon the thecal sac, and bulged discs at L4-5 and L5-S1, with minimal indenting of the thecal sac. Dr. G reviewed the results of the MRI in a November 1998 report and wrote that claimant has insulin-dependent diabetes and is hesitant of any surgical approach to her problem and that claimant should remain off work. He noted that claimant had an antalgic gait and walked with a cane. Dr. G noted in several subsequent reports that claimant continued to be symptomatic and recommended lumbar epidural steroid injections. Dr. G wrote in March 1999 that claimant had a good effect from an injection, that she was not needing to use her cane, and that she should remain off work. Dr. G wrote in April 1999 that claimant had minimal pain after completing a series of injections, that he was recommending a functional capacity evaluation (FCE), and that claimant is to remain off work.

Claimant underwent an FCE on April 19, 1999, and the physical therapist wrote that claimant did not meet the light physical demand level requirements for a nursery school teacher and that she is currently testing safely at less than a sedentary physical demand level. Dr. G wrote in April 1999 that the injections had given claimant temporary relief but that her pain had come back and that he was prescribing pain medications and recommending pain management. Dr. G issued a series of work status reports from October 12, 1998, through May 5, 1999, in which he noted that claimant was to remain off work. Claimant said that Dr. G has had her completely off work since September 1998. Claimant said that during the time that she has treated with Dr. G she has had lower back pain that radiates into both hips and down her left leg and that the toes on her left foot are

numb. She said her pain medications make her sleepy and dizzy and that she wears a TENS unit and back brace every day.

A videotape taken of claimant on January 14 and 15, 1999, shows claimant standing and walking without a walker or cane, driving a pickup truck, carrying her purse and a small grocery sack, and going into a video store. An investigator wrote in a surveillance report that when she went into the video store on January 14, 1999, claimant conducted herself as an employee of the store and told the investigator what she would need to obtain a membership and that claimant stayed in the video store for at least one and one-half hours that day. The investigator wrote that claimant was in the video store for at least three hours on January 15, 1999.

Claimant testified that in 1996, prior to her injury of _____, she worked for her friend, AD, in AD's video store but that she was not employed by AD nor did she receive any wages from AD since the time of her injury. Claimant testified that AD is sick with pulmonary and heart problems and that when AD got out of the hospital in October 1998, she began helping AD by taking AD to the doctor and going to the grocery store and pharmacy for AD. She said that she visits AD at AD's video store and that she and AD talk, watch movies, and have lunch. She said that AD's granddaughter works at AD's video store and that sometimes AD's grandson works there. She said that when she is at AD's video store visiting AD she will help out with customers if AD's granddaughter or grandson are not there at the time. She said that she will get a movie off a shelf and take money from a customer and put it in the register but that she does not perform the job of a video store employee, such as putting up the movies or receiving deliveries, and that she is not at AD's video store for eight hours and is not paid. Claimant stated in answers to interrogatories that the total time she spends on errands or doing other things for AD is about one-half hour a day, three days a week. Claimant said that since her injury, she does not cook, clean her house, or do laundry, that her husband does all of that, and that she is not scheduled for surgery.

AD stated in an affidavit that claimant is not one of her employees; that claimant does not receive any wages from her or from her video store; that claimant was one of her employees in 1996 but has not worked for her since then; that because she is disabled, claimant runs errands for her; and that when claimant is in her store, claimant may briefly assist a customer when her granddaughter or grandson are not there, but that claimant is not an employee and is not paid wages. In another affidavit, AD described the job duties of a video store employee, indicating that that requires a lot of standing, bending, kneeling, twisting, pulling, and reaching throughout the day.

Claimant had the burden to prove that she had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Whether disability exists is generally a fact issue to be determined by the hearing officer from the evidence presented. Carrier did not appeal the hearing officer's finding that

claimant had disability from May 7, 1997, to September 14, 1998. Claimant appeals the hearing officer's finding that claimant has not had disability since September 15, 1998. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge