APPEAL NO. 991716

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 June 28, 1999. The issues at the CCH were whether the appellant/cross-respondent (claimant) has reached maximum medical improvement (MMI), and, if so, when; the claimant's impairment rating (IR); and whether the claimant had disability. The hearing officer determined that the claimant reached MMI on August 1, 1996, per the designated doctor; that the claimant's IR is 14% per the designated doctor; and that the claimant was unable to obtain and retain employment equivalent to preinjury wages, as a result of the _____, date of injury, from January 1, 1996, through December 31, 1998. The claimant appeals, urging that the great weight of the other medical evidence is contrary to the designated doctor's opinion; that the hearing officer erred in failing to make a conclusion of law or decision concerning disability; that the claimant had disability from October 5, 1995, through December 31, 1995; and that the hearing officer incorrectly found the income earned by the claimant in 1995 and 1996 to be based on gross profits of self-employment, rather than net income. The respondent/cross-appellant (carrier) replies that the hearing officer correctly concluded that the designated doctor's report deserves presumptive weight; that the designated doctor's report is proper; that the claimant failed to show the great weight of the other medical evidence contrary to the designated doctor's report; and that although incorrectly found, the hearing officer's decision contains a finding of the time frame for which the claimant is allegedly entitled to temporary income benefits. In its cross-appeal, the carrier asserts that the claimant did not have disability and that although the claimant's income during 1996 was below her preinjury wage, the claimant's inability to perform consulting services was not a result of her compensable injury. The claimant responds that she suffered a severe disabling injury to her lower back, lower legs and neck, and that these injuries prevented her from earning preinjury wages from October 4, 1995, through the date of the CCH.

DECISION

Affirmed, as reformed.

The claimant sustained a low back injury on _____, when lifting baggage into an overhead compartment on an airplane. The claimant worked as a change management consultant, which required extensive travel, and she earned $129,994.52 in 1995. The claimant sought medical treatment with Dr. S. Dr. S diagnosed the claimant as having a mechanical spine injury, prescribed pain medication and physical therapy, and released the claimant to return to work on August 7, 1995, with restrictions: no pushing, pulling or lifting objects over 10 to 15 pounds. The claimant testified that the travel associated with her job required her to carry a suitcase, briefcase, and computer and that because of the restrictions, she was not able to travel. After being released to return to work, the claimant returned to work, but did not travel. On October 4, 1995, she was terminated from employment for poor performance.

The claimant testified that she incorporated a consulting business in 1990, but it was not active during the years she worked for employer. Following her termination, the claimant received unemployment compensation, tried to get a job within her restrictions, and attempted to develop a consulting business. For the tax year December 1, 1995, through November 30, 1996, the claimant's business made a gross profit of $66,277.00, and the claimant received $3,000.00 in salary. The claimant testified that although her expertise in consulting was in demand, the potential clients were large organizations with multiple locations, which required travel; that she was unable to make the same amount of money by consulting locally because there were not enough large corporations with multiple locations in the Houston area; and that there are no positions in her field that do not require travel. In the third quarter of 1997, the claimant obtained a job within her restrictions, making $45,000.00 per year as a consultant in the Houston area. In the fourth quarter of 1997, the claimant testified that her consulting business earned income of $33,378.00 for developing training materials, which did not require travel.

Dr. S certified that the claimant reached MMI on March 6, 1996, with a 13% IR (five percent based on specific disorder using Table 49 II.B of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association and eight percent based on range of motion (ROM)). On September 10, 1996, the claimant returned to Dr. S for recurrent symptoms of low back pain and Dr. S took the claimant off work. On September 24, 1996, the claimant had a lumbar MRI which indicated "moderate chronic degenerative change at the L4-L5 level, with a small 'contained' or subligamentous left lateral disc protrusion, without nerve root compression."

On November 11, 1996, the claimant was examined by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, Dr. A. Dr. A certified that the claimant reached MMI on August 1, 1996, with a 14% IR (five percent based on specific disorder using Table 49 II.B and six percent based on ROM). Dr. A opined that the claimant suffered an acute lumbar sprain superimposed on degenerative disc disease at L5-S1 with a small protrusion not impinging on the nerve roots at that level. On February 11, 1997, the Commission wrote a letter of clarification to Dr. A regarding his specific disorder assessment under Table 49. II.B. Dr. A responded that he reviewed the lumbar MRI and that his IR assessment remained the same. Dr. A stated that the claimant had degenerative disc disease at L5-S1 with a small protrusion but no impingement on the nerve root at that level, and that a sensory examination did not indicate a herniated disc impinging on a nerve root. Dr. A reiterated that he assessed a five percent impairment for specific disorder using Table 49 II.B.

On July 20, 1998, the claimant chose to be examined by Dr. K for an IR. Dr. K certified that the claimant reached statutory MMI on July 25, 1997, with a 21% IR. Dr. K opined that the claimant originally sustained an injury to her lumbar spine which subsequently developed into post-traumatic fibromyalgia with inclusion of the cervical spine region. Dr. K assessed a four percent impairment for specific disorder of the cervical spine using Table 49 II.B, and assessed a seven percent impairment for specific disorder of the

lumbar spine using Table 49 II.C. Dr. K states that "there is an identifiable protrusion at the L4-L5 level which should be rated at seven percent whole person impairment. This percentage of impairment is given for a herniated nucleus pulposus with or without radiculopathy."

An IR is "the percentage of permanent impairment of the whole body resulting from a compensable injury." Section 401.011(24). Impairment is defined as "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Section 408.125(e) provides that the designated doctor's IR has presumptive weight which can be overcome only if the great weight of the other medical evidence is to the contrary.

The claimant asserts that Dr. A failed to assign a seven percent impairment for specific disorder of the lumbar spine using Table 49 II.C. The hearing officer considered all of the medical evidence presented, found that the report of Dr. A is valid and entitled to presumptive weight regarding the claimant's date of MMI and IR, and that Dr. A's certification is not contrary to the great weight of the other medical evidence. We do not regard Dr. K's opinion to constitute the great weight of the other medical evidence but, rather, a professional difference of opinion. As the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 951921, decided December 11, 1995, the decision to include or not to include a rating for a specific disorder pursuant to Table 49 represents a medical difference of opinion and the statute gives presumptive weight to the designated doctor's reconciliation of such a difference.

The claimant had the burden to prove disability. Whether disability exists is a question of fact and can be established through claimant's testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. To prove disability, a claimant need not prove that she either looked for work or that she is totally unable to do any kind of work at all. As we have previously noted, "a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues." Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. In this case, the claimant was terminated from employment while on light-duty restrictions. We have previously stated that termination with or without cause does not, as a matter of law, end disability, but is a factor to be considered in resolving why a claimant is unable to earn preinjury wages. Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998.

The amount of claimant's postinjury wages was in evidence and was clearly less than preinjury wages; however, the dispute concerns whether the claimant's inability to earn preinjury wages was a result of the compensable injury. The carrier argues that after her termination from employment, the claimant had the ability to earn preinjury wages, as evidenced by the claimant's earnings from her consulting business in the fourth quarter of 1997. The hearing officer made the following findings of fact:

FINDINGS OF FACT

11. Regarding the disability issue, Claimant continued to work after the date of injury, with lifting, pushing and pulling restrictions until terminated by Employer in September or October 1998. Claimant continued to work in a self-employment role as a Consultant, with lifting, pushing and pulling restrictions.

12. The evidence showed that for 1995 Claimant earned $129,994.52 as a consultant for Employer. Claimant also earned income through her corporation that year in the amount of $66,277.00. In 1996 Claimant earned [$]3,000[.00] from Collaborative Resources Inc., and $464.64 and $17.82 from Employer. During 1997 Claimant earned $74,143[.00] through her corporation and $20,330.32 working for _____. Claimant earned $33,378.00 in 1998.

13. Claimant was unable to obtain and retain employment equivalent to pre-injury wages, as a result of the _____ date of injury, from January 1, 1996 through December 31, 1998, although Temporary Income Benefits ended on August 1, 1996.

The claimant asserts that the hearing officer erred in finding that she was terminated from employment in September or October of 1998. The record reflects the termination date was not disputed, and the claimant's consistent testimony was that she was terminated on October 4, 1995. We reform the date in Finding of Fact No. 11 to state October 4, 1995. The claimant also asserts that she did not earn income of $66,277.00 as is reflected in Finding of Fact No. 12. The evidence indicates that the claimant's consulting business had a gross profit of $66,277.00. We reform the second sentence of Finding of Fact No. 12 to state that the corporation had a gross profit that year in the amount of $66,277.00. The hearing officer did make a factual finding regarding disability which would support a conclusion of law that the claimant had disability from January 1, 1996, through December 31, 1998; however, she failed to make a correlative conclusion of law and decision. Such flaw was appealed, but is not fatal to the efficacy of the hearing officer's determination that the claimant had disability. We reform the conclusions of law and decision sections to state that the claimant had disability from January 1, 1996, through December 31, 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 finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. The hearing officer considered the evidence and resolved the disability issue in favor of the claimant. The claimant testified that she had work restrictions which prevented her from traveling as a consultant, and that she was in excruciating low back pain in 1995. The testimony of the claimant is supported by the medical records of Dr. S. We will reverse a

factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination that the claimant had disability from January 1, 1996, through December 31, 1998.

The decision and order of the hearing officer are affirmed, as reformed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge