APPEAL NO. 991860

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 2, 1999. He (hearing officer) determined that the appellant (claimant) did not have disability from April 6, 1999, as a result of a compensable injury of _____. The claimant appeals this determination, expressing his disagreement with it. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____, diagnosed as rotator cuff syndrome and lumbar strain. He saw Dr. N, who originally returned him to light duty. The claimant testified that he worked light-duty office work for about a week, but did not like the close quarters of the office or the nature of the work. On February 2, 1999, he was returned to full duty at his request. He continued working over the next several months, mostly as a delivery man, but was counseled several times for not doing his work and for claiming more mileage in his deliveries than he was allowed. He also saw Dr. A, on referral from Dr. N, and was issued a full-duty release on March 31, 1999.

On April 6, 1999, the claimant was terminated from his position. That day, he saw Dr. A at 8:40 a.m. At this visit, Dr. A described his condition as worsening and placed him in off-work status, which he continued through June 1999. The claimant was aware that he was to meet with his supervisor and the operations manager at 1:00 p.m. that day, but, he said, he did not know he would be terminated. He said he went home and fell asleep and missed the meeting. He returned to work later, worked about two hours, and was terminated at 4:00 p.m. He testified that he stopped working because of the termination, had no intention otherwise to stop working, and would have continued working but for the termination. He also testified that he never complained about shoulder or back pain at work, but confined his complaints to doctor's visits. His handwritten response to the termination notice does not mention any physical restrictions on his duty performance.

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 a question of fact for the hearing officer to decide and can be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Termination for cause is not as a matter of law determinative of the issue of disability, but may be considered by the hearing officer in determining why the claimant is unable to earn the preinjury wage. Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992. Similarly, whether he knew or did not know that termination was pending on April 6, 1999, was not in itself controlling on the issue of disability. In his discussion of the evidence, the hearing officer found the claimant "not generally credible." Both his testimony

and the duty excuses of Dr. A beginning on and after April 6, 1999, were evidence of disability. There was also undisputed evidence that the claimant had been performing his job up until the termination and he himself testified that he would have continued to do so, but for the termination. The hearing officer was the sole judge of the weight and credibility of the evidence, including the medical evidence. Section 410.165(a). He obviously was not persuaded that Dr. A's work excuse, based on a "worsening" of the claimant's condition, was to be taken at face value. He thus concluded that the claimant did not establish disability. 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 decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the evidence sufficient to support the determination that the claimant did not have disability after his termination for cause on April 6, 1999.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Thomas A. Knapp
Appeals Judge