

APPEAL NO. 000032

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 December 13, 1999. The issue at the CCH was whether the claimant had disability from July 29, 1998, through November 30, 1998. The hearing officer concluded that the respondent (claimant herein) did have disability during this period. The appellant (carrier herein) files a request for review arguing that this determination was contrary to the great weight and preponderance of the evidence and should be reversed. The carrier also argues that the hearing officer's finding that the claimant sustained a left groin injury exceeded his authority and should be either reversed or corrected. The claimant responds that there is sufficient evidence to support the hearing officer's finding of disability. The claimant also argues that the carrier's contention that the hearing officer's finding of injury was error is groundless in that the pending judicial review of the earlier decision does not vitiate the earlier determination and that the carrier cites no authority for its position.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The procedural history of this case is significant. There had been an earlier CCH on July 28, 1999, to determine whether the claimant sustained a compensable injury on _____, and whether the claimant had disability from February 9 through July 28, 1998. At that CCH, the hearing officer, who was the same hearing officer who presided at the present CCH, concluded that the claimant suffered a left groin injury on _____, but did not have disability from February 9 through July 28, 1998. The carrier appealed the hearing officer's injury determination, but there was no appeal of the disability determination. The hearing officer's decision was affirmed in Texas Workers' Compensation Commission Appeal No. 982017, decided October 8, 1998 (Unpublished). The carrier represented at the present CCH that it has sought judicial review on the issue of injury and that this matter is presently pending in the county court.

At the CCH under review, the claimant testified that he was unable to work from July 29 through November 30, 1998, as a result of his compensable injury. The claimant testified that he believed that his recovery had been impeded by the refusal of the carrier to authorize necessary medical treatment. The claimant presented medical evidence from Dr. F, his treating doctor, and Dr. Fo, the designated doctor, concerning his treatment and physical condition. The carrier presented contrary medical evidence from Dr. W, the claimant's former family doctor.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

2. The Claimant worked for the Employer, and sustained a compensable left groin injury on _____. (See H.O. Ex. 2)
3. The occurrence of a compensable injury was affirmed in a Decision on Appeal filed October 8, 1998. (See H.O. Ex. 3)
4. The injury determination has not been reversed by a court of competent jurisdiction.
5. Between July 29 and November 30, 1998, the Claimant experienced continuing effects from his injury that impaired his ability to obtain or retain employment earning his pre-injury wages.

CONCLUSION OF LAW

1. The Claimant had disability from July 29 through November 30, 1998.

We first address the carrier's contention that the hearing officer exceeded his authority in stating in his findings that the claimant sustained a compensable injury on _____. It is true that there was no issue of injury, per se, before the hearing officer. However, disability is defined in Section 401.011(16) as follows:

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.

Under this definition, a compensable injury is obviously a prerequisite to the existence of disability. The hearing officer stated during the CCH that it had been determined that the claimant had a compensable injury and that he considered this to be "law of the case" unless and until the finding of injury previously made was overturned on judicial review. We do not find the hearing officer exceeded his authority in making the findings that he did. Obviously, if the earlier decision concerning injury is overturned on judicial review, the claimant, by definition, will not have disability for any period. Unless and until that decision is overturned by a higher authority, the claimant has a compensable injury under the earlier decision of the hearing officer and the decision of the Appeals Panel in Appeal No. 982017, *supra*. Section 410.205(b).

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, we find no reason to overturn the decision of the hearing officer. The carrier argues that the hearing officer's finding of disability was inconsistent with his finding of no disability from February 9 through July 28, 1998, at the earlier CCH. A claimant may go in and out of disability and the hearing officer's determination regarding disability in an earlier period does not bar him from finding disability for a later period. See Texas Workers' Compensation Commission Appeal No. 931049, decided December 31, 1993. The carrier also argues that the hearing officer did not point to evidence that showed a definite change in the claimant's condition between July 28 and July 29, 1998. We note that the hearing officer stated during the present CCH that he believed the evidence differed between the two hearings and that he may have erred in not finding disability at the earlier CCH, but that he was foreclosed from revisiting the issue of disability during the earlier period as his decision regarding that period had become final. Under these circumstances, we find no error in the hearing officer's not pointing to specific evidence of a change in the claimant's condition between July 28 and July 29, 1998.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge