APPEAL NO. 000175

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 January 7, 2000. The issue at the CCH was whether the appellant/cross-respondent (claimant) had disability resulting from the injury sustained on _____, and, if so, for what period. The hearing officer determined that the claimant did not have disability from June 3, 1999, to September 15, 1999, but that he did have disability beginning on September 16, 1999, and continuing through the date of the CCH. The claimant appeals, contending that he had disability beginning on June 3, 1999, and continuing. The respondent/cross-appellant (carrier) appeals, contending that the hearing officer erred in determining that claimant had any disability. The file did not contain a response by either party to the other's appeal.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he did not have disability for the period from June 3, 1999, to September 15, 1999. Claimant agrees that he had disability from September 16, 1999, to the date of the CCH. Claimant complains that: (1) he was undergoing physical therapy and had "20 to 40 [pound] lifting restrictions from June 1 to June 20, 1999"; (2) his underemployment was due to the injury and lifting restrictions and he was not able to return to a skilled position because of this; and (3) if he had informed the second employer of his restrictions, he would not have been hired. Claimant asserts that he had disability from June 3, 1999, to "September 14, 1999."

Claimant testified that he injured his back working for (employer) on _____, while lifting a crate full of parts. Claimant said he continued to work his regular duty, which did not require lifting over 20 to 30 pounds. He testified that he asked to see a doctor, but that he was not able to see one until about six months later in late May 1999. Claimant said he then saw Dr. L, who released him to light-duty work. Claimant said that after this, employer assigned him duties as a troubleshooter, which he could do because there was no lifting involved. Claimant testified that his employment with employer was terminated in June 1999 because he had nine "incidences," which were noted on an employee's record if, for instance, an employee was late to work. Claimant said he believed the termination was improper. Claimant testified that he obtained a new job as a stocker at a supermarket beginning in mid-August 1999. Claimant said he did not tell this new employer about his restrictions, but asked others to help when there was heavy lifting required. Claimant said Dr. L referred him to Dr. K who took x-rays and kept him on light duty. Claimant said his attorney referred him to Dr. P who took him off work completely on September 15, 1999.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The fact that an employee's employment is terminated does not necessarily mean there can be no

disability. Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant alone if the testimony is deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence, including the medical evidence. Section 410.165(a). Where there is conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appeals body, we will not substitute our judgment for that of the hearing officer unless the determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer determined that: (1) claimant's inability to obtain and retain employment at his preinjury wage from June 3, 1999, to August 14, 1999, was not due to his compensable injury, but was due to his termination for cause; (2) claimant did not have disability from August 15, 1999, to September 15, 1999; and (3) due to the claimed injury, claimant was unable to obtain or retain employment at wages equivalent to the preinjury wage from September 16, 1999, to the date of the CCH.

We may affirm the hearing officer's determinations on any ground supported by the record. The hearing officer could have determined from the evidence that the reason for claimant's inability to earn his preinjury wage during this entire period from June 3, 1999, to September 15, 1999, was the termination for cause. The hearing officer determined that: (1) claimant did not have disability from the time his employment was terminated until mid-August 1999, when he obtained a new job, because of his termination for cause; and (2) claimant did not have disability between August 15, 1999, and September 15, 1999, because he was employed with the supermarket. The hearing officer emphasized that claimant "did not indicate that his underemployment at [the supermarket] was a direct result of his compensable injury." However, the fact that claimant was employed at his new job earning less money from August 15, 1999, to September 15, 1999, while he was still under work restrictions, did not mean that he did not have disability. Further, whether claimant told his employer of his work restrictions would not necessarily affect his disability status. However, the hearing officer could find from the evidence that the reason that claimant did not have disability for the entire period from June 3, 1999, to September 15, 1999, was because of the termination for cause. The fact that claimant got a job at the supermarket in mid-August 1999 did not change the fact that he had been terminated for cause from his employment with employer, and that this was the reason, found by the hearing officer, for his inability to obtain or retain employment at his preinjury wage. Accordingly, we affirm the hearing officer's determination that claimant did not have disability from June 3, 1999, to September 15, 1999. We have reviewed the hearing officer's determinations in this regard and we conclude that they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

In its cross-appeal, carrier contends the hearing officer erred in determining that claimant had disability from September 16, 1999, to the date of the CCH. Carrier asserts that Dr. P's opinion that claimant could not work was not credible given the fact that an October 1999 functional capacity evaluation (FCE) report indicated that claimant was capable of medium-duty work.

A June 1999 EMG report from Dr. A indicated normal findings. In a June 1999 report, Dr. K stated that claimant was being followed for, "a thoracic sprain with lumbar syndrome with post-traumatic aggravation of preexisting grade-1 spondylolisthesis at L5-S1, with disc space narrowing at L5-S1. Dr. K said claimant complained of back pain radiating to his right leg and that MRI films indicated marked narrowing of L5-S1 with moderate bilateral neural foraminal stenosis at L5-S1." Dr. K released claimant to light-duty work on June 11, 1999. In a July 1999 report, Dr. L indicated that claimant had been referred to Dr. K for an orthopedic evaluation and that he could return to "limited work" on July 13, 1999. In an August 1999 report, Dr. K noted that claimant was experiencing persistence of symptoms and that claimant is being referred to Dr. O for a lumbar epidural block. In a September 16, 1999, medical report, Dr. P stated under "diagnosis," "traumatic thoracic/lumbar (annular tear) discogenic pain syndrome" and "spondylolisthesis." He stated that claimant would remain off work and return to the office for a review of tests already performed. In a November 1999 FCE report, a physical therapist, Mr. G, stated that claimant complained of pain during the FCE; that no symptom magnification was noted; that claimant should be referred to work hardening; and that claimant is able to lift, carry, push and pull at a medium work competency level. Claimant testified that Dr. P had not released him to return to work.

From the evidence, the hearing officer could determine that claimant's condition as of September 15, 1999, was such that claimant should not work at all. The hearing officer judged the credibility of Dr. P's reports and determined that the reason claimant could not obtain and retain employment at wages equivalent to the preinjury wage, was due to his compensable injury. We have reviewed the hearing officer's determination and we conclude that it is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge