

APPEAL NO. 000373

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 18, 2000. The issue at the CCH was whether the appellant (claimant) had disability resulting from the compensable injury of _____, beginning February 3, 1998, and ending May 5, 1999. The hearing officer determined that the claimant did not have disability beginning February 3, 1998, and ending November 16, 1998; but that the claimant did have disability beginning November 16, 1998, and ending May 3, 1999. The claimant appeals, requesting that we reverse the hearing officer's decision that she did not have disability between February 3 and November 16, 1998, and render a decision in her favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant had been employed as a reservation agent for a regional airline (employer) for 17 years. Claimant had apparently sustained a number of repetitive trauma injuries including one in _____, carpal tunnel syndrome in _____ and tendinitis in her right elbow in _____. Claimant had returned to work from her _____ injury and on _____, she tripped on a curb and fell, injuring her right elbow. Claimant was seen at a clinic, was taken off work and was referred to Dr. O, who became claimant's treating doctor. Dr. O saw claimant for the _____, injury on September 19, 1997, and in a report of that date noted x-rays were negative and an impression of "recurrent lateral epicondylitis." Claimant was treated with medication and returned to light duty after two weeks off. (Disability prior to February 3, 1998, is not at issue.) Claimant testified that she did return to light duty but that her elbow continued to bother her. Dr. O, in a report dated October 31, 1997, notes claimant's complaints and kept claimant on "light work." Claimant continued to complain and in a report dated December 5, 1997, Dr. O stated he had injected claimant's arm a third time and put claimant's arm in a long arm cast. In a Dispute Resolution Information System note dated December 15, 1997, claimant stated she was off work, her arm was in a cast and that she was "thinking of quittin her job though not sure what to do." In a January 2, 1998, note Dr. O stated claimant has "very minimal tenderness," started claimant on gradual range of motion (ROM) exercises and scheduled claimant to be reseen in four weeks. (For many of these reports, Dr. O refers to a _____, date of injury.) In an office note dated February 2, 1998, Dr. O states:

The patient is doing much better. She is driving without pain and picking up objects without pain. She still has a little tenderness laterally but resisted wrist extension is negative. Full [ROM]. Grip strength is 53/55. Released for full work as of 2/3/98. Return here in eight weeks. Continue wearing splints as long as she has discomfort.

It is undisputed that claimant did not return to work. While claimant said that her arm did feel better, she said that she was afraid that the pain (in her elbow) would return if she went back to work. In a handwritten letter dated February 20, 1998, claimant wrote the employer "I am submitting my resignation effective as of today, February 20, 1998." Claimant agrees that she did not tell the employer that she was quitting because of her injury or inquire regarding any alternatives. Claimant testified that she would not go back to work for the employer in any circumstance. In an office note dated March 30, 1998, Dr. O stated that the office visit was a follow-up and that claimant's "elbow has cleared up nicely and she is not experiencing any significant pain." Claimant was assessed at having full ROM and wrist extension was not painful.

Claimant testified that in mid-April 1998, she was raking some leaves in "a tiny little area just around my porch" and that evening "the pain came back." Claimant went back to Dr. O on June 24, 1998, and Dr. O, in an office note of that date commented, "The patient returns with a recurrence of her elbow pain. It has been with her for the past four weeks or so," noted complaints of "severe pain" and that she "cannot even use her arm for cooking." Claimant was prescribed medication and was advised "to return in four weeks if she is still having trouble." Claimant testified that she was unable to do anything because of her arm, that the medication made her "drowsy" and that she was afraid to go back to the doctor because he would give her an injection which was very painful. Claimant returned to Dr. O on November 16, 1998, and in a report of that date Dr. O noted "increasing pain," that claimant has trouble in activities of daily living "including brushing her teeth, scooping ice cream, etc." and that she has been having "trouble with the elbow since June of 1997" (the injury under consideration here was _____). Dr. O recommended surgery. (The hearing officer, in unappealed findings determined that claimant had disability beginning November 16, 1998.) In a report dated December 14, 1998, Dr. R, the designated doctor for the _____ injury, stated that claimant "reinjured her right elbow approximately eight weeks after March 30, 1998, while doing yard work. I considered this a new injury but [Dr. O] disagrees." Claimant had additional surgery on January 14, 1999. Dr. O, in a report dated May 26, 1999, summarized:

[Claimant] first injured her elbow at work using a key punch on _____. She was treated for lateral epicondylitis in this office with several injections. She did reasonably well until she reinjured the elbow in a fall at work on _____. The elbow was reinjected several times and she was placed in a long arm cast. Basically, after removal of the cast and some physical therapy, she improved and had returned to work on 2/3/98. [Claimant, in fact, did not return to work on or after February 3, 1998.] Her relief didn't last long however because in the following month, she had recurrence of the lateral elbow pain. She had several more injections in the elbow, as well as immobilization and a sling, but did not improve significantly. In view of her long history of pain and unresponsiveness to conservative treatment, we performed a lateral release and lateral epicondylectomy on the right elbow on

1/4/99. She has done fairly well from this surgery and when I last saw her on 5/3/99, she was fully healed and released back to full work at that time. [The hearing officer found disability from November 16, 1998, through May 3, 1999.] It should be noted that the patient was incapable of working from April 8 through May of 99

In disputed findings, the hearing officer determined:

FINDINGS OF FACT

2. The Claimant was released to return to work on February 3, 1998, but she did not return to work.
3. The Claimant resigned her position as a reservation agent for the Employer on February 28 [sic, February 20], 1998.
4. The Claimant re-injured her elbow on _____, while doing yard work, and the Carrier has paid for medical treatment since that date.
5. The Claimant had no medical treatment between June 24, 1998, and November 16, 1998.
6. The preponderance of the evidence presented shows or otherwise establishes that the Claimant was unable to work, beginning November 16, 1998.

CONCLUSION OF LAW

3. The Claimant did not have disability, beginning February 3, 1998, and ending November 16, 1998.

At issue in the appeal is the hearing officer's determination that claimant did not have disability between February 3 and November 16, 1998. Claimant initially argues that the issue originally disputed by the carrier was regarding entitlement to temporary income benefits based on claimant's resignation. Whether that is or is not so is not a fact before us. The agreed upon issue at the CCH was "Did the claimant have disability resulting from the [compensable injury]?" Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment" at the preinjury wage. Claimant argues that disability "may be proven" by claimant's testimony alone, that medical evidence is not required to prove disability, that a doctor's return to work is not conclusive to end disability, and that "retirement or resignation alone does not of itself preclude a finding of disability" citing two Appeals Panel decisions. Those generalities are correct and we do not retreat from them; however, they are only factors for the hearing officer to consider. The fact that disability can be proven by claimant's testimony alone does not

require a hearing officer to accept claimant's testimony as fact. We have often noted that the hearing officer is the sole judge of the weight and credibility to be given to the evidence (Section 410.165(a)) and that as an interested party, claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ), and that the hearing officer may believe all, part or none of the testimony of any witness, including the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

We do not agree with claimant's contention that the hearing officer's findings "illustrate total disregard" of claimant's testimony and medical evidence, that the hearing officer "imposed a job search requirement," or that the hearing officer required that disability be proven by medical evidence. The hearing officer obviously did not find claimant's testimony persuasive, as she had a right to do. While it would have been desirable for the hearing officer to use the terms of the statutory definition (inability to obtain and retain employment), the hearing officer's use of "unable to work" is sufficiently clear.

Claimant's reliance on Texas Workers' Compensation Commission Appeal No. 980873 (miscited as 980783), decided May 20, 1998, and Texas Workers' Compensation Commission Appeal No. 970089, decided February 28, 1997, is misplaced. In Appeal No. 980873, *supra*, the injured employee voluntarily retired but clearly did so because of the compensable injury, and the issue was whether earnings from a concurrent cattle business should be considered for purposes of income benefits. Appeal No. 970089, *supra*, stands for the proposition that the injured worker's resignation, retirement or involuntary termination "may be considered" by the hearing officer but does not necessarily foreclose the existence of disability. In this case, the hearing officer could consider Dr. O's February 2, 1998, report which said claimant was "much better," was "driving without pain" and that she was released for "full work." Earlier in this opinion we quoted Dr. O's report to avoid any misinterpretation exactly what that report said. Claimant made no effort to return to work and instead merely submitted her resignation without any reference to her injury.

Claimant argues that the carrier "did not produce one shred of medical or testimonial evidence" that claimant did not have disability. We would only note that the claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she has the disability that she alleges. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Carrier has no burden to prove, either by medical or testimonial evidence, that claimant does not have disability. The hearing officer, in this case, was clearly not persuaded by claimant's testimony and we decline to substitute our decision for that of the hearing officer on such a factual determination.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge