APPEAL NO. 000896

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 March 27, 2000. The hearing officer determined that the appellant (claimant) sustained a compensable injury to his right arm and elbow on or about _____; and that claimant had disability from April 14, 1999, through July 6, 1999, and from November 12, 1999, through November 17, 1999. She stated that there was no evidence of inability to work after that date.

The claimant has appealed the disability issue only. The claimant asserts that disability continued from the last date found by the hearing officer through the date of the CCH, and asks for a remand hearing to consider "newly discovered evidence" from the claimant's treating doctor. The respondent (carrier) responds that claimant had every opportunity at the time of the CCH to present additional documentary evidence or testimony on the disability issue, but did not do so. The carrier points out that no showing has been made that such evidence could not have been obtained timely with the exercise of diligence.

DECISION

We affirm the hearing officer's decision.

The hearing officer found that the claimant sustained a new right arm injury on August 4, 1998, while employed by (employer). The claimant was present at the CCH, but did not testify; his attorney announced that the matters at hand were primarily medical issues which would be established through documents in the record. No continuance was sought nor was it asserted that valuable and essential medical records had not been obtained despite efforts to do so. The record shows no attempt to obtain any medical records by subpoena.

The claimant's attorney argued that it was "well-documented" in the medical records that claimant had disability both for the earlier period found by the hearing officer, and then from October 17, 1999, forward. Summary sheets filled out by the treating doctor, Dr. J, are in evidence for the additional period of time sought by the claimant for his period of disability. The summary forms dated October 29, November 17, December 1, and December 17, 1999, and January 7, 2000, have nothing at all circled in the work-status portion of this form. The last "Work Status" report from Dr. J, as the hearing officer noted, is a certification to remain off work until November 17, 1999. The only "Work Status" in evidence before that is dated September 10, 1999, and noted that claimant is released to light duty with minimal use of his right arm and a 10-pound lifting limit, and that his work trial should "continue." This is accompanied with a "To Whom It May Concern" note signed by Dr. J that says claimant should continue on light duty for at least six months.

With the evidence in this posture, we cannot agree that the hearing officer erred in her determination. Disability is defined in the 1989 Act to incorporate a concept of diminished earning capacity that goes beyond a physical status; it is, according to Section 401.011(16) a state of being unable to obtain and retain employment, due to the compensable injury, at wages equivalent to the preinjury average weekly wage. The existence of disability is not strictly a medical issue, as information about whether the claimant has returned to work and is being paid wages is of paramount importance in analyzing entitlement to temporary income benefits. A claimant's testimony alone is sufficient to establish that an injury has caused disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). In the absence of testimony (and argument of counsel is not testimony), the hearing officer was left to conclude when any disability might have occurred solely from any records in evidence which made reference to work status. While we realize that the parties may have been primarily occupied with the larger issue of whether there was a new injury, or continuation of the old injury, one of the stated issues also was the existence of disability and its duration.

We will not consider evidence urged for the first time on appeal. We cannot agree that the documents presented by the claimant on appeal, for which no groundwork was laid at the CCH, constitute "newly discovered evidence" which could not have been obtained by the exercise of diligence in time for the CCH. The claimant's attorney merely asserts, without explanation of underlying facts, that claimant was not successful in obtaining the attached records until April 14, 2000. However, some of the records are simply additional records from Dr. J for treatment dates already included in medical records put into evidence at the CCH. The requests for records that are also attached (made in December 1999) do not self-evidently correlate to the additional records produced. Consequently, there is no way to tell what records were belatedly sent as opposed to those on hand but merely overlooked at the time of the CCH. We cannot agree that a remand is in order.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). This determination is made on the evidence presented, not what might have been presented.

We cannot agree that this is the case and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge