

APPEAL NO. 000934

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 April 12, 2000. The appellant (claimant) and the respondent (self-insured) stipulated that the claimant sustained a compensable injury on _____. The issue was did the claimant have disability from January 6, 2000, through the date of the CCH. The hearing officer determined that he did not. The claimant appealed, stated that the videotape of him was not sent to the treating doctor or the clinic where he was treated, contended that the videotape is not medical evidence, said that his neck was not well, and requested that the Appeals Panel reverse the decision of the hearing officer. The self-insured responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. Briefly, the claimant testified that he worked as a teacher's assistant in physical education classes; that on _____, he demonstrated throwing a football a long distance and felt pain in his neck and right shoulder; that he went to Dr. T, was taken off work, and was prescribed physical therapy; that he was referred to Dr. B and received two epidural injections; and that he has not returned to work because of the pain he has. The claimant acknowledged that a videotape indicates that on December 24, 1999, he performed exercises for about 50 minutes at a fitness center and that some of the exercises included the use of both arms. Mr. M testified that he is a personal trainer; that on December 24, 1999, he worked with the claimant; and that the exercises the claimant performed that day were lighter than those he did before the October 1999 injury. Dr. B testified that he is a pain management specialist; that on February 9 and March 1, 1999, the claimant received epidural injections; that the claimant reported over 50% improvement; that the claimant should have one or two more injections; that the self-insured did not approve additional injections; that he does not know enough about the specifics of the claimant's duties as a teacher's assistant in physical education to say whether he could to return to work at that job; that it is possible that the claimant could return to that job and that some activities may have to be curtailed; and that he had not seen the videotape of the claimant. An off-work note dated February 16, 2000, states that the claimant is not able to work. A work status report dated February 28, 2000, states that the claimant may work six hours a day with restrictions. Dr. C examined the claimant at the request of the self-insured. In an addendum report dated February 17, 2000, Dr. C stated that on December 20, 1999, he reported that the claimant was not at maximum medical improvement (MMI); that since that date he has reviewed a videotape of the claimant; that the portion of the tape dated December 24, 1999, indicated that the claimant was working out in a gymnasium, was able to fully abduct and flex his arms with weights of unspecified amounts, and was performing a number of other tasks; that there were inconsistencies with the claimant's functional

capacity evaluation; and that the claimant has reached MMI, is fit to return to work without restrictions, and should have his range of motion measured to assign an impairment rating. In addition to the activities at a fitness center on December 24, 1999; the videotape also shows the claimant going into a fitness center on November 19, 1999, and departing it over an hour later and, on November 19 and 20, 2000, performing activities such as walking and getting into and out of a small car without apparent difficulty.

The burden is on the claimant to prove by a preponderance of the evidence that he had disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). The record indicates that the videotape was considered at the benefit review conference and was available for the claimant to provide to doctors who treated him. The videotape is not medical evidence; however, it was appropriate for the hearing officer to consider it. In her Decision and Order, the hearing officer stated that the claimant was not able to establish by a preponderance of the credible evidence that he was unable to obtain and retain employment at his preinjury wage because of the _____, injury from January 6, 2000, through the date of the CCH. The determination of the hearing officer that the claimant did not have disability from January 6, 2000, through the date of the CCH is not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge