APPEAL NO. 001611

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 15, 2000. She concluded that the appellant (claimant) "sustained disability resulting from the claimed injury sustained on _____, beginning _____, and ending March 6, 2000." The claimant appeals, asserting that his testimony and that of his treating doctor, Dr. BB, as well as other medical evidence, constitute the great weight of the evidence that his disability continued to the date of the hearing. The respondent (carrier) urges that the evidence is sufficient to support the hearing officer's determination of the sole disputed issue.

DECISION

Affirmed.

The parties stipulated that the claimant had disability from _____, through June 28, 1999. The claimant testified that he is 35 years of age and that he has neither worked nor looked for work since sustaining the compensable injury of his back and ribs on _____. He testified that prior to this injury, he worked as a heavy machinery operator, work he described as physically demanding, and also did some welding jobs. He indicated that after the carrier refused to authorize the surgery (to remove a mass) recommended by his former treating doctor, Dr. FG, he hired his attorney and was referred to Dr. BB with whom he has been treating since August 1999. The claimant said he has twice been examined by Dr. MB at the carrier's request and has also been twice examined by the designated doctor, Dr. GB, a chiropractor, who determined that he had not yet reached maximum medical improvement (MMI). The hearing officer noted that the sole issue before her was the period of disability.

The claimant further testified that although he does drive, can wash his car, and performs some home exercises and activities learned in the work hardening program he failed to complete, he does not believe he can return to his job because of his back and ribs which still hurt. He said that after several weeks of participation in the work hardening program, Dr. BB took him out of it due to his back pain. The claimant conceded that since he has not tried to operate any heavy machinery since his injury, he does not know if he can do it. The claimant also said that he takes some pills he obtained the day before the hearing from Dr. J and that, as he put it, "my back is killing me." He further stated that he goes to Dr. BB's office every two weeks but that another person administers his adjustments and that no doctor has released him to return to work. The claimant also mentioned having fallen at home on September 9, 1999, injuring his jaw. A medical airlift record of that date reflects that the claimant fell from standing height striking his left jaw and cheek on the corner of a concrete step and that he denies neck and back pain.

Dr. BB testified that he took the claimant off work on the date he first saw him and that he has not released the claimant to return to work because he does not feel that the

claimant is ready to return to work, "mentally or physically." He said that the claimant is very depressed from the pain and all the surrounding circumstances and that the psychological component of the claimant's injury has not been addressed. We observe that the hearing officer did not have an extent-of-injury issue before her.

Dr. BB further testified that he terminated the claimant's participation in the work hardening program because of the level of the claimant's pain, which he described as being in the thoracolumbar spine and down into the ribs. Dr. BB also said that the claimant has lumbar spine bulges or herniations as well as muscle spasms. Dr. BB further stated that the claimant could not and cannot perform any work, not even light duty because he cannot sit for hours, and that he could improve if he gets the treatment he needs. Dr. BB conceded not having reviewed the claimant's records before the hearing, not knowing what medications the claimant takes, and "going by memory" concerning the results of various diagnostic tests. He further conceded that based just on what the therapist who administered a functional capacity evaluation stated, the claimant was able to return to work but again stated that he would not even have recommended that the claimant perform light duty. Dr. BB concluded by stating his opinion that the claimant cannot now return to work and at no time since he has been treating the claimant would he have recommended that the claimant return to work.

Dr. FG's March 16, 1999, record states a history of the claimant's being in the sleeper cabin of a truck and being tossed about when the truck flipped. Dr. FG's impression was lumbosacral strain and two rib fractures. According to Dr. FG's April 13, 1999, record, an MRI of the lumbosacral spine was negative as was a bone scan and Dr. FG had the claimant off work "for the time being." According to the February 2, 2000, report of Dr. J, the results of a nerve conduction test were normal.

According to the August 17, 1999, report of Dr. GB, the claimant reported that he was driving a truck loaded with dirt around a curve when he hit a bump that caused the truck to roll, throwing him back and forth in the cab. Dr. GB further reported that the claimant said he sought care in an emergency room the next day and was diagnosed with muscle strains. Dr. GB, who diagnosed a rib fracture, a lumbar sprain/strain injury with possible annular tear, and lumbar myofasciitis, determined that the claimant had not yet reached MMI for his rib fracture. In his March 6, 2000, report, Dr. GB stated that he felt the claimant's back complaints remain unchanged and that the claimant should have a discogram before being found to be at MMI. Dr. GB also stated that the February 1, 2000, report of Dr. MB implies that Dr. MB feels the claimant is "malingering" and that while he, Dr. GB, remains "open to that possibility," he feels a further diagnostic work-up should be done.

According to June 29, 1999, and February 1, 2000, reports of Dr. MB, who examined the claimant for the carrier, the claimant reached MMI on June 26, 1999, with a two percent impairment rating. Dr. MB's February 1, 2000, report states the impression as lumbar strain and left seventh and eighth rib fractures; that no further treatment of the ribs is necessary; that there were no objective findings relating to the lumbar strain but only

subjective complaints of pain; and that the claimant "displays a large amount of symptom magnification." Dr. MB further stated that the claimant can return to work with no restrictions for his lumbar spine but that as for his thoracic spine he should do no upper body twisting and limited overhead work with his arms.

The claimant had the burden to prove that he had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." Section 401.011(16). The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.).

The hearing officer found that the preponderance of the evidence shows or otherwise establishes that the claimant was unable to obtain or retain employment at the preinjury wage beginning June 29, 1999, and ending on March 6, 2000. The hearing officer states in her discussion of the evidence that she did not find Dr. BB's testimony persuasive nor did she find persuasive records stating that the claimant is unable to work. The hearing officer further stated that she believes that the claimant was capable of returning to work when his fractured ribs were healed and that Dr. GB determined that the rib fractures were healed as of March 6, 2000. While another hearing officer may have drawn different inferences from the evidence, we cannot say that the hearing officer's determination is so against the great weight. As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer was not bound to accept Dr. BB's opinions nor was she bound to accept Dr. MB's statement that the claimant had two physical restrictions relating to his thoracic spine considering that only Dr. BB's diagnosis included the thoracic spine.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Alan C. Ernst
Appeals Judge