APPEAL NO. 001815

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 July 5, 2000. The hearing officer determined that the appellant (claimant herein) had disability from the injury sustained on _____, beginning on January 18, 1999, through February 5, 1999, and from January 12, 2000, through February 12, 2000. The claimant appeals arguing that a number of the hearing officer's findings and her decision were contrary to the evidence. The respondent (carrier herein) responds that the hearing officer's decision was sufficiently supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that the injury took place when he hit his right shoulder on an open door while working as a bartender. At the time of the injury the claimant was only working as a bartender part-time on weekends, spending the week operating a landscaping business. The claimant testified that he had disability from January 18, 1999, through the date of the CCH as a result of the compensable injury asserting he was unable to return to his work as a bartender after January 17, 1999. The claimant put medical evidence in the record supporting his claims of disability until March 12, 1999. There was evidence that the claimant continued working in his landscaping business after his injury beginning on February 5, 1999. The claimant received no medical treatment from March 12, 1999, until October 5, 1999, when he sought treatment from Dr. O. Dr. O placed the claimant off work pending further testing. On January 12, 2000, Dr. O performed exploratory surgery to check for a rotator cuff tear and found no tear. The claimant resumed his landscaping business within four to six weeks after this surgery.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. However, the hearing officer is not required to find either the claimant's testimony or the medical evidence persuasive. In this case, she did not and she explained her reasoning in her decision. She essentially believed that the claimant's ability to perform the landscaping work belied his inability to work as a bartender. She also discounted the medical evidence due to the fact the doctors were unaware of the claimant's landscaping work. Applying the standard of review set out above, we perceive no error.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge