

APPEAL NO. 001837

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. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) did not have disability from October 27, 1999, through the date of the CCH.

The claimant, in a timely appeal, contended that she had not quit her job, that her inability to work was due to her compensable injury, that her treating doctor had taken her off work, and that she had had disability since November 15, 1999. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier), in a timely response, urges affirmance. The claimant submitted additional correspondence dated August 26, 2000, which is untimely as an appeal. The 1989 Act does not provide for replies to responses and we decline to consider such information submitted for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 001069, decided June 28, 2000.

DECISION

Affirmed.

The claimant sustained a compensable injury in _____ (not at issue in this case) and returned to work at light duty from that injury. On _____, while still on light duty from the _____ injury, the claimant sustained another compensable injury to her neck and left arm. Issues of injury and disability due to the 1998 injury were resolved by another hearing officer who determined that the claimant had suffered a minor injury to her neck and left arm, that the claimant had disability from October 7, 1998, through October 15, 1998, and that the claimant's inability to work from October 16, 1998, through October 26, 1999, was not the result of the _____, injury. That decision was affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 992670, decided January 13, 2000 (Unpublished). At issue in this case is disability after October 26, 1999.

There was substantial testimony regarding the claimant's condition and circumstances, including hospitalization in November 1998 due to an unrelated psychological condition, all of which we regard as irrelevant to the issue of the claimant's ability to obtain and retain employment at her 1998 preinjury wage on and after October 27, 1999. In evidence is an off-work certificate from Dr. F, the claimant's treating doctor, which states the claimant has been under his care from "10-27-99 to Present" (the date appears to have been altered). That note is dated April 4, 2000. The carrier notes that Dr. F's initial evaluation of the claimant was November 15, 1999, and suggests that the off-work slip was back-dated to coincide with the first date of disability eligibility in this case. Various progress reports note the possibility of a brachial plexus injury and median nerve entrapment. In a note dated March 21, 2000, Dr. F "clarifies" that the claimant "appears" to have "a brachial plexus stretch injury with possibly, even, some degree of Complex

Regional Pain Syndrome" and that the claimant "was officially taken off work . . . on November 15, 1999, through the current date." In a report dated June 7, 2000, Dr. F referenced a functional capacity evaluation (FCE) done in January (presumably 2000) which indicated the claimant was capable of light sedentary work (which was apparently the claimant's 1998 preinjury work) and makes reference to the claimant's "post-traumatic stress." The claimant was also examined by Dr. H a required medical examination doctor (for whose report the record was held open) who in a report dated July 10, 2000, noted evidence of "malingering or exaggeration" and referenced the claimant's "psychological factors." Dr. H was of the opinion "that [the claimant] should be able to return to work without physical restrictions or limitations."

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant relies on the reports of Dr. F taking her off work, either on October 27, 1998, or November 15, 1998. Evidence to the contrary is the report of Dr. H. The determination of whether an employee has disability is a question of fact. The hearing officer's decision is supported by sufficient evidence.

The hearing officer, both in his Statement of the Evidence, and in a finding of fact, states that the claimant "quit her job." The claimant adamantly disputes that statement, saying that she is off work because of her workers' compensation injury or injuries. We would agree with the claimant only to the extent that there is scant evidence that she quit her job or for that matter what her job status is. But as noted at the outset, the claimant's status in November 1998 and whether she quit or what her status was then was determined at the previous CCH and affirmed in Appeal No. 992670, *supra*. Whatever the reason for her unemployment through October 26, 1999, the issue here is her ability to obtain and retain employment at her preinjury wage due to the compensable "minor" neck and left arm injury of _____.

Upon review of the record submitted, we find no reversible error. 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:

Kathleen C. Decker
Appeals Judge

Tommy W. Lueders
Appeals Judge