

APPEAL NO. 001933

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 27, 2000. The issue at the CCH was whether the respondent (claimant) has disability after January 11, 2000, for a compensable injury sustained on _____. The significance of the date in the issue was that it was the date that the appellant (carrier) contended that the claimant had been given a release back to work.

The hearing officer found that the claimant had the inability to obtain and retain employment equivalent to his preinjury average weekly wage from January 11, 2000, through May 31, 2000, and then from June 24, 2000, through the date of the CCH, and therefore had disability for those time periods.

The carrier appeals, arguing that the claimant, although essentially released to full duty, made no effort to search for employment. The carrier further argues that the claimant would have been able to return to work for the employer. The claimant disputes that he was released to full duty, noting that he had a 70-pound lifting restriction which would not have allowed him to return to his former job. The claimant points out that there was no evidence of a bona fide offer of employment. The claimant asks that the decision be affirmed.

DECISION

We affirm the hearing officer's decision as not against the great weight and preponderance of the evidence.

The claimant, who was 31 years old, was employed by (employer) when he was injured on _____. The nature of his injury was not stipulated. Medical records indicate a lumbar strain and a bulging disc, although the claimant contended that his first treating doctor, Mr. A, told him he had a herniated disc that was pressing on nerves to his legs. However, other medical records in evidence indicate a "negative" MRI. The claimant testified that he experienced back and leg pain and numbness due to his injury.

On January 10, 2000, the claimant said that Dr. A told him there was nothing more he could do for him and urged him to get a second opinion. Dr. A released him back to work since he had finished his work hardening therapy and could return to his "normal activities" with a lifting restriction of 70 pounds. In his letter of that day, Dr. A said that the claimant was "full of complaints" but Dr. A could find no significant abnormalities. Dr. A noted that he had a long talk with the claimant to tell him that his symptoms did not correlate to neurological problems or compression of nerve roots. At this point, the claimant changed his treating doctor to Dr. B. In his report of January 24, 2000, Dr. B noted that the claimant had limited lumbar range of motion. No sensory deficits were found on pinprick. Dr. B diagnosed chronic traumatic lumbar IVD syndrome and sprain/ strain and took the claimant off work. Around April, Dr. B referred claimant to Dr. C and Dr. D, both medical doctors. Dr. C noted some bulging and a lumbar strain. He said

degenerative changes were very, very minimal. Dr. D gave the claimant some pain injections.

The claimant said that due to weakness in his leg, he slipped and fell in the bathtub two months before the CCH. He maintained that this caused no increase in his symptoms or additional injury. Under cross-examination¹ the claimant said he had fallen other times before but had not told his doctor. He said he reported the bathtub fall because he hurt himself.

An analysis of the functions required in the claimant's previous employment show that the weight of materials he would be required to lift would be 0 to 50 pounds. The claimant said he did return to work on June 1, 2000, and worked a total of three weeks, with an increasing number of days per week, but was unable to sustain this and went off work again pursuant to Dr. B.

The claimant said he could not walk or sit for more than 15 minutes without pain and numbness. He was examined on July 10, 2000, by Dr. E, apparently in an independent medical examination for the carrier. Dr. E noted that he believed the claimant's pain to be genuine, and that he had been placed in work hardening prematurely. He recommended a pain management program. He noted that the claimant could do restricted duty work if available.

We would first tend to agree with the carrier's argument that a lifting limit of 70 pounds, given the job analysis of the claimant's previous position, would equate to a full-duty release. However, medical evidence is not the sole basis upon which disability is determined. Leaving aside conflicting medical evidence in this case, the claimant testified as to his limitations and pain which precluded him from returning to work, or retaining work for longer than the three-week period of time he did return. A claimant's testimony alone, when believed by the hearing officer, is sufficient to establish that an injury has caused disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). 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 of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

¹ Cross-examination as to the reason for reporting the bathtub fall drew a curious objection that the carrier's counsel was "leading" the witness, apparently sustained by the hearing officer, who asked the representative for the carrier to "rephrase." It is worth pointing out that leading questions are permissible on cross-examination.

We note that there is no job search requirement for temporary income benefits, and the matter of whether benefits could be adjusted because of a bona fide job offer from the employer was not reported as an issue from the benefit review conference for the hearing officer to consider. Thus, whether the claimant sought employment after his release by Dr. A, or whether he could have worked for the employer, are not controlling on the issue of disability.

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.). We do not agree that the hearing officer's decision lacks sufficient support in the record, and accordingly affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge