APPEAL NO. 002242

Following a contested case hearing held on August 30, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the first impairment rating (IR) assessed by Dr. C, became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant herein) files a request for review arguing that he did dispute Dr. C's certification of IR the day he received it. The claimant argues that there are discrepancies in the adjuster's notes to the contrary that render them unreliable. The respondent (carrier herein) replies that the evidence showed that the Texas Workers' Compensation Commission (Commission) sent the claimant notice of Dr. C's certification more than 90 days before he claimed to have disputed Dr. C's certification. The carrier also argues that the testimony of the claimant and his wife that they timely disputed Dr. C's certification within 90 days of the date they admit receiving notice of it from the carrier was not persuasive and is contradicted by records of both the carrier and of the Commission.

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 January 20, 1999. It was also stipulated that Dr. C, the claimant's treating doctor, certified maximum medical improvement (MMI) and IR in a report executed on October 5, 1999. It was undisputed that this was the first certification of MMI and IR. Commission records indicate that the Commission sent the claimant notice of this certification on October 13, 1999. The claimant testified that he did not receive this notice. The claimant testified that he was notified by the carrier of Dr. C's certification on February 10, 2000. The claimant and his wife testified that on that date they called the carrier and the Commission to dispute Dr. C's certification. Records of the Commission and of the carrier indicate that the claimant first disputed Dr. C's certification on June 19, 2000.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. [Dr. C's] assessment was the first certification of the claimant's [IR] and [MMI] date.

3. The claimant was notified of [Dr. C's] assessment no later than February 10, 2000.

4. The claimant first disputed [Dr. C's] assessment on June 19, 2000.

CONCLUSION OF LAW

3. The 1st [IR] assessed by [Dr. C] dated October 5, 1999 become [sic] final under Rule 130.5(e).

Rule 130.5(e) provides that absent certain exceptions, which no one argued applied in the present case, the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. We have held that this time does not begin to run until a party has received written notice of the assignment of an IR. Texas Workers' Compensation Commission Appeal No. 951229, decided September 5, 1995. In this case written notice of the IR was sent to the claimant by the Commission on October 13, 1999. The claimant denies receiving this notice. Rule 102.5(d) deems receipt of a notice from the Commission five days after it is mailed unless the great weight of the evidence indicates otherwise. Pursuant to this rule the claimant was deemed to have received the October 13, 1999, notice from the Commission informing him of Dr. C's certification on October 18, 1999. This was more than 90 days before the date the claimant and his wife contend they disputed Dr. C's certification. Assuming that the hearing officer accepted the claimant's testimony that he did not receive notice of Dr. C's certification until February 10, 2000, the hearing officer also found that the claimant did not dispute Dr. C's certification until June 19, 2000, which was more than 90 days later.

While the claimant and his wife testified that the claimant disputed Dr. C's certification on February 10, 2000, there was conflicting evidence concerning this. 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). 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). Applying this standard of review, we find sufficient evidence that the claimant first disputed Dr. C's assessment on June 19, 2000, which was clearly more than 90 days after his receipt of Dr. C's certification.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge