APPEAL NO. 002462

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 September 21, 2000. The hearing officer determined that the appellant (claimant) did not have disability as a result of the compensable injury sustained on _____, and that the Texas Workers' Compensation Commission (Commission) abused its discretion in approving Dr. B as the claimant's alternate treating doctor. The claimant appealed the adverse determinations on the grounds of sufficiency of the evidence. The respondent (carrier) filed a response urging that the evidence was sufficient to support the determinations of the hearing officer and that they should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he sustained an injury to his eyes while filling a barrel with some kind of liquid food/chemical. No description of the material was testified to by the claimant. He explained that one of the barrels exploded with the contents hitting his face and eyes which left him traumatized and blind from the burning and pain in his eyes. The claimant stated that he was transported to the local hospital where his eyes were washed out. He admitted that he was returned to work by the hospital doctors that day but claimed he could not return to work so his friend took him to the company clinic the next day where a physician gave him eyedrops. The claimant stated that his supervisors sent him to the clinic.

The claimant testified that he was referred to Dr. D by the clinic doctor and treated with her until April 17, 2000, which was the last time that he saw her. He related that Dr. D did not release him from work and he worked for the next two weeks then quit working asserting that his vision was getting worse and that he had headaches. The claimant testified that after he saw Dr. D he saw two other doctors, but they too only gave him drops to put into his eyes when he felt he needed more treatment. The claimant stated that he saw Dr. U, who referred him to a specialist and told him he could work. He admitted that he did not go to see the referral doctor. He also testified that he saw Dr. T, an optometrist, "on his own" who prescribed glasses for him. The claimant admitted that none of the doctors that he had seen to date had examined him the way Dr. T examined him, "using a machine to put light into his eyes." He stated that there was nothing wrong with the medical treatment provided to him by Dr. T.

The claimant testified that he was now treating with Dr. B, who had not told him what was wrong with his eyes but had given him pills (Celebrex) for his headaches and then referred him to Dr. Ta. The claimant stated that Dr. Ta did some testing and gave him some eyedrops then referred him to another doctor, but that the carrier would not pay so he did not see this doctor. The claimant admitted that Dr. Ta's treatment was the same treatment he received from all the other eye doctors.

The claimant contended that his vision was blurred and got worse every day, and that before his injury he had good vision and could drive and read which he could no longer do. He claimed that he could not see out of the left eye at all and only a little bit out of his right eye. He admitted that he had not had his vision checked prior to injury on _____.

The claimant stated that his reason to change treating doctors from Dr. T to Dr. B was because his vision was going bad and he needed a doctor to help him. He explained that his lawyer sent him to Dr. B.

On cross-examination, the claimant was asked by the carrier's attorney to review his Employee's Request to Change Treating Doctors (TWCC-53) so that a question could be propounded. The claimant contended that he could not see the TWCC-53 because it was blurry. The claimant was asked if he had filled the document out and he replied that his attorney's secretary had filled it out. He then stated that the reason for the requested change was that he needed to see a specialist and subsequently admitted that he had previously been seen by Dr. D, who was a specialist. The claimant related that no one told him that he could no longer be treated by Dr. D; all he knew was that "she was the one that let me go. She said that I could go and return to work," and that she did not refuse to treat him. The claimant subsequently identified the TWCC-53 for the hearing officer and stated that the signature on the document was his.

The claimant presented to Dr. D for the first time on March 7, 2000, for complaints of pain, redness and blurred vision due to contact with a liquid used to grow chicken feed. She noted that the claimant had been referred from (clinic) for bilateral corneal abrasions. Dr. D diagnosed a chemical abrasion on the right eye with conjunctivitis and prescribed medication to treat conjunctivitis. The claimant was released to return to full-duty work. By March 17, 2000, Dr. D had noted improvement in the claimant's condition and that he was "much better."

On March 13, 2000, the claimant was examined by Dr. U, who administered several tests including a test for glaucoma, which was normal. He found the claimant to have 20/20 vision in one eye and 20/30 vision in the other, but that glasses could help. The claimant was requested to return in one week and medication was prescribed. The claimant did not do so.

A note dated April 3, 2000, from Dr. A, a chiropractor, was offered by the claimant indicating that the claimant was not to return to work until further notice. No progress notes were offered by either party and no testimony was elicited to explain who this doctor was or why he gave the claimant an off-work slip.

Dr. T's medical records reflect that on May 8, 2000, the claimant presented for an eye examination after being exposed to methionine hydroxy analogue at work. Dr. T diagnosed myopia (nearsightedness) and an astigmatism in both eyes, and glasses were prescribed. Dr. T also issued a letter restricting the claimant to light duty until his condition

was resolved and referred the claimant to Dr. Da, an ophthalmologist, for further treatment and evaluation.

The claimant filed a TWCC-53 with the Commission on May 30, 2000, which was written in Spanish. The hearing officer requested the translator to provide a translation which is as follows:

> I was treating with this doctor that has not been able to tell me what is happening with my vision. He has not been able to approve them to send me with a specialist so I can know what has to be done so I can get better from my eyes and I could return to work. I want a doctor that can help me.

He requested to change from Dr. T to Dr. B. The Official Actions Officer (OAO) approved the request on June 7, 2000.

The claimant subsequently presented to Dr. B on June 9, 2000, for complaints of bilateral eye pain. Dr. B made a general examination of the claimant and referred him to Dr. Ta, an ophthalmologist, and prescribed Celebrex to help the pain. Dr. B found that the claimant had 20/30 acuity bilaterally. The claimant was issued work-release slips through August 17, 2000.

The claimant was examined by Dr. Ta on July 13, 2000. Dr. Ta performed extensive testing on the claimant and by report dated the same day, indicated that the claimant had subjective visual disturbances, minimal ptosis OS (drooping of the eye lid), exodeviation (astigmatism) and physiological anisocoria (different pupil sizes) possibly due to sphincter irregularity OS. Panatol eyedrops were prescribed and he was referred to Dr. L, a cornea specialist due to the claimant's complaints of pain.

The hearing officer wrote in her Statement of the Evidence that the evidence showed minimal findings of visual disturbances, except for some myopia; that there was little harm or damage to the eyes as a result of the exposure; and that the claimant's testimony and other evidence was not persuasive in establishing disability since _____. The hearing officer believed that the claimant showed no sign of impaired vision at the CCH. She indicated that although Dr. T released the claimant to light duty, there was no indication as to the medical basis for doing so. She found the medical evidence from Dr. B and Dr. T to not be credible because it was based on the claimant's history and subjective complaints. The hearing officer is apparently referring to the work releases issued by the doctors.

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 Appeals Panel has held that disability may be proven by the testimony of the claimant alone, that objective medical evidence is not required. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section

410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The record in this case sufficiently supports the hearing officer's determination on the issue of disability. The fact finder was not bound by the claimant's testimony or the work-release slips issued by Dr. B and Dr. T.

Section 408.022 sets out the criteria for selecting and changing a treating doctor which are to guide the parties and the Commission. Section 408.022(d) expressly states that a change may not be made to secure either a new impairment rating or a new medical report. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(h)(2) (Rule 126.9(h)(2)). A determination to approve or disapprove a change of treating doctors is reviewed under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 970686, decided June 4, 1997. There is an abuse of discretion when a decision maker reaches a decision without reference to guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). An abuse of discretion review is based on the facts as they exist at the time the request is acted upon. Texas Workers' Compensation Commission Appeal No. 000193, decided March 13, 2000. Generally, this determination is made with regard to what information was before the reviewing authority, specifically in this case, the OAO, including information that would have been in the Commission's files at the time of the requested change. Texas Workers' Compensation Commission Appeal No. 950252, decided April 5, 1995. The determination of what the reasons were for the change of treating doctor was a factual matter for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 992921, decided February 9, 2000.

The carrier had the burden to prove an abuse of discretion in the approval. Texas Workers' Compensation Commission Appeal No. 93433, decided July 7, 1993. It is unknown what specific documents were considered by the Commission employee who reviewed and approved the claimant's TWCC-53. However, based on the records in existence prior to June 5, 2000, such as the various reports from Dr. D, Dr. U and Dr. T which could have supported the carrier's position that the claimant was given medically appropriate care, and was improving at the time of the requested change, the hearing officer could have determined that the claimant's change of treating doctor was made solely for the purpose of obtaining a new medical report which might give him a higher impairment rating. In evidence was Dr. U's Report of Medical Evaluation (TWCC-69)dated April 13, 2000, reflecting that he found the claimant to have reached maximum medical improvement on March 13, 2000.

The hearing officer, however, found that the claimant's initial choice of treating doctor was Dr. D, who examined the claimant several times in the first two months after the compensable injury of _____; that the claimant requested a change of physicians to Dr. B to obtain another medical report taking him off work as there had already been at

least two releases to return to unrestricted work by two examining and treating doctors, Dr. D and Dr. U; that the treatment rendered by the initial treating doctor, Dr. D (or even Dr. T), was medically appropriate based on the medical evidence; that Dr. B could not render appropriate medical care because the claimant suffered a potentially serious injury to his eyes which was outside the specialty of Dr. B, but was within the specialty of Dr. T; and, that the claimant stated (in his TWCC-53) that he wanted to be examined by an eye specialist which was the course of treatment undertaken by Dr. T at the time of the submission of the TWCC-53. The hearing officer concluded that the Commission abused its discretion in approving the TWCC-53 because the decision maker acted without reference to guiding rules or principles.

The hearing officer considered the circumstances surrounding the request to change treating doctors. Whether Dr. D or Dr. T was the claimant's initial choice of treating doctor is irrelevant to the inquiry even though the hearing officer erred in finding that Dr. D was the claimant's initial choice of treating doctor. *See* Rule 126.9(c). The claimant could not have treated with Dr. D in excess of 60 days as the claimant stated that his last visit was on April 17, 2000, and the medical records from Dr. D reflect the last visit as March 17, 2000. Further, the claimant had been referred by the employer to the clinic doctors who subsequently referred the claimant to Dr. D. The evidence can only support a finding that Dr. T was the claimant's initial choice of treating doctor. Nonetheless, it was the change from Dr. T to Dr. B which was the subject of the hearing and there was sufficient evidence to support the hearing officer's findings concerning Dr. T and Dr. B to support her determination that the request to change the treating doctor to Dr. B should not have been approved.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Kathleen C. Decker
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge