

APPEAL NO. 010296

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 18, 2001. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) had disability from January 22 to February 1, 1999, and from February 9, 1999, through the date of the hearing. In its appeal, the appellant (carrier) requests that the hearing officer's determination be reversed and a new decision rendered in its favor. The appeals file contains no response from the claimant.

DECISION

Affirmed.

In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we will only consider the evidence admitted at the hearing. After the deadline for filing an appeal, the carrier submitted a videotape along with a written explanation that it had inadvertently left it out of the mailing containing the carrier's appeal. The videotape was not considered on appeal because it was offered into, and excluded from, evidence at the hearing and the carrier did not appeal that ruling.

Although the record clearly reflects that the parties agreed that the disputed issue for resolution at the hearing was whether the claimant had disability and, if so, for what periods, the carrier argues on appeal that a different issue should have been resolved at the hearing. Specifically, the carrier argues that the disputed issue which should have been addressed was whether the claimant had abandoned medical treatment thereby triggering Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4 (Rule 130.4), which had the potential to affect the claimant's eligibility for temporary income benefits (TIBs). The evidence in the record does not support the carrier's contention that the hearing officer resolved the wrong issue in this case. The issues of disability and TIBs entitlement are different concepts under the 1989 Act. That is, disability may exist separately from entitlement to TIBs. Texas Workers' Compensation Commission Appeal No. 950879, decided July 17, 1995. Thus, if the carrier wanted to pursue an issue under Rule 130.4, it was required to specifically raise that issue. We find no merit in the assertion that the hearing officer erred in not resolving such an issue, because it was not before him. We note that while the carrier complains about vagueness of the benefit review conference report, it did not file a response thereto. The carrier's appeal will be treated as a challenge to the sufficiency of the evidence to support the hearing officer's disability determination.

Disability is defined as the inability to obtain and retain employment at wages equivalent to the preinjury wage due to the compensable injury. Section 401.011(16). Disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact the hearing officer resolves conflicts and inconsistencies in the evidence and decides what

facts the evidence has established. The hearing officer's determination that the claimant had disability from January 22 to February 1, 1999, and from February 9, 1999, through the date of the hearing is supported by the claimant's testimony and the evidence from the doctors who treated the claimant. Nothing in our review of the record demonstrates that the hearing officer's disability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge