

APPEAL NO. 010597

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 January 30, 2001, in (city 1). The hearing officer determined that: (1) venue is proper in (city 2) Field Office; (2) the Texas Workers' Compensation Commission (Commission) abused its discretion in approving appellant's (claimant) request to change treating doctors from Dr. W to Dr. C; (3) the claimant did not sustain disability from September 29, 2000, and continuing through the present date of the hearing on January 30, 2001, or for any other time period, due to the compensable injury claimant sustained while working for employer on August 24, 2000; and (4) the respondent (carrier) timely disputed the order approving the change of treating doctor, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(g) (Rule 126.9(g)).

The claimant has appealed all of these determinations, raising both factual sufficiency and legal arguments. The carrier responds, agreeing that the statement of venue was incorrect and urging affirmance on the other appealed issues.

DECISION

Reformed in part, affirmed in part, reversed and rendered in part.

The claimant was employed by (employer) as a carpenter. The claimant sustained a compensable right arm injury on _____, when a bench fell on his right arm. The claimant sought medical treatment at (clinic) that same day. The claimant treated at the clinic from _____, through October 9, 2000, and was returned to light-duty work on August 25, 2000. The claimant's primary care giver during this period was Ms. O, a physician's assistant to Dr. W. Upon returning to work on August 25, 2000, the employer gave the claimant a supervisory position to accommodate his restrictions. The claimant was referred to Dr. M, who prescribed a regimen of physical therapy. The claimant was terminated for cause by the employer on September 29, 2000.

The claimant attended a follow-up examination with Ms. O on October 9, 2000, at which time the claimant requested that she take him completely off work so that he could collect workers' compensation benefits. The claimant was informed that he was not completely disabled, and was released to light-duty work with specific restrictions. On October 18, 2000, the claimant completed an Employee's Request to Change Treating Doctors (TWCC-53) from Dr. W to Dr. C. The claimant stated that his reason was that he was not receiving the appropriate medical treatment, wanted to get well to return to work, and lacked confidence in Dr. W. The Commission approved the claimant's request on October 27, 2000. The carrier received the approved TWCC-53 on November 7, 2000, and disputed it by completing a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 8, 2000, and completing a Request For a Benefit Review Conference (TWCC-45) dated November 16, 2000.

Dr. C examined the claimant on November 6, 2000, at which time he took the claimant off work and recommended the claimant undergo a regimen of a home program treatment using exercises and cryotherapy. Dr. C opined that reattachment of the biceps tendon may be needed, and the claimant was referred to Dr. S for an orthopedic evaluation and treatment.

The claimant was next seen by Dr. P, the carrier-selected doctor, for a required medical examination (RME) on December 21, 2000. Dr. P certified that the claimant was not at maximum medical improvement (MMI), and no impairment rating could be assigned. Dr. P opined that the claimant could return to light-duty work with the restriction that he not lift more than 10 pounds with his right arm for more than 4 hours per day. At the time of the CCH, no doctor had released the claimant back to regular duty.

VENUE

First, addressing the hearing officer's determination that venue was proper in city 2 Field Office, the parties stipulated on the record that venue was proper in the city 1 [sic] Field Office, and it appears that the hearing officer made a typographical error in his Conclusions of Law No. 2. We reform that determination to conform to the stipulation of the parties that venue was proper in the city 1 Field Office.

ABUSE OF DISCRETION

Section 408.022 and Rule 126.9 control the requirements for a change of treating doctor. Section 408.022 provides, in pertinent part:

- (c) The commission shall prescribe criteria to be used by the commission in granting the employee authority to select an alternate doctor. The criteria may include:
 - (1) whether treatment by the current doctor is medically inappropriate;
 - (2) the professional reputation of the doctor;
 - (3) whether the employee is receiving appropriate medical care to reach maximum medical improvement; and
 - (4) whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired.
- (d) A change of doctor may not be made to secure a new impairment rating or medical report.

The hearing officer found as fact that the claimant requested a change of treating doctors from Dr. W to Dr. C because Dr. W had released the claimant to return to light-duty work, which the claimant accepted until he was terminated, and the claimant subsequently wanted a new medical report taking him completely off work. Under these facts, the Appeals Panel has affirmed hearing officers' determinations that the Commission abused its discretion in approving the change. See Texas Workers' Compensation Commission Appeal No. 000413, decided April 10, 2000. Additionally, where the claimant's own testimony at least partially impeached the rationale stated in his TWCC-53, the hearing officer could properly consider such in determining the abuse-of-discretion issue. See Texas Workers' Compensation Commission Appeal No. 982207, decided November 2, 1998. In the present case, the claimant testified that on October 9, 2000, he did in fact request Dr. W's physician's assistant to take him totally off work so that he could receive workers' compensation benefits. While the claimant denied that was the reason he filed his TWCC-53 on October 18, 2000, Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as 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 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

The claimant, for the first time on appeal, asserts that Dr. W was not his treating doctor and a TWCC-53 was not needed pursuant to Rule 126.9(c). The claimant, having not raised this issue at the benefit review conference or CCH, has waived it.

We find the evidence of record sufficient to support the hearing officer's determination and affirm on this issue.

DISABILITY

The hearing officer determined that the claimant "did not sustain disability from September 29, 2000, and continuing through the date of the hearing on January 30, 2001, or for any other period, due to the compensable injury the claimant sustained while working for the employer on _____." The hearing officer based this determination on his finding that the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage was due to his termination for cause, and not due to the compensable injury.

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 determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. When an employee sustains a compensable injury, receives a light-duty release, returns to the employer at light duty, and then is terminated by the employer, we must consider

whether the termination was for cause. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. If the termination was for cause, the employee must establish disability after the termination by credible evidence. *Id.* Disability, by definition, depends upon there being a compensable injury. Appeal No. 92147, *supra*.

The fact that a claimant is released for light duty is evidence that the effects of the injury continue and disability therefore exists; even a claimant terminated for cause may establish disability thereafter. Appeal No. 91027, *supra*. The 1989 Act does not impose on an injured employee the requirement to engage in employment while still suffering from the lingering effects of his injury unless such employment is readily available and fully compatible with his physical condition and generally within the parameters of his training, experience, and qualifications. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. We direct attention to Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998, for an informative discussion of the case law pertaining to a determination of disability after termination from employment. All of the medical reports submitted into evidence indicate that the claimant was released to light-duty work with restrictions from the date of the injury. There is no evidence that the claimant had been released to return to work without restrictions as of the date of the CCH. Dr. W released the claimant to light-duty work with restrictions as to the right arm; Dr. C had taken the claimant entirely off work as of November 6, 2000; Dr. P, the carrier-selected RME doctor, examined the claimant on December 21, 2000, and determined that he had not reached MMI, and that he could return to light-duty work with the restriction that he not lift more than 10 pounds with his right arm for more than 4 hours per day.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find that the overwhelming weight of the evidence supports a determination that the claimant had disability from September 29, 2000, through the date of the hearing.

Because the evidence supports a determination that the claimant had disability from September 29, 2000, to the date of the hearing, we reverse the disability determination and render a new decision that the claimant had disability from September 29, 2000, through the date of the hearing.

TIMELY DISPUTE OF THE ORDER APPROVING THE CHANGE OF TREATING DOCTOR

In his appeal, the claimant disputed a number of the hearing officer's findings of fact and conclusions of law. Among them was the hearing officer's determination that the carrier timely disputed the order approving the change of treating doctor, pursuant to Rule 126.9(g).

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain, *supra*; Pool, *supra*. Applying this standard of review to the record of this case, we find there is sufficient evidence in the record to support the hearing officer's determination that the carrier timely disputed approval of the request to change treating doctors.

The hearing officer is affirmed on this issue.

Michael B. McShane
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge