

APPEAL NO. 041906
FILED SEPTEMBER 22, 2004

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 7, 2004. The hearing officer determined that the respondent (claimant herein) had disability beginning on April 10 and continuing through April 28, 2002; beginning December 11, 2002, and continuing through August 14, 2003, and beginning January 16, 2004, and continuing through the date of the CCH. The appellant (carrier herein) files a request for review in which it argues that the hearing officer's finding of disability was contrary to the evidence, that it was not supported by medical evidence, and that it was legally incorrect because it failed to take into account the date of maximum medical improvement (MMI). There is no response from the claimant to the carrier's request for review in the appeal file.

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 carrier argues that the hearing officer erred in determining disability without reference to MMI. The carrier contends that by finding disability after MMI, the hearing officer erred and left the carrier without any basis to determine the period for which it owes temporary income benefits (TIBs). This is simply not true. In Texas Workers' Compensation Commission Appeal No. 992069, decided October 28, 1999, we explained the relationship between MMI and disability as follows:

In his decision, the hearing officer ended the claimant's disability on January 8, 1999, the date Dr. G certified as the claimant's date of MMI. At the outset, we note that disability and MMI are different concepts under the 1989 Act. While a claimant's entitlement to TIBs ends when he or she reaches MMI, disability, the inability to obtain and retain employment at wages equivalent to the preinjury wage (Section 401.011(16)), does not necessarily end on that date. Texas Workers' Compensation Commission Appeal No. 980919, decided June 15, 1998; and Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. That is, disability may exist separately from entitlement to TIBs. Texas Workers' Compensation Commission Appeal No. 950879, decided July 17, 1995. The hearing officer in this case confused these concepts and erred in ending disability on the date Dr. G had certified MMI. Thus, we reverse his disability determination and remand for him to determine the period, or periods of time, the claimant had disability as a result of her compensable injury.

Thus, in the present case the hearing officer correctly determined disability without reference to the date of MMI.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. 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 of the weight and credibility that is to be given to 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). 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). Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. There was clearly conflicting evidence in this case concerning disability and based upon the above standard of review, we find no basis to reverse the hearing officer's decision concerning disability.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO F. MALO
ZURICH NORTH AMERICA
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS, 75251.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Margaret L. Turner
Appeals Judge