

APPEAL NO. 970089

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on December 11, 1996, with (hearing officer) presiding as hearing officer. He determined that because of a compensable injury sustained on (date of injury), the respondent (claimant) had disability from September 14, 1995, until the date of the hearing. The appellant (carrier) requested review, contending that since the claimant voluntarily retired on October 1, 1995, his disability ended on September 30, 1995, and requesting that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant had disability from September 14, 1995, to September 30, 1995. The claimant responded, stating that he still cannot do the work that he did before he was injured and that he agrees with the findings of the hearing officer. The claimant requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

The claimant worked as a machinist for the employer. He testified that he retired on October 1, 1995, soon after his 62nd birthday; that he started thinking about retiring about three years before he retired; and that he submitted his written request to retire in February 1996. He stated that after he retired he planned on traveling, working part time as a machinist when he needed money, and working in his wood shop. The claimant said that he injured his lumbar spine on (date of injury), before he retired; that (Dr. W) performed a fusion on his spine on February 5, 1996; that he has not returned to work after the injury; that he last saw Dr. W on October 29, 1996, when Dr. W told him that he might be able to return to light-duty work in December 1996 but that it would depend on the fusion; that Dr. W has not released him to return to work; and that he will see Dr. W on December 16, 1996.

The claimant contended he had disability from the compensable injury that continued until the date of the hearing because he was unable to work because of the injury and he intended to work part time after he retired. The carrier contended that disability ended when the claimant retired on October 1, 1995, that his intention to perform part-time work while retired did not establish disability, and that he has not established he was unable to obtain and retain employment at the preinjury wage because of the compensable injury.

At the hearing and on appeal, the carrier relied on Texas Workers' Compensation Commission Appeal No. 94905, decided August 26, 1994. In that case, the claimant's intent was to retire, travel, and seek part-time employment to supplement her retirement. She sustained a compensable injury on (date of injury); was released to do light duty; worked in a lighter capacity in her department pending retirement; and retired effective May 30, 1992. The hearing officer determined that the claimant did not have disability after she retired on May 30, 1992, and the Appeals Panel affirmed that determination. The carrier also cited Texas Workers' Compensation Commission Appeal No. 950109, decided March 1, 1995. While Appeal No. 94905, *supra*, is cited in that decision, the dispute in Appeal No. 950109, *supra*, centered on the ability or inability of the claimant to work as an occupational nurse. In the case before us, the claimant was not released to work in any capacity during

the time that the hearing officer determined that the claimant had disability. The claimant had not returned to work prior to retirement as the claimant had in Appeal No. 94905, *supra*.

In Texas Workers' Compensation Commission Appeal No. 941012, decided September 14, 1994, the Appeals Panel stated that the compensable injury need not be the sole cause of the inability to obtain and retain employment at the preinjury wage and reversed a determination that the claimant did not have disability and remanded for the hearing officer to apply the proper standard. The focus on the inquiry of whether a claimant has disability is on the inability to obtain and retain employment at the preinjury wage and the fact that a termination was for cause does not, in and of itself, foreclose the existence of disability. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. In Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995, the Appeals Panel affirmed a determination that the claimant had disability after she voluntarily resigned and a doctor told her not to work, in part, due to her compensable injury. That a claimant resigns, retires or is involuntarily terminated may be considered, but does not foreclose the existence of disability.

The determination of the hearing officer that the claimant had disability from September 14, 1995, until the date of the hearing is not inconsistent with the holding in Appeal No. 94905, *supra*. That determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust and there is not a sound basis to disturb it. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge