APPEAL NO. 011513
FILED AUGUST 15, 2001

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 June 11, 2001. The hearing officer resolved the disputed issues by determining the following:

1. The respondent/cross-appellant (claimant) did not have disability from March 24, 2001, to April 15, 2001, resulting from the injury sustained on _____;

2. The claimant is entitled to change treating doctors pursuant to Section 408.022; and

3. The appellant/cross-respondent (carrier) did not waive the right to dispute the order regarding a change in the claimant's treating doctor by failing to file a dispute within 10 days after receiving the order.

The carrier filed an appeal asserting that the hearing officer erred in determining that the claimant was entitled to change treating doctors. The claimant filed a cross-appeal asserting that the hearing officer erred in determining that he did not have disability, and in finding that the carrier did not waive the right to dispute the change of treating doctors. Neither the carrier nor the claimant filed a response to the appeal or cross-appeal.

DECISION

Affirmed.

Section 408.022(c) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §126.9(d) (Rule 126.9(d)) set forth the criteria for change of treating doctors. Section 408.022(c) provides:

> The [Texas Workers' Compensation Commission (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.

There was evidence before the hearing officer from the claimant's testimony and the Employee's Request To Change Treating Doctors (TWCC-53) that the claimant had lost confidence in his treating doctor and that the claimant had not seen any improvement of his medical condition and had been feeling exacerbating pain with any activity done. The hearing officer did not err in determining that the claimant was entitled to change treating doctors.

The hearing officer did not err in determining that the claimant did not have disability from March 24, 2001, to April 15, 2001, resulting from the injury sustained on_____. Section 401.011(16) provides that disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The hearing officer was not persuaded by the claimant's testimony or the medical reports in evidence that the claimant was unable to perform his job duties from March 24, 2001, through April 15, 2001.

The hearing officer did not err in determining that the carrier did not waive the right to dispute the change of treating doctors, pursuant to Rule 126.9(g). The hearing officer determined that the carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) disputing the change of treating doctors on March 27, 2001, and filed a Request for a Benefit Review Conference (TWCC-45) which only disputed entitlement to temporary income benefits (TIBs) on April 2, 2001. The Appeals Panel has held that while filing a TWCC-45 may be the preferred way to dispute an order concerning change of treating doctors, filing a TWCC-21 disputing change of treating doctors within 10 days of receiving the order approving the request to change treating doctors is a timely dispute. Texas Workers' Compensation Commission Appeal No. 000620, decided May 11, 2000.

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. Section 410.165(a). 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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will reverse the factual determinations of a hearing officer only if those determinations are 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 decline to substitute our opinion of the evidence for that of the hearing officer.

The claimant asserts on appeal that the hearing officer stated that the claimant was represented by an attorney. We agree that the hearing officer has incorrectly stated that the claimant was represented by an attorney, when in fact he was assisted by an ombudsman. We perceive no error from this obvious typographical error. The parties were correctly identified in the record.

The decision and order of the hearing officer are affirmed.

Michael B. McShane
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge