APPEAL NO. 990256

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 December 9, 1998. He (hearing officer) determined that the appellant (claimant) had disability from January 26, 1998, through July 6, 1998, as a result of a _____, compensable injury. The claimant appeals this determination, contending that it is against the great weight and preponderance of the evidence. The respondent (carrier) replies that the claimant's appeal is untimely and that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

We consider the claimant's appeal timely based on a deemed date of receipt of January 19, 1999, which was a state holiday. The 15 days for timely filing an appeal began the next day, January 20, 1999, and expired on February 4, 1999. The claimant's appeal was postmarked on this day and received within five days, that is, on February 8, 1999. For this reason, it is timely. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)).

The claimant worked as a home care nurse. On _____, she sustained a back injury while holding a patient. The claimant first sought treatment from Dr. C on January 28, 1998. The diagnosis was cervical/lumbar strain. He prescribed medication and physical therapy. After three weeks of therapy, according to the claimant, Dr. C told her he could do no more for her and that if she did not return to work she would likely be terminated. The claimant then changed treating doctors to Dr. T, who also diagnosed cervical and lumbosacral strain. On July 6, 1998, he considered the injury resolved and concluded that she could return to work safely "at her current job status." The claimant disagreed and sought treatment from Dr. J, D.C., who became, and remains, her treating doctor. At his initial examination on May 5, 1998, Dr. J diagnosed a sprain/strain injury to the cervical, thoracic, and lumbar areas of the spine. He provided chiropractic treatment multiple times per week thereafter. Presumably, he considered her unable to return to work from the date of his initial treatment, but did not place her in an off-work status in writing until September 1, 1998. The claimant testified that as of the CCH she did not believe she was able to return to work.

Other medical evidence included a report of an MRI on July 17, 1998, which reflected mild bulging at L4-5 and L5-S1, with no evidence of herniation or nerve root involvement, and degenerative changes at L3-4 and L4-5. Dr. P, the designated doctor in this case, completed a Report of Medical Evaluation (TWCC-69) on August 18, 1998, in which he found the claimant not at maximum medical improvement (MMI) and recommended further physical therapy. An independent medical examination at the request of the carrier was performed by Dr. PY on June 16, 1998. He found no objective

evidence to corroborate the claimant's subjective complaints of pain and concluded she was at MMI and able to return to full duty as of the date of his examination. A functional capacity evaluation (FCE) done on September 9, 1998, concluded that the claimant could work at a sedentary level.

At issue in this case is whether the claimant had disability after July 6, 1998. The claimant appeals the following findings of fact and conclusion of law of the hearing officer:

**FINDINGS OF FACT**

6. The claimant has received extensive conservative treatment and physical therapy for her condition by different providers, to wit: [Dr. C, Dr. T, and Dr. J].

7. As of July 6, 1998, the claimant was capable of returning to work at her prior job.

* * * *

9. The claimant failed to prove by a preponderance of the credible evidence, that she sustained any disability after July 6, 1998.

**CONCLUSION OF LAW**

3. Claimant had disability beginning on January 26, 1998 and continuing through July 6, 1998.

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wages." Section 401.011(16). The claimant has the burden of proving disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4,1995. Whether disability exists is a question of fact for the hearing officer to decide and can be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

In her appeal, the claimant argues essentially that she still needs therapy before she can return to work and that the hearing officer was wrong in finding that she already received extensive treatment. She further observes that Dr. C refused treatment after two or three visits; that Dr. T only saw her twice; and that the "first doctor to take an active role in Claimant's recovery was [Dr. J]." The hearing officer considered the nature of the injury in this case, as consistently diagnosed by all doctors who saw the claimant, and the amount of treatment each gave. When considered together, the treatment given by these doctors could fairly be described as "extensive." Similarly, it is clear that the near total majority of the treatment, if measured solely in terms of office visits and disregarding the physical therapy recommended by Dr. T and attended by the claimant, was given by Dr. J.

Nonetheless, in his role as fact finder, the hearing officer was the sole judge of the weight and credibility of the evidence, including the claimant's testimony, the results of the FCE, and the medical opinions in evidence. Section 410.165(a). He could accept or reject, in whole or in part, any of the evidence, including the medical evidence. As he stated in his decision and order, he did not find the claimant persuasive in her own or Dr. J's assertion of disability. While Dr. P found the claimant not yet at MMI, this finding is not inconsistent as a matter of law with a finding of no disability after July 6, 1998. *See* Section 408.101(a) which addresses disability and not having reached MMI as essential for the award of temporary income benefits.

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 decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the evidence found credible by the hearing officer, particularly the opinions of Dr. C, Dr. T and Dr. PY, sufficient to support his resolution of the disability issue.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge