APPEAL NO. 93579

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on June 7, 1993, in (city), Texas, to determine two issues: whether the claimant was offered light duty within the restriction given by his doctor from the injury of (date of injury); and whether the claimant has continuing disability. The claimant, who is the appellant in this case, appeals hearing officer (hearing officer) determination that the evidence failed to show that the claimant has had disability as a result of his compensable injury since August 3, 1992. In its response, the carrier contends that the hearing officer's determination is supported by the medical evidence and claimant's own testimony.

DECISION

We affirm the hearing officer's decision and order.

The claimant, who was an assistant manager for (employer), suffered a compensable back injury on (date of injury), when he fell while lifting a case of soft drinks. He was originally seen in a hospital emergency room, and sometime thereafter began treating with (Dr. S).

On March 13, 1992, Dr. S wrote claimant's employer that he had discussed returning to work with claimant the previous day. The letter said that "I [Dr. S], again, advised him against doing any heavy type of work requiring moving, lifting, pushing, pulling any object heavier than 10 pounds. Repetitive bending, prolonged sitting and standing could also aggravate his condition. If [employer] has any job that does not require any of the above activities, [claimant] needs to be rehabilitated for that type of work." The claimant testified that Dr. S by this letter was not releasing him to return to work but was merely discussing work restrictions with him.

On July 20th, employer sent claimant a letter in which it was stated that the employer would modify and/or create a position for claimant "in accordance with any restrictions your doctor may feel are warranted." The letter went on to state that employer would pay claimant his full salary for the modified position and would adjust claimant's schedule to meet any medical treatments. It urged claimant to contact the area manager as soon as possible.

The claimant testified that he took this letter to Dr. S, who stated that claimant could not return to work. On December 17th, Dr. S wrote a letter giving the following work restrictions to claimant: no lifting more than 15 pounds, no standing more than four hours per day, no climbing, and no stooping. He also suggested claimant not drive long distances. Dr. S stated that these restrictions were effective from October 1, 1992. On December 11, (Dr. L), whom claimant had also been seeing, assessed the same restrictions, although he did not make them effective October 1. Dr. L also found claimant to have reached maximum medical improvement (MMI) on December 4, 1992, with a 10% whole body impairment rating.

Following a period of time in which claimant said he tried unsuccessfully to contact a representative of employer, and no job was offered him which did not require driving time of about 45 minutes, employer on February 1, 1993, terminated claimant. A letter of that date to claimant basically attributed the termination to claimant's lack of response to employer's latest job offer, which apparently had been made verbally in October 1992. An October 13th letter to claimant from employer's representative had complained of claimant's failure to keep appointments to discuss jobs and requested a written statement of claimant's work restrictions (claimant said Dr. S's December 17th letter was written in response to this request). Claimant said that since July of 1992 he was capable of going back to light duty work, so long as it was within his doctor's restrictions.

The claimant testified that he had started his own travel business three years before, and that since the date of injury he has been going to that job sometimes as much as four hours a day, pursuant to his restrictions (he said he could not sit for eight hours because of the pain). He said that he did not go into the office every day, but just when he needed to do paperwork.

An August 3, 1992, letter from (Dr. B), who examined claimant once, observed that tests (EMG, MRI, and myelogram) "showed some abnormalities in the discs," although he said he had not seen the films but only had seen the reports. He noted that claimant continued to have back pain, but said "neurologic is normal." Dr. B also observed that the claimant was working at the time of the examination, "and I would certainly encourage him to continue to do so." At the hearing, claimant said this was a misunderstanding, and he denied telling Dr. B about the travel agency. Claimant also said he never went back to work for employer after the injury.

The hearing officer held that the employer's letter of July 20, 1992, did not state the position offered, the duties of the position, that employer was aware of the doctor's restrictions, the maximum physical requirements of the job, or the location of the employment, and thus employer did not make a *bona fide* offer of light duty employment to claimant pursuant to rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §129.5 (Rule 129.5). This determination was not appealed by either party.

The hearing officer also stated in her statement of evidence that although the exact time frame is not clear, the record reflects that the claimant has been working at his travel business during the time that he has not been working for employer as a result of the (date of injury) injury. The hearing officer also noted Dr. B's opinion of August 3, 1992, including the fact that Dr. B encouraged claimant to keep working, and she concluded that the claimant has not had disability since that date.

The claimant on appeal alleges that the evidence shows he has disability, and that he can work only light duty four hours a day. The claimant's timely appeal was followed by an untimely letter attaching reports dated August 3 and 9, 1993 from a doctor to whom claimant said he had been sent by the Texas Workers' Compensation Commission.

The 1989 Act defines disability as the inability to obtain or retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). This panel has ruled that there is no limit on the evidence that may be considered by a hearing officer in making a determination on disability. Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992. In making her determination, the hearing officer was clearly persuaded by the fact that the claimant had the ability to do some form of work, as evidenced by his presence at the travel agency, along with Dr. B's assessment. We have previously ruled that the report of a non-treating doctor assessing a claimant's ability to work can appropriately be considered in determining the factual issue of an end of disability. Texas Workers' Compensation Commission Appeal No. 92206, decided July 6, 1992.

The Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). We will not overturn the hearing officer's decision unless it is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

With regard to the new evidence attached to claimant's August 10, 1993, letter, we have already noted that this correspondence does not constitute a timely appeal or amendment thereto under Article 8308-6.41(a), which provides that a party that desires to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received. Furthermore, the Act requires that this panel's review of the evidence is limited to the record developed at the contested case hearing. Even though these documents obviously came to claimant's knowledge after the hearing, there was no showing that it was not owing to a lack of diligence that they did not come to his knowledge sooner, that they are not cumulative, or that the information contained therein would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 92156, decided June 1, 1992.

The decision of the hearing officer is affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Gary L. Kilgore
Appeals Judge