APPEAL NO. 980532

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A hearing was held in _____, Texas, with (hearing officer) presiding. She determined that appellant (claimant) did not have disability from February 10, 1993, through November 3, 1994, and that no bona fide offer of employment was made to him. Claimant asserts that the determination of no disability is in error because the hearing officer found that claimant was released to limited duty. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We reverse and remand.

Claimant worked for (employer) on_____, when he hurt his back. The parties stipulated that a compensable injury occurred on _____. Claimant described his job as involving candy making and said that a heavy pot of candy struck his back on_____. Within the first three months of the injury, claimant was seen by several doctors. There appears to be no dispute that claimant was initially taken off work.

Studies made during the initial months of treatment included a CT scan on November 12, 1992, which noted a bulging disc at L5-S1 with degenerative changes at L4-5 and L5-S1. An MRI of the lumbar spine was done on December 16, 1992, which was reported as normal, with disc spaces normal and no evidence of degeneration or herniation. An EMG on December 29, 1992, was reported as normal "with no evidence of lumbar radiculopathy, plexopathy or neuropathy." The EMG report also contained a comment of "gross functional overlay" and "symptom magnification and embellishment throughout," with a recommendation from the reporting physician against any further "neurodiagnostic or curative therapeutic intervention."

On January 18, 1993, Dr. F noted the normal report of the EMG, the normal MRI (which did not confirm disc bulging as shown on the CT scan) and indicated that a functional capacity evaluation (FCE) should be done; he added that he had nothing further to offer claimant. On January 28, 1993, an FCE was performed which reported inconsistency in testing with an inability or refusal to perform some aspects of the testing. The report said that the assessment was "highly invalid" and that claimant "grossly exaggerated his response." The report concluded by indicating that claimant could do sedentary work and recommended physical therapy. Dr. F, after receiving this report, provided two documents contained in the record of hearing, a letter dated February 4, 1993, which said the FCE confirmed "gross exaggeration"; Dr. F also said, "I think at this point, he should be able to resume a light duty activity, no heavy lifting, no prolonged sitting or standing, no repetitive bending or twisting" with a "conditioning program" said to be "likely" required for him to resume full duty. Dr. F, on February 7, 1993, also provided a Report of Medical Evaluation (TWCC-69), which said that claimant reached maximum

medical improvement (MMI) on February 4, 1993, with a zero percent impairment rating (IR).

Thereafter, although no further records of Dr. F were included in the evidence before us, Dr. M, a neurologist, saw claimant on March 18, 1993, upon referral from Dr. F. He reviewed the studies and tests previously discussed and examined claimant. He believed that claimant had a bulging disc and back spasms; he recommended pain care on a provisional basis, noting claimant's anxiety and symptom magnification. In addition, a designated doctor, Dr. P, in 1997 referred to having seen the claimant in June 1993. A letter from the Texas Workers' Compensation Commission (Commission) to Dr. P in 1996 refers to Dr. P having previously found that claimant reached MMI on June 14, 1993, with a five percent IR. In addition, a report by Dr. D in 1997 also refers to Dr. M having seen claimant in 1993, and Dr. D also refers to a physical therapy evaluation of March 22, 1993 and "other notes" from a pain care center. (The record does not contain either the 1993 report of MMI/IR by Dr. P or the physical therapy and pain care center notes of 1993.) Dr. D also refers to a psychological assessment by Dr. C Ph.D., of March 30, 1993 (mentioning amplification of symptoms), but the record does not contain this report either.

No other reports of treatment in 1993 are provided, and Dr. W indicates that he first saw claimant on January 10, 1994. He said at that time that claimant should not work. He again saw claimant on January 20, 1994, and then notes on October 19, 1995, that he last saw claimant in January 1994. Dr. W, in 1997, provided two short answers to two questions, indicating that claimant could not have done even limited work from February 4, 1993, to January 1994, and that he could not do even limited work from January 1994 to the present (1997).

Beginning in 1996, additional tests were performed on claimant, and the presence of a herniated disc at L5-S1 was diagnosed. Other reports from the period 1995 through 1997 will not be discussed in this review, but may be considered by the hearing officer on remand. The hearing officer found that no bona fide offer of limited employment was made in February 1993 and that finding has not been appealed. It is therefore final and is not a matter for further consideration upon remand.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She may consider both lay and expert evidence in determining whether disability existed during the stated period in question. She may weigh medical evidence just as she may weigh other evidence.

In this case, two findings of fact present a question which the hearing officer should reconcile. One finding said that Dr. F concurred with the FCE and released claimant "to light duty with no heavy lifting, no prolonged sitting or standing, no repetitive bending or twisting" in a "credible report dated February 4, 1993." Another finding said that medical evidence failed to establish that claimant was "unable to obtain or retain employment at wages equivalent to preinjury wage from February 10, 1993 through November 3, 1994." The hearing officer should reconsider these two apparently inconsistent findings of fact and

indicate, based on all the evidence, whether she found claimant was unable to obtain or retain employment at wages equivalent to preinjury wages from February 10, 1993, to some later date (which may be November 3, 1994). In providing these findings of fact, no additional evidence should be considered.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Christopher L. Rhodes
Appeals Judge