

APPEAL NO. 990563

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 10, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) sustained a compensable upper back injury on _____ (all dates are 1998 unless otherwise stated), and that claimant had disability from October 27th through November 14th. The hearing officer's decision on the compensable injury has not been appealed and has become final. Section 410.169.

Claimant appeals the disability determination, contending that her doctor had her in an off-work status, that she had told the employer that she was willing to work "as soon as my doctor told me 'I was able to do so'," and that no bona fide job offer was made. Claimant requests that we reverse the hearing officer's determinations on disability and render a decision in her favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant was employed by (employer) and assigned to (client A) as a computer inspector. Claimant testified that on _____ she felt a pain in her neck and back "pulling a rail." Although there was considerable testimony and evidence, including photographs, about the details and mechanics of her injury, because the issue of injury has not been appealed we will summarize only the evidence as it relates to disability. Claimant continued to work from _____, through October 23rd, with October 24th and 25th being a weekend, and reported for work on October 26th. Claimant was sent to a doctor on October 26th, but instead went to a hospital emergency room (ER) on October 27th. The ER report of October 27th indicated an "upper Back sprain" and placed claimant on "light duty X 1wk." Claimant then saw Dr. N, who, in an Initial Medical Report (TWCC-61) for a November 2nd visit, diagnosed cervical, thoracic, and lumber sprains and released claimant to "Limited Type of Work: 11-15-98."

There was some testimony whether or not claimant was going to be laid off by client A in a pending reduction in force and he may in fact have been laid off. Ms. M testified that the employer had a light-duty program and that she spoke with claimant on October 26th about a light-duty position, explaining that claimant would be making copies, doing light filing or whatever claimant's doctor authorized for the employer but that claimant wanted to go back to work for client A because she lived close to client A's premises. Ms. M testified that she again spoke with claimant on the telephone on November 2nd, again offering claimant a light-duty office position with the employer or another client company at whatever restrictions claimant's doctor listed but that claimant did not want to work anywhere else but with client A. In evidence are off-work slips from Dr. N saying claimant "may not resume work" dated November 2nd, December 10th, and January 5, 1999. Claimant relies on these off-duty slips as establishing disability.

The hearing officer found:

FINDINGS OF FACT

5. On November 2, 1998, her treating doctor indicated that she could return to light duty work on November 15, 1998 and her recorded statement indicates she could have returned to light duty work by November 15, 1998.
6. By November 2, 1998, the Claimant was offered a light duty position with her employer but she refused it.

The hearing officer found claimant had disability through November 14th and claimant contends that she has continuing disability as evidenced by her testimony and Dr. N's off-duty slips.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. As we have frequently noted, the testimony of a claimant alone may establish disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). However, a claimant's testimony only raises an issue of fact which the hearing officer can believe or not. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In this case, the hearing officer found that claimant sustained an upper back strain/sprain and the medical reports establish a return to light or limited duty by November 15th. The evidence is unclear why Dr. N in the TWCC-61 form and narrative dated November 2nd released claimant to light duty on November 15th and at the same time in an off-work slip, also dated November 2nd, took claimant off work altogether. It is the responsibility of the hearing officer to resolve conflicts and inconsistencies in the evidence, Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ) and this is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer obviously believed Ms. M's testimony that the employer had offered claimant light work within whatever restrictions the doctor imposed whether with the employer or with another client company but that claimant insisted that she only wanted to work for client A. Under the circumstances, we find the hearing officer's decision supported by the evidence.

Claimant, in her appeal, cites Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(a) and (b) (Rule 129.5(a) and (b)) contending no bona fide offer of employment was made. Rule 129.5(a) lists the elements that should be considered in determining whether an offer is bona fide, including the expected duration of the offered position, the length of time the offer was kept open, whether the offer accommodates claimant's physical capabilities, and

the distance from the employee's residence the work is. Clearly, there was no written offer which would create a presumption of a bona fide offer. However, Rule 129.5(b) provides that if the offer was not made in writing, the carrier is required to provide clear and convincing evidence that a bona fide offer was made. The hearing officer apparently accepted Ms. M's testimony regarding the light-duty offer of employment by the employer or with another client as clear and convincing evidence of a light-duty position making copies or doing light filing, and that offer was made on October 26th and repeated on November 2nd. We cannot say that the hearing officer's decision on this point was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge