APPEAL NO. 990816

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 March 11, 1999. The issues at the CCH were whether the appellant (claimant) had disability from December 7, 1998, through the date of the hearing, and whether the employer made a bona fide offer of employment to the claimant entitling the respondent (carrier) to adjust the postinjury weekly earnings, and if so, for what period. The hearing officer determined that the claimant did not have disability from December 7, 1998, through the date of the hearing, and the employer did not make a bona fide offer of employment to the claimant. The claimant appeals, urging that she did have disability from December 7, 1998 through the date of the hearing. The carrier responds that sufficient evidence supports the challenged determination. The determination of bona fide offer of employment has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant testified that she sustained a back injury on _____, when she lifted a file cabinet while performing her job duties as a janitor. The claimant testified that she received medical treatment from Dr. D, who referred her to Dr. H. On December 7, 1998, Dr. H diagnosed left sacroiliac strain and lumbar strain, and released the claimant to light duty, no lifting over 20 pounds and instructions to avoid prolonged bending. The claimant testified that she returned to work on December 10, 1998, and worked on December 11 and December 14, 1998. The claimant resigned employment on December 15, 1998, and has not worked for any employer since that date.

The claimant testified that when she returned to light-duty work on December 10, 1998, she was assigned duties that did not require her to bend and included: cleaning sinks, sweeping floors, mopping, dusting, and cleaning desks. The claimant testified that at times her supervisor, Ms. MA, would give her too much work and that she was assigned more work after the injury than before. The claimant stated that she had worked for Ms. MA approximately one year and that she began to have conflicts with her after she started to miss work. The claimant testified that on December 15, 1998, she requested a meeting because Ms. MA was giving her another area to work, and she was not able to do so much work. The meeting was attended by the claimant, Mr. F, the principal, and Ms. MO, the assistant principal. The claimant testified that Mr. F told her that she would have to follow the orders of Ms. MA, and that if she did not want to, she should look for another job. The claimant testified that she resigned employment on December 15, 1998, because she was dissatisfied with her work, she was given too much work, and because of the way Mr. F spoke to her. Upon being asked by the hearing officer what work was assigned that she felt was not proper, the claimant responded, "I don't know."

The carrier asserted that the claimant did not have disability after December 7, 1998, and presented the testimony of Ms. MA and Ms. MO in support of its position. Ms. MA testified that, after the claimant was released to light duty, Mr. F instructed her to give the claimant light duty, dusting only. Ms. MA testified that she told the claimant her job duties were to dust the library shelves and furniture with a feather duster, which did not require any lifting or bending. According to Ms. MA, the claimant did not follow her instructions and started cleaning the bathrooms and mopping. Ms. MO testified that at the meeting on December 15, 1998, the claimant told Mr. F that she was not happy taking on another area and was complaining that she did not want to do dusting, because it was an added responsibility. Ms. MO testified that the claimant never indicated at the meeting that she was physically incapable of performing the light-duty work she was given. According to Ms. MO, the claimant had complained prior to _____, about Ms. MA. Ms. MO testified that while claimant was working light duty, she was paid her normal pay.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant has the burden to prove by a preponderance of the evidence that he has disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Whether disability exists is a question of fact and may be established by the claimant's testimony alone. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. The claimant asserts disability from December 7, 1998, through the date of the CCH. The evidence indicates Dr. D, as of November 16, 1998, had not released the claimant to return to work. Dr. H, on December 7, 1998, released the claimant to return to light duty; the claimant returned to work on December 10, 1998, and then voluntarily resigned her employment on December 15, 1998. The claimant asserts that her disability should be measured not against her capacity to return to lighter work, but rather against her capacity to perform the daily tasks of her usual employment. We note that by definition, disability is dependent on the inability to obtain and retain employment at preinjury wage. (Emphasis added.) Section 401.011(16).

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer felt there was sufficient evidence that the claimant voluntarily resigned her employment on December 15, 1998, because she did not get along with her immediate supervisor and further, advised her employer that she would not take directions or accept assignments from the supervisor. Additionally, the hearing officer found that at the time of her resignation, the claimant's assigned duties were within the medical restrictions provided by her doctor; and from December 7, 1998, to the date of the CCH, the claimant was physically able to work as a janitor for the employer at her preinjury wage. There was conflicting evidence concerning whether the claimant was able to perform the work that employer assigned after December 7, 1998, and the reasons the claimant voluntarily resigned her employment. Voluntary resignation from gainful employment is a factor to be weighed for disability. The hearing officer, after considering the testimony and documentation regarding the claimant's termination, found the resignation was for noninjury related reasons. It was for the hearing officer to resolve any conflict in the evidence and testimony before him. Garza v. Commercial Insurance

Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In weighing the testimony, the hearing officer does not have to accept the testimony of a claimant at face value and can believe all, part, or none of the testimony of any witness. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.); Section 410.165(a). When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight 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). We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not have disability from December 7, 1998, through the date of the CCH.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Judy L. Stephens
Appeals Judge