APPEAL NO. 990863

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 8 and April 6, 1999. The appellant (claimant) and the respondent (self-insured) stipulated that the claimant sustained a compensable injury on _____, and it is undisputed that the claimant had disability until July 9, 1998. The hearing officer determined that on August 25, 1998, the designated doctor, Dr. S, certified that the claimant had not reached maximum medical improvement (MMI); that that certification is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to the report of the designated doctor; that the claimant had not reached MMI as of August 25, 1998; and that the assignment of an impairment rating (IR) was premature. Those determinations have not been appealed and have become final under the provisions of Section 410.169. The hearing officer determined that the claimant had disability from January 1 to July 9, 1998, and from January 11 until April 6, 1999. The claimant appealed; contended that the hearing officer erred in not admitting a report of an MRI of the claimant's left knee dated March 16, 1999; urged that the determination that the claimant did not have disability from July 10, 1998, to January 10, 1999, is against the great weight and preponderance of the evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she had disability during that period. The self-insured responded, urged that the hearing officer did not err in not admitting the MRI report, contended that the determinations of the hearing officer concerning disability are supported by sufficient evidence, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

Only the evidence related to the appealed determination that the claimant did not have disability from July 10, 1998, until January 10, 1999, will be summarized. The claimant, who is five feet and six inches tall and weighed about 300 pounds when the incident occurred, testified that on _____, she sat on a chair that was already broken and fell, hitting a wall and the floor. She said that she immediately had back pain and after about two weeks developed knee pain. In an Initial Medical Report (TWCC-61) dated January 14, 1998, Dr. C, her treating doctor at the time, diagnosed mild vertebral sprain syndrome and left knee post-traumatic synovitis. Dr. C's notes concerning visits in February, March, April, and June 1998 indicate that the claimant complained of back pain and physical therapy reports in January and February 1998 indicate that she was treated for low back pain. In a note dated June 9, 1998, Dr. C stated that an MRI of the claimant's low back was negative; that the results were carefully explained to her; and that she was advised to start working four hours a day with no lifting or walking. Records of Dr. C indicate that the claimant did not keep eight appointments with Dr. C. At the request of the self-insured, the claimant was examined by Dr. F on July 9, 1998. The claimant testified that Dr. F only measured her leg and did not perform any tests. In a narrative attached to a

Report of Medical Evaluation (TWCC-69) dated July 9, 1998, Dr. F noted that the claimant did not keep two prior appointments; that as the result of his examination he was unable to explain her subjective complaints on any credible, demonstrable, objective, pathological basis; that in his opinion she was physically capable of employment without restrictions; and that she had reached MMI with a zero IR. On July 23, 1998, Dr. C indicated on the TWCC-69 that he agreed with the report of Dr. F concerning MMI and IR. In a Specific and Subsequent Medical Report (TWCC-64) dated July 23, 1998, Dr. C said that the claimant was released to return to full-time work on July 23, 1998. In a report dated August 25, 1998, Dr. S stated that the claimant needed additional testing and had not reached MMI. The claimant testified that she was terminated by the self-insured after she was released to return to work at light duty by Dr. C and that she did not receive treatment since she was last seen by Dr. C in June 1998 until she was referred by her attorney to Dr. H, a chiropractor, in January 1999. In a return to work recommendation form dated January 11, 1999, and in a TWCC-61 dated that same day, Dr. H said that the claimant was not capable of working.

We first address the decision of the hearing officer not to admit the report of the MRI of the claimant's left knee that is dated March 16, 1999, and was sent by the attorney representing the claimant to the self-insured the next day. In his report dated September 1, 1998, Dr. S, the designated doctor, stated that the claimant needed to have an x-ray and MRI of her left knee. The claimant did not seek medical treatment from June 1998 until January 1999. At the session of the hearing convened on March 8, 1998, the attorney representing the claimant said that the MRI had been approved, but that the MRI had not been performed. In his Decision and Order, the hearing officer stated that the report of the MRI was not timely exchanged. He did not comment on good cause for not timely exchanging the report of the MRI. In the report of the benefit review conference dated February 8, 1999, the benefit review officer commented on the designated doctor stating the need for an MRI. The claimant missed appointments with Dr. C and Dr. F. She testified that she tried to get an appointment with Dr. C in October 1998, but was not able to because he was on a two-week vacation and he was going to retire from his practice. It appears that the MRI could have been obtained earlier and that the claimant did not use due diligence in not having the MRI performed until March 16, 1999. Evidentiary rulings by the hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary on the part of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94816, decided August 10, 1994. The standard of review on such issues is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 93580, decided August 26, 1993. In determining whether there was an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In the case before us, the hearing officer did not abuse his discretion in not admitting the report of the MRI.

The burden is on the claimant to prove by a preponderance of the evidence that she had disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the

evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer's determinations concerning disability are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the hearing officer's determinations concerning disability, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We do not necessarily agree with the hearing officer's comments concerning the issue of the extent of the claimant's injury. However, those comments do not cause us to reverse the appealed determinations of the hearing officer. We affirm his decision and order.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Judy L. Stephens
Appeals Judge