APPEAL NO. 991405

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 June 10, 1999. The appellant (claimant) and the respondent (self-insured) stipulated that the claimant sustained a compensable injury on _____. The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. As a result of the compensable injury of _____, Claimant was unable to obtain and retain employment at wages equivalent to her pre-injury wage, beginning January 15, 1999 and continuing through February 18, 1999.

3. Claimant's inability to obtain and retain employment at wages equivalent to her preinjury wage, from February 19, 1999 and continuing through the date of this hearing, is due to degenerative disc disease and not the compensable injury of _____.

4. Claimant had not been released to work when the job offers were tendered by the employer, and Claimant has not to this date been released to return to work.

CONCLUSIONS OF LAW

3. As a result of the compensable injury of _____, Claimant had disability only during the period from January 15, 1999 through February 18, 1999.

4. The employer did not make a bona fide offer of employment to Claimant.

The claimant appealed, contended that the extent of injury was not a determination for the hearing officer to make, urged that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in her favor. The self-insured responded, contended that the hearing officer properly considered the evidence before him, urged that the decision of the hearing officer is sufficiently supported by the evidence, and requested that it be affirmed. The determination by the hearing officer that the self-insured did not make a bona fide offer of employment has not been appealed and has become final under the provisions of Section 410.169.

DECISION

We reverse and remand.

The claimant testified that on Thursday, _____, she injured her back working with laundry in a hospital of the self-insured; that she and another worker reported the injury; that she was not scheduled to work the next day, but went to the office because she was hurting so bad; that she was sent to Dr. W by Ms. H; that Dr. W told her to go back to work on Monday; that she was still hurting on Monday; that she and her son went back to the hospital and told Ms. H that she was not happy with the treatment of Dr. W; that Ms. H sent her to Dr. A; that Dr. A placed her on medication and prescribed therapy; that she had one day of therapy; that she decided to see another doctor; and that she went to Dr.F, a chiropractor who was recommended by a friend. The claimant said that she saw Dr. F on January 21, 1999; that he had x-rays taken; that she goes to his clinic every day and is treated with machines and massages; that Dr. F sent her to Dr. B; that Dr. B gave her three injections under anesthesia; that she still has one more week of therapy with Dr. F; and that she has not been released to return to work.

Dr. W testified that he examined the claimant; that he diagnosed a lumbar strain; that she could have returned to work on January 18, 1999; that the claimant did not come back to him; that he reviewed the records of Dr. A and saw no reason she could not have returned to work with no twisting or lifting over five pounds after seeing Dr. A; that he reviewed the reports from other doctors; and that the diagnosis was the same, but recommended treatments were different.

Dr. A testified that he is board certified in physical medicine and rehabilitation; that the claimant had a back strain; that it is expected that a person with a back strain would recover within two days to four weeks; that when he saw the claimant on January 18, 1999, her neurological examination was not remarkable and he thought that she could return to work in about a week; that the claimant did not return to him; that he did not agree with the recommendation of Dr. B in a report dated February 18, 1999, that the claimant was not able to work; that in that report Dr. B stated that neurodiagnostic studies would be helpful and that an MRI was recommended; that an electrodiagnostic study interpretation report without additional testing such as a needle study is not enough to accurately make such a diagnosis; that he does not agree with the impression by Dr. T of suggestive bilateral nerve root dysfunction in his March 2, 1999, report and in that report Dr. T stated that clinical correlation is needed; that the report of an MRI dated March 10, 1999, showed two level disk desiccation which indicates disk degeneration consistent with normal aging; that the MRI did not show nerve root involvement; and that he saw nothing that would prevent the claimant from at least trying to return to work.

Ms. H testified that the claimant had worked in the laundry area; that _____, was the first day that laundry service was contracted out; that on that day the claimant was placed in housekeeping; that on the day that the claimant said that she injured her back, she took the claimant to physical therapy (PT) where hot packs were placed on her back;

that the next day the claimant and her daughter-in-law came to her; that she made arrangements for the claimant to be seen by Dr. W; that on Monday the claimant, her son, and her daughter-in-law came to her; that the son told her that his mother was old and needed time off and that they did not approve of the treatment of Dr. W; that she asked if they wanted her to see another doctor, the response was yes, and she made arrangements for the claimant to see Dr. A; that after the visit everything seemed to be okay; that the claimant went to one PT session; that the son used his mobile telephone to call friends to find a doctor that would take the claimant off work; and that she told the family that the claimant could choose her own doctor.

In a report dated January 21, 1999, Dr. F said that x-rays showed that disc spaces were decreased at L4-5 and L5-S1; said that additional tests would be necessary to rule out nerve pathology; diagnosed lumbar syndrome with myelopathy and lumbar radiculopathy; and took the claimant off work. In a note dated February 12, 1999, Dr. F stated that the claimant was still off work and was not able to work. In his report dated February 18, 1999, Dr. B provided some history concerning the claimant; stated that he performed a neuromuscular examination and provided the results of that examination; diagnosed right sciatic radiculitis and acute lumbar and lumbosacral strain; prescribed medication; and provided a list of recommendations that included that the claimant continue therapy with Dr. F, that an MRI and neurodiagnostic studies be performed because of the positive findings and symptom complaints, that the claimant is not able to work, and that she see him in a month for reevaluation.

In a report dated January 18, 1999, Dr. A said that he prescribed medication, three sessions of PR, and home stretching exercises and that he felt the claimant could return to work at the end of the week or the beginning of the next week. At the request of the carrier, the claimant was seen by Dr. Y on March 15, 1999. Dr. Y examined the claimant and reviewed the medical records, including x-rays and the report of the MRI; diagnosed degenerative disc disease at L4-5 and L5-S1 with superimposed lumbosacral strain; recommended that she undergo epidural steroid injections; opined that she should reach maximum medical improvement in one month; and stated that she could be released to a light-duty status with no lifting over 20 pounds.

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 burden is on the claimant to prove that she has disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. It was not improper for the hearing officer to consider evidence concerning a preexisting condition in making his determination concerning disability.

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). In her appeal, the claimant contends that the medical evidence does not establish that she has degenerative disc disease. The medical records and the testimony of Dr. A are sufficient to establish degenerative disc disease. The hearing officer stated that he considered the testimony and the report of Dr. B dated February 18, 1999, in making his determination that disability did not extend beyond February 18, 1999. We have reviewed the testimony and read the report of Dr. B dated February 18, 1999, and do not find anything in the report of Dr. B that supports ending disability on February 18, 1999, and the finding of fact and conclusion of law that infer that the claimant's disability ended on February 18, 1999, 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We reverse Findings of Fact Nos. 2 and 3, Conclusion of Law No. 3, and the decision of the hearing officer that the claimant had disability only during the period from January 15, 1999, through February 18, 1999, and remand for him to make a finding or findings of fact and a conclusion of law and to render a decision concerning disability.

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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge