

APPEAL NO. 991737

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 19, 1999. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) had disability from December 9, 1998, to April 20, 1999, and that he has not yet reached maximum medical improvement (MMI). In his appeal, the claimant asserts error in the hearing officer's determination that disability ended on April 20, 1999, arguing that his disability continues because he has not been released to full duty. The claimant asks that we render a new decision that he had disability through the date of the hearing. In its cross-appeal, the respondent/cross-appellant (carrier) argues that the hearing officer erred in excluding the evidence of the claimant's positive drug test, which precipitated his termination from a light-duty position with the employer; that the determination that the claimant had disability is against the great weight of the evidence; and that the great weight of the other medical evidence is contrary to the designated doctor's determination that the claimant has not yet reached MMI. The carrier asks that we render a decision that the claimant did not have disability and that he has reached MMI. In his response to the carrier's appeal, the claimant urges affirmance of the MMI determination and of the disability determination, subject to his appeal of the April 20, 1999, ending date of disability.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he injured his low back and suffered a hernia in a lifting incident in the course and scope of his employment as a compressor engine mechanic. The claimant returned to work with the employer for whom he was working at the time of his injury on July 20, 1998, and continued to work for the employer until July 30, 1998, when he was terminated for testing positive for cocaine. At a prior hearing, the hearing officer determined that the claimant had disability from July 30, 1998, through December 8, 1998, the date of the hearing. That decision was affirmed in Texas Workers' Compensation Commission Appeal No. 990070, decided February 26, 1999 (Unpublished).

The claimant initially treated with Dr. CD, who performed hernia repair surgery on June 25, 1998. Dr. CD released the claimant to light duty in July 1998 and, as noted above, the claimant returned to work for his employer at the time of the injury under that release. In January 1999, the claimant changed treating doctors to Dr. CTD, a chiropractor. Dr. CTD took the claimant off work and has continued him in that status. On January 28, 1999, the claimant was examined by Dr. R, an orthopedic surgeon, who was selected to serve as a Texas Workers' Compensation Commission (Commission)-selected required medical examination (RME) doctor. In his narrative report, Dr. R stated that "[t]o state that this patient does heavy work would be an understatement." Dr. R diagnosed disc degeneration at L4-5 and L5-S1, with facet syndrome and recommended facet injections

and a "rehabilitation-reconditioning program for rehabilitation of the spinal musculature in an effort to try and return this man back to gainful employment." Dr. R concluded that the claimant could not return to the level of work he was performing at the time of his injury, but opined that he could "return to work on a light duty basis, that is he is not to climb and balance. He is not to work bent over. He is to lift up to 30 pounds."

On April 20, 1999, Dr. BB examined the claimant as the carrier's RME doctor. In a Report of Medical Evaluation (TWCC-69), Dr. BB certified that the claimant reached MMI on April 20, 1999, with a five percent impairment rating. In his accompanying narrative report, Dr. BB also stated:

I do believe that it is in the best interest of the patient to also state that at this point in time he could return to work. I would specify that he could work in a light to a light-medium category of work with no lifting greater than 30 pounds of weight and no frequent carrying greater than 20 to 25 pounds of weight. It would likely be best for him not to be involved in climbing tasks and not to work over in a lumbar flexed position for periods of time.

Apparently, the claimant disputed Dr. BB's certification and the Commission selected Dr. RB, a chiropractor, to serve as the designated doctor. In a TWCC-69 dated June 30, 1999, Dr. RB certified that the claimant had not yet reached MMI. In his narrative report, Dr. RB stated the "[p]atient is still involved in active treatment protocol by being in process of referral to an orthopedic surgeon for treatment evaluation. Patient may be a candidate for facet injections if his conditions do not show any improvement. If further testing and treatment is performed with no results, then patient can be listed at MMI."

Initially, we will consider the carrier's assertion that the hearing officer erred in excluding the drug testing evidence. In ruling that the evidence would be excluded, the hearing officer stated that the drug test results of July 1998 were "not relevant to today's issues based on my prior decision." In addition, the hearing officer stated that the disability determination made in the prior decision "is binding on me or any other hearing officer because there's already been a decision that termination for cause did not end disability through December 8th." In Texas Workers' Compensation Commission Appeal No. 971532, decided September 18, 1997, we considered a strikingly similar case. In that case, a hearing officer at a prior hearing had determined that the claimant did not have disability through the date of the hearing because he resigned from his employment. The claimant did not appeal the determination and it became final. A later hearing was held to consider the question of whether the claimant had disability in a subsequent period. At that hearing, another hearing officer determined that the claimant had disability despite his resignation from employment. The carrier in Appeal No. 971532 argued that the doctrine of *res judicata* precludes a subsequent finding of disability that is inconsistent with a prior final determination that the claimant did not have disability. The hearing officer rejected that argument, as did the Appeals Panel in affirming the determination that the claimant had disability in a subsequent period despite the prior determination that he did not have disability from the date of injury through the date of the first hearing because of his resignation. See also, Texas Workers' Compensation Commission Appeal No. 981406,

decided August 10, 1998 (previous decision on disability not *res judicata* as to period of disability not litigated at the prior hearing). Under the guidance of Appeal Nos. 971532 and 981406, we believe that the hearing officer erred in excluding the evidence of the claimant's drug test results and in failing to consider the evidence to the claimant's termination for cause in resolving the issue of whether the claimant had disability in a subsequent period. While the fact that a claimant resigns, retires, or is involuntarily terminated is not dispositive, such a factor can be considered in resolving a disability issue. Texas Workers' Compensation Commission Appeal No. 970089, decided February 28, 1997; Texas Workers' Compensation Commission Appeal No. 94238, decided April 11, 1994. Carrier's Exhibit No. 1 should have been admitted by the hearing officer and considered, along with the other relevant evidence, in resolving the disability issue. The weight to be assigned to a given piece of evidence is a matter left to the hearing officer's discretion; however, he was required to admit and consider the evidence presented by the carrier in support of its argument that the claimant did not have disability in this instance. Accordingly, we reverse the hearing officer's disability determination and remand for reconsideration of that issue based upon all of the relevant evidence, including Carrier's Exhibit No. 1.

Next, we consider the carrier's assertion that the great weight of the other medical evidence is contrary to Dr. RB's opinion that the claimant has not yet reached MMI. We find no merit in this assertion. At best, there is a difference of medical opinion between Dr. RB and Dr. BB as to whether the claimant has reached MMI. By giving presumptive weight to the designated doctor's report in Sections 408.122(c) and 408.125(e), the 1989 Act establishes a mechanism for accepting the designated doctor's opinion in such circumstances. Our review of the record demonstrates that the hearing officer did not err in determining that the great weight of the other medical evidence is not contrary to the designated doctor's opinion; thus, he properly determined that the claimant has not yet reached MMI.

Finally, we note that we are somewhat puzzled by the hearing officer's determination that the claimant's disability ended on April 20, 1999, the date that Dr. BB certified MMI and released the claimant to restricted duty. We have long stated that the existence of a restricted-duty release is evidence that disability continues. Texas Workers' Compensation Commission Appeal No. 970579, decided May 12, 1997; Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. In addition, we have recognized that a release to light-duty does not end disability. Texas Workers' Compensation Commission Appeal No. 980951, decided June 24, 1998; Texas Workers' Compensation Commission Appeal No. 980532, decided April 30, 1998; Texas Workers' Compensation Commission Appeal No. 971464, decided September 5, 1997. Dr. BB did not release the claimant to full duty on April 20, 1999, but continued him on restricted duty, with restrictions that are very similar to those imposed by Dr. R. Thus, the hearing officer's ending date of disability does not find evidentiary support in the record. We have already noted that the hearing officer must reconsider the issue of disability on remand by evaluating all of the relevant evidence on the issue, including the evidence related to the claimant's termination for cause. If the hearing officer determines on remand that the claimant has disability, he must find an ending date of disability that is supported by evidence of record.

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.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge