APPEAL NO. 991756

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 July 14, 1999. She (hearing officer) determined that: (1) the employer tendered a bona fide offer of employment to appellant (claimant); (2) claimant had disability from May 30, 1998, to July 28, 1998, but not from July 30, 1998, to the date of the CCH; (3) the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final; (4) claimant reached MMI on August 4, 1998; (5) claimant's IR is seven percent; and (6) the great weight of the other medical evidence is contrary to the report of the designated doctor, Dr. B. Claimant appeals the determinations regarding bona fide offer, disability, MMI, and IR on sufficiency grounds. Claimant also contends that he should have a new hearing with another hearing officer because claimant's arrest during the CCH negatively influenced the hearing officer in this case. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision. The determination regarding the 90-day rule was not appealed.

DECISION

We affirm in part and reverse and render in part.

Claimant testified that he was injured at work on _____, when he lifted a box and felt a pop in his back. Claimant first went to Dr. E, who was recommended by employer, then treated with Dr. H, and then Dr. M. Claimant said he worked two or three hours per day from _____, to May 30, 1998, when he was laid off for one week. He said he did not work between May 30, 1998, and July 14, 1998, the day he tried to return to light-duty work for one day. Claimant said he left because he was unable to do the work. Claimant said he was taken back off work after that time and that he has not been able to return to work since that time. There was evidence that claimant did not tell some of his treating doctors or the designated doctor that he had sustained prior injuries in a motor vehicle accident and a slip-and-fall accident.

Claimant first contends the hearing officer erred in determining that the employer made a bona fide offer of employment in July 1998. Claimant asserts that: (1) carrier did not show that the bona fide offer was communicated to claimant; (2) employer did not have a position ready for claimant; (3) claimant was not provided with the maximum physical requirements of the job; and (4) employer did not discuss with claimant the rate of pay for the position.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5(a) (Rule 129.5(a)) provides that in determining whether an offer of employment is bona fide, the Texas Workers' Compensation Commission (Commission) shall consider the following: (1) the expected duration of the offered position; (2) the length of time the offer was kept open; (3) the manner in which the offer was communicated to the employee; (4) the physical requirements and accommodations of the position compared to the employee's physical capabilities; and (5) the distance of the position from the employee's residence. Rule 129.5(b) provides that a written offer of employment which was delivered to the employee during the period for which benefits are payable shall be

presumed to be a bona fide offer if the offer clearly states the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of employment, and that, if the offer of employment was not made in writing, the carrier shall be required to provide clear and convincing evidence that a bona fide offer was made. Carrier had the burden to prove that it made a bona fide offer of employment. Texas Workers' Compensation Commission Appeal No. 92293, decided August 17, 1992.

A finding that an employer made a bona fide offer of light-duty employment and that the employee refused it does not eliminate disability after the offer is refused. The refusal merely affects the amount of temporary income benefits (TIBS) due. An employee is entitled to TIBS for periods of disability, prior to attaining MMI, in an amount equal to a set percentage of the difference between his weekly earnings after the injury and his average weekly wage. Section 408.103(a).

Claimant testified that he did not work from May 30, 1998, to July 13, 1998, because of his injury. He said he tried to go back to light-duty work for one day on or about July 14, 1998, and that he did so on his own only because his benefits checks had stopped. He said he had not discussed with employer any job or wage, but that he just showed up to work. Mr. K, the district workers' compensation manager, testified that he discussed a light-duty job offer with claimant when claimant called in sometime prior to July 21, 1998. He said he told claimant what light-duty job he would be doing, the wage he would be paid, and that he would be working the same general hours at the same location. Mr. K said he told claimant to report to work. Mr. K testified that he knew claimant's restrictions and that he told claimant the job was light-duty or modified work. He said the job was within claimant's restrictions. He said claimant did show up to work, but that he had already gone home early by the time Mr. K came in and went to talk to claimant about the job offer. Claimant said he had gone home because he was not able to continue doing the work due to his injury. There was evidence that supervisors had given claimant various jobs to do when he arrived to work on July 21, 1998, although he had to ask several supervisors what to do and where to go next.[1]

The hearing officer determined that between July 14, 1998, and July 24, 1998, employer made a verbal offer of employment in which claimant was told about the position offered and the duties involved; that the duties conformed to Dr. H's recommendations; the wages and location of the position; and that the duties were available until claimant could return to light duty. The hearing officer also determined that: (1) employer's offer of employment was made in good faith commensurate with the physical limitations and accommodations of the positions offered compared to claimant's physical capabilities; (2) claimant reported for duty on July 25, 1998, pursuant to the verbal offer; and (3) employer tendered a bona fide offer of employment to claimant on July 25, 1998.

[1]There was evidence that the one day claimant returned to work was July 25, 1998, rather than July 21, 1998.

Since the job offer was not made in writing, the carrier had to prove by clear and convincing evidence that a bona fide offer was made. Rule 129.5(b). In her discussion of the evidence, the hearing officer stated that the carrier had established by clear and convincing evidence that a bona fide offer of employment was made to the claimant. Whether the claimant was capable of performing the offered employment was a fact question to be determined by the hearing officer from the evidence presented. The hearing officer judged the weight and credibility of the evidence, resolved conflicts in the evidence, and decided what facts the evidence established. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. From the evidence, the hearing officer could find that a bona fide offer was communicated to claimant, that employer had a position ready for him, that claimant was told the maximum physical requirements of the job, and that claimant was told about the pay rate for the work. We conclude that the hearing officer's decision that the employer made a bona fide offer of employment to the claimant is supported by sufficient evidence and that it is not against the great weight and preponderance of the evidence. We affirm the hearing officer's determinations regarding bona fide offer.

Claimant contends the hearing officer erred in determining that he did not have disability from July 30, 1998, to the date of the July 14, 1999, CCH. The hearing officer determined that claimant had disability from May 30, 1998, to July 28, 1998. Claimant contends that: (1) until August 3, 1998, the only release claimant had was a restricted release to work; (2) from August 4, 1998, to August 23, 1998, Dr. H had released claimant to work, but said he could not work; (3) Dr. H took claimant back off work on September 8, 1998; and (4) the great weight and preponderance of the evidence shows that claimant also had disability from July 30, 1998, to the date of the CCH.

The claimant in a workers' compensation case has the burden of proof regarding disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The hearing officer in this case considered the conflicting evidence regarding disability, but found that claimant did not have disability after July 28, 1998. There was evidence from Dr. M, Dr. BA, and Dr. H that claimant had disability after that date. However, the hearing officer made it clear that she did not find the evidence to be credible regarding disability. The hearing officer also did not find claimant's testimony to be credible regarding disability. After reviewing the evidence, we conclude that the hearing officer's disability determination is not 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). We affirm the hearing officer's disability determination.

Claimant next contends the hearing officer erred in determining that: (1) the designated doctor's report is not entitled to presumptive weight; (2) the great weight of the other medical evidence is contrary to the designated doctor's report; and (3) the great weight of the credible medical evidence supports the May 11, 1999, report of Dr. PE. Claimant complains that the hearing officer did not explain in detail the reasons for her determinations or list the medical evidence that supported her findings. Claimant contends that he never had epidural injections.

Section 401.011(23) defines "impairment" as an abnormality or loss "existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." *See*

Texas Workers' Compensation Commission Appeal No. 94149, decided March 16, 1994. An "[IR]" is the "percentage of permanent impairment of the whole body resulting from a compensable injury." Section 401.011(24). The existence and degree of an impairment must be determined using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. Section 408.124. Sections 408.122(c) and 408.125(e) further provide that the report of a designated doctor selected by the Commission has presumptive weight and the determination of MMI and IR shall be based on that report unless the great weight of the other medical evidence is to the contrary. Only medical evidence can rebut the presumptive weight afforded the report of the designated doctor. Whether the great weight of the other medical evidence is contrary to the report of the designated doctor is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993.

The great weight of the medical evidence is more than a preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. A hearing officer should not reject the report of a designated doctor absent a substantial reason to do so. Texas Workers' Compensation Commission Appeal No. 93483, decided July 26, 1993. A hearing officer who finds that the great weight of the other medical evidence is contrary to the report of the designated doctor must identify the specific evidence on which this conclusion is based and clearly state why this evidence is contrary to the report of the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 961429, decided September 6, 1996; Texas Workers' Compensation Commission Appeal No. 941457, decided December 13, 1994.

In his November 4, 1998, report, the designated doctor noted that in July 1998, Dr. BL had noted that claimant had mild left L4 radiculopathy. The designated doctor stated that he examined claimant and found "slight weakness of dorsiflexion of the ankle on the left side" and "a decrease in sensation reported for the anterior aspect of the left lower leg" and other areas of the left lower extremity. The designated doctor stated that "based upon today's examination and the records sent to me," claimant is not yet at MMI.

A July 2, 1998, Report of Medical Evaluation (TWCC-69) signed by Dr. E, who treated claimant first, states that claimant reached MMI on July 2, 1998, with an IR of zero percent. A July 1998 lumbar MRI report states under "impression," "3mm central disc herniation at L5-S1." In a July 1998 report, Dr. BL stated that "we are seeing evidence consistent with mild left L4 radiculopathy." In an August 18, 1998, note, Dr. H, who treated claimant after Dr. E, stated that claimant could return to regular-duty work as of August 18, 1998. In an August 24, 1998, report, Dr. BA stated a diagnosis of "L sciatica radiculitis," and recommended that: (1) claimant continue with physical therapy and work conditioning; (2) that he continue taking medications; and (3) that he obtain a neuro-diagnostic evaluation. Dr. H later took claimant off work for one week on September 8, 1998, after claimant came in complaining of recurrent back pain. On September 23, 1998, claimant sought to change treating doctors to Dr. M, and the request was approved by the Commission. In an October 16, 1998, report addressed to Dr. M, Dr. W stated that claimant was not yet at MMI. He said that claimant would benefit from a more aggressive therapy program. Dr. M had referred claimant to Dr. C regarding an IR evaluation. In an October 26, 1998, report, Dr. C stated that claimant was not yet at MMI. In an accompanying

report, Dr. C noted muscle weakness and radiculopathy, and stated that claimant requires a stabilization program and work hardening, and that he should undergo a surgical evaluation. In a November 30, 1998, report, Dr. M indicated that she agreed with the designated doctor's report. In a May 11, 1999, TWCC-69, Dr. PE certified that claimant reached MMI on August 4, 1998, with an IR of seven percent. In an accompanying report, Dr. PE noted that the findings regarding the L5-S1 disc lesion would not support the L4 radiculopathy found by Dr. BL, that she saw no evidence of antalgia or specific abnormal neurology, that claimant's sensory examination was unremarkable, that the complaints of back pain were without objective findings, and that there was clear evidence of symptom magnification.

The hearing officer stated in the decision and order that: (1) Dr. B was the Commission-selected designated doctor; (2) the designated doctor found that claimant was not at MMI based on a report from Dr. C, and based on what claimant told him about his medical history; (3) the designated doctor's physical examination "seemed quite limited reflecting claimant's subjective complaints of pain"; (4) the designated doctor did not change his opinion even after he was told that claimant had undergone epidural injections and sedation just prior to his examination; (5) the report of the designated doctor is not entitled to presumptive weight; and (6) presumptive weight given to the designated doctor was overcome by "the credible medical opinions of [Dr. H] . . . and the examination report by [Dr. PE]."

Claimant first contends that the designated doctor's report was entitled to presumptive weight by statute. The hearing officer made a determination that the designated doctor's report is not entitled to presumptive weight. However, in the decision and order, the hearing officer correctly stated the law in that she said she found that the designated doctor's report is entitled to presumptive weight, but that it was overcome by the great weight of the other medical evidence. We perceive no error in this regard.

It appears that the hearing officer gave as a reason for rejecting the designated doctor's report that she did not find that his examination reflected claimant's true condition. The hearing officer apparently found Dr. PE's report regarding symptom magnification more credible, and determined that the designated doctor found that claimant was not yet at MMI based on claimant's representations to the designated doctor. The hearing officer appears to believe that claimant was not in pain, and that the designated doctor's findings were not based on truthful statements by claimant. Our review of the designated doctor's report does not show that his examination was "limited." The "other medical evidence" to overcome the designated doctor's report cited by the hearing officer was the report of Dr. PE and the medical records of Dr. H. The hearing officer relied on this evidence as constituting the great weight of the other medical evidence. The great weight of the medical evidence is more than a preponderance of the evidence. However, we do note that two doctors, Dr. C and Dr. W, as well as the designated doctor, stated that claimant was not yet at MMI. Based on the totality of the evidence, we conclude that the hearing officer did not have a substantial basis to reject the designated doctor's report. Appeal No. 93483, *supra*. After reviewing the medical evidence in this case, we conclude that the decision of the hearing officer that the great weight of the other medical evidence was contrary to the report of the designated doctor is itself against the great weight and preponderance of the evidence and will be reversed. Cain, *supra.*

Regarding claimant's assertions that the hearing officer was biased due to his arrest during the CCH, we perceive no error. There is nothing to indicate that the hearing officer was biased by this incident, which was unrelated to claimant's claim.

We affirm that part of the hearing officer's decision and order that determines that employer made a bona fide offer of employment and that claimant did not have disability from July 30, 1998, to the date of the CCH. We reverse that part of the decision and order that determines that the great weight of the other medical evidence is contrary to the report of the designated doctor and render a determination that claimant is not yet at MMI and that the issue of IR is not ripe for determination.

Judy Stephens
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge