APPEAL NO. 000772

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 22, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) had disability from the compensable injury of _____, from November 8, 1999, to November 16, 1999; and from November 18, 1999, to January 18, 2000. The claimant appealed, contending that this determination ending disability on January 18, 2000, is against the great weight and preponderance of the evidence. The respondent/cross-appellant (carrier) replies that this portion of the decision is correct, supported by sufficient evidence, and should be affirmed. The carrier appealed the limited finding of disability on and before January 18, 2000. The appeals file contains no response to the cross-appeal.

DECISION

Affirmed.

The claimant worked as a leather inspector. On _____, she tripped, twisting her left foot and ankle. The carrier has accepted liability for this injury. The claimant worked the rest of her shift and part of the next day. On November 9, 1999, she saw Dr. N. Dr. N diagnosed a left foot and calf muscle sprain and returned her to work with limitations on sitting, standing and walking. The claimant returned to work on November 17, 1999, but said she was given her former job without accommodation for her restrictions except for the last two hours of her shift. After this experience, she told her supervisor that she could not return to work. November 17, 1999, was her last day of work, apparently a full shift.

The claimant then changed treating doctors to Dr. C. He diagnosed a left foot and ligament sprain/strain and at her first visit on November 23, 1999, excused her from work until December 8, 1999, or "until her ability to ambulate has improved," when he returned her to light duty. A left ankle MRI on January 18, 2000, was interpreted as showing no fracture or tendon abnormality, no bone marrow edema, and mild increased fluid in tibiotalar and subtalar joints (described as a "nonspecific finding." On December 6, 1999, Dr. C renewed his off-work certification until January 7, 2000, and then extended it to January 28, 2000. In a report of a January 28, 2000, visit, Dr. C projected a release to limited work on February 25, 2000. He still noted mild swelling of the left foot/ankle.

Section 401.011(16) defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The claimant has the burden of proving disability. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether disability exists is a question of fact for the hearing officer to decide and can be proved by a claimant's testimony alone if found credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Normally, the existence of a light duty release is

evidence of the continuing effects of an injury and of disability if the claimant has in fact not returned to work earning the preinjury wage. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

In his discussion of the evidence, the hearing officer commented that he found the claimant's testimony and Dr. C's work excuses after the date of the MRI "less than credible." Instead, he found more credibility in the MRI report and the demeanor of the claimant at the CCH. Specifically, as to demeanor, he noted that she appeared to be able "to walk with an entirely normal gait."

In her appeal, the claimant declares correctly that the hearing officer "is not a health care provider" and that the carrier failed to produce its own expert medical evidence (discounting the MRI) to rebut Dr. C's opinion on the claimant's ability to return to earning her preinjury wage. As noted above, the carrier had no burden of proof in this case. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. This includes the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In the role of fact finder, the hearing officer does not exercise medical judgement, but rather, determines what facts have been established. In this process of fact finding, the hearing officer can accept or reject in whole or in part any of the evidence. Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993. In this case, the hearing officer considered the claimant's medical evidence, including the nature of the injury, and the claimant's testimony and did not find it credible and persuasive that she had continuing disability after January 18, 2000.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determination that the last day of disability was January 18, 2000.

The carrier appeals the finding of disability through January 18, 2000, pointing to the nature of the injury as a sprain and negative x-rays. It also introduces into its appeal the notion of a bona fide offer of employment even though this was not a disputed issue at the CCH and evidence of others that the claimant did not appear to be limping or in pain or otherwise restricted in her ability to perform her preinjury job. The claimant's testimony that at least initially she was returned to her preinjury work without accommodation was verified in other testimony to the effect that the supervisor did not realize the claimant had been issued work restrictions. In any case, the claimant testified to her inability to earn her preinjury wage after her injury, but for one day. The hearing officer, as discussed above, evaluated the medical evidence in terms of what the MRI disclosed. He found the claimant's evidence of disability

credible and persuasive up to this point in time. Under our standard of review, we find the evidence sufficient to support this determination.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge