

APPEAL NO. 010339

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 January 11, 2001. The unresolved issue was whether the appellant (claimant) had "disability between September 7, 2000, and January 11, 2001." (All dates are 2000 unless otherwise noted.) The hearing officer determined that the claimant did not have disability during the period at issue.

The claimant appealed, citing her testimony and asserting that she is only claiming "disability from Nov. 18, 2000 till now [January 11, 2001]." The claimant submits additional medical evidence, including one report dated February 1, 2001, three weeks after the CCH. The respondent (carrier) responds, urging affirmance and objecting to evidence offered for the first time on appeal.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable low back injury on _____ "getting up and down from the floor to do price changes." The claimant was four months pregnant at the time. The claimant reported her injury and was sent home with full pay for March 1 through 3. The claimant returned to work on March 4 and worked through April 1. The claimant went to an emergency room and was subsequently referred to (clinic) for low back complaints. The claimant was off work from April 2 to April 9. The claimant was returned to full duty on April 20 (a clinic note of that date states that the claimant "is doing fine" and she "has not been experiencing pain with her back"). The claimant continued working until August 17 when she delivered her child. The claimant acknowledges that she had requested 12 weeks of maternity leave under the Family Medical Leave Act prior to her delivery.

The claimant saw Dr. P, a chiropractor, with back complaints on September 7. Dr. P referred the claimant to Dr. D, who, in a report dated September 12, had an impression of lumbar radicular syndrome and suggested an MRI. A lumbar MRI performed on September 25 showed degenerative changes at L4-5 and L5-S1, a small disc bulge at L4-5, and a "minor central bulge" at L5-S1.

In a report dated October 20, Dr. D recommended physical therapy and commented that the premise that the claimant's back pain was due to her pregnancy and not the work injury "is preposterous." The claimant was examined by Dr W, the carrier's required medical examination doctor, who, in a report dated December 8, stated that the claimant was not at maximum medical improvement.

The hearing officer, in his Statement of the Evidence, commented that the claimant had failed to establish a sufficient causal link between her original injury and the subsequent period of disability "starting September 7, 2000, through January 11, 2001."

Disability means the inability because of a compensable injury to obtain and retain employment at the preinjury wage. Although there was evidence contrary to the hearing officer's decision, that alone does not provide a basis for us to disturb the decision.

In her appeal, the claimant submits several medical reports dated at various times in 2000, the claimant also submits a report dated February 1, 2001, from Dr. D and a functional capacity evaluation performed on January 17, 2001. We do not normally consider evidence submitted for the first time on appeal, particularly when that evidence was available but not offered at the CCH. To determine whether the evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through a lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case, Dr. D's report is largely cumulative of a report in evidence other than to comment that the claimant was on maternity leave until November 7 and that she "would have returned to work [at that time] except that her disability has precluded her from doing so." We do not feel that that evidence rises to the level of necessitating a remand.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge