APPEAL NO. 961878
FILED NOVEMBER 1, 1996

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 6, 1996, a hearing was held. He (hearing officer) closed the record on August 23, 1996, and determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the eighth and ninth compensable quarters. Appellant (carrier) disputes several findings of fact that relate to medical treatment provided by various doctors, findings as to direct result and inability to work, and findings related to the claimant's request for SIBS for the eighth quarter. Claimant replies that the decision should be affirmed.

DECISION

We affirm.

Claimant fell at work in _____. She was an office worker at the time. According to the opinion of Dr. S, the designated doctor, claimant had a "right hemilaminotomy at L4-5 and L5-S1 with excision of herniated nucleus pulposus and lateral recess decompression and medial foraminotomy of April 5, 1993." Dr. S refers to claimant's pain and numbness in her lower back and leg and the possible need for continued treatment by "a neurosurgeon, orthopedic surgeon, or physical medicine rehabilitation specialist," saying further that "if she has exacerbations of her symptomatology, she may need therapeutic intervention, including, but not limited to comprehensive physical therapy, trigger point release, as well as medications for pain, and pharmacologic and non-pharmacologic pain management."

The hearing officer found that claimant was unable to work "at any position" from November 10, 1995, through May 8, 1996 (the filing periods for the eighth and ninth quarters), "because of depression and chronic pain that resulted from her lower back injury." The carrier cites Texas Workers' Compensation Commission Appeal No. 961122, decided July 26, 1996, stating that it says the inability to work was based on depression and depression was not part of the rated injury; therefore the direct result test was not met. Appeal No. 961122 said that "the unemployability/underemployability was due to the depression" pointing out that a back injury had been the basis for impairment. While it is noted that not all judges on the panel joined in the rationale of the opinion and the holding spoke in terms of "due to" rather than that the impairment was not part of the basis for unemployability, Appeal No. 961122 provides no guidance because the finding in the case under review is not limited to depression but says that pain from the "lower back injury" (the lower back was the basis for impairment) and depression were the bases of claimant's inability to work. Texas Workers' Compensation Commission Appeal No. 960008, decided February 16, 1996, emphasized the statutory language calling for a direct result and indicated that there could be more than one contributing factor. Texas Workers' Compensation Commission Appeal No. 952082, decided January 10, 1996, said that there was no requirement to show that the impairment was the sole cause of the unemployment.

In addition, Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996, said that no modifiers, such as the word, "primary" had been grafted on to the statutory standard of "a direct result." Recently, Texas Workers' Compensation Commission Appeal No. 961812, decided October 30, 1996, remanded for application of the correct standard when the decision under review said that factors other than the impairment "to an appreciable degree" were the bases for unemployment and then found that the "a direct result" test was not met.

With pain from the impairment being part of the basis for unemployment, the cases above support the finding that the "a direct result" test was met and sufficiently supported by the evidence. While carrier also argues that pain is neither an injury "nor is it ratable under the AMA Guidelines [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)]," we note the point made by Dr. S's report which allowed 10% impairment for two level spinal surgery and then commented that claimant's "symptomatology" may require pain management and therapeutic intervention. We do not agree with carrier that claimant's symptoms of pain from the two-level spinal surgery must somehow be treated separately from the surgery or the impairment. While the Appeals Panel has held that "pain alone" is not a compensable injury, Table 49 of the AMA Guides specifically includes "pain" as part of one of the foundations for impairment to be assigned for unoperated back lesions and also specifically provides 10% impairment for "surgically treated disc lesion, with residual symptoms." We conclude from the AMA Guides and Dr. S's report that "symptoms" may include pain. Dr. N on May 10, 1996, said that claimant should not "return to work" until "resolution of pain." In February 1996 Dr. N had said that two months before claimant's "chronic pain" was "stabilizing"; he added that claimant had been so "despondent and desperate" that she at one time "contemplated putting a Magnum 357 to her head." Claimant testified that some days she is in so much pain, she could not get out of bed and also said that she "couldn't even wear my shoes, I couldn't wear my clothes, I couldn't drive. . . ." Dr. N also wrote on March 21, 1996, that claimant's pain had been reduced by adjustment of medication, "with resulting increase in some functionality." (Emphasis added.) As stated, there is sufficient evidence to support the finding that claimant's unemployment was "a" direct result of her impairment.

Carrier, in its appeal, stresses that Dr. N is "the only doctor saying she is completely unable to work. . . ." It is true that a physical therapist conducted a functional capacity evaluation in 1994 which said that "if she is to return to work, it should be sedentary or light level activities. She needs the ability to get up and change posture frequently. She would need to start out at less than eight hours." This evaluation correctly concluded its assessment by commenting that claimant could be released to return to work, but "per physician only." The record does contain a short note from Dr. C who apparently was claimant's treating doctor at the time, in 1994 which says that claimant may return to work with no lifting over 10 pounds and "no prolonged sitting or standing over 15 minutes without position changes." The hearing officer refers to Dr. C as also saying that claimant could not return to work. There are no records of Dr. C, other than the short note mentioned in this record, but claimant did testify that Dr. C in addition to Dr. N, during the filing period of

November 10, 1995, to February 7, 1996, told her she should not return to work. The part of Finding of Fact No. 7 that refers to Dr. R providing pain management is also referred to in Dr. Co IME report, so there is sufficient evidence to support Finding of Fact No. 7 which said that Dr. C said she could not return to work and Dr. R provided pain management. Dr. Co in January 1996 said that he could see no "objective" reason why claimant could not return to work at a sedentary level "on a gradual basis beginning 1-2 hours per day with increase to a full 8 hour day over a 2-3 month period." We note that while Section 408.122 requires objective evidence for impairment income benefits, Section 408.142(a)(2) and (4) make no such requirement.

Four findings of fact that address Dr. N's reports are sufficiently supported by copies of those reports in evidence. Three other findings of fact, which address claimant's filing of her request for SIBS for the eighth quarter, were listed in the appeal, but carrier at the hearing stated that it no longer contested the time of filing of claimant's request for SIBS for the eighth quarter. The assertions of error will not be considered on appeal when the issue was not contested at the hearing. The final finding that controls this decision was that claimant was unable to work at any position during the filing periods of November 10, 1995, through May 8, 1996. This finding is not attacked as unsupported by any evidence that claimant is unable to work; on the contrary, carrier's appeal acknowledges that Dr. N is "the only doctor saying she is completely unable to work. . . ."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could choose to give more weight to Dr. N's three documents prepared in the filing periods in question and one prepared two days post such periods than he did to Dr. Co's opinion. He could view Dr. N's instruction not to return to work until her pain is resolved as another form of restriction placed on claimant which precluded any work. While Dr. N spoke in terms of not returning to work or that she should not "go back" to work, we note that claimant's prior work was sedentary (office work) to begin with; in addition, with claimant's testimony of inability to dress and Dr. N's reference to her desperation, the facts and circumstances of this case allow an interpretation of the medical reports as precluding any work. *Compare to* Texas Workers' Compensation Commission Appeal No. 941559, decided January 5, 1995, which said that the absence of a release to return to work was not sufficient to forego the good faith attempt to find work. The hearing officer determined that claimant could do no work and that determination is not against the great weight and preponderance of the evidence.

We note that while Dr. Co questioned claimant's magnification of symptoms, the functional capacity evaluation commented that claimant's "effort level was good." In addition, claimant testified that she was told by an agent of the carrier that she must attempt to find work. She said that even though Dr. N told her not to work, she applied for three jobs and provided copies of those applications made in February, March, and April 1996; she also sent her resume to 14 other employers during the same timeframe. She indicated that if offered a job, she did not know how she would do it because she could not wear shoes and could only sit, walk and stand for short periods, but she would try. While the case did not turn on the good faith aspect of seeking employment because the hearing

officer found an inability to work, we note that Texas Workers' Compensation Commission Appeal No. 950471, decided May 10, 1995, allows a hearing officer to consider the mental limitations of a claimant in determining whether the attempt to obtain employment was made in good faith since the individual, not a reasonable man, is the basis for determining good faith. In this vein, it is noted also that the "good faith" standard in Sections 408.142 and 408.143 is not directly tied to the claimant's impairment in contrast to the "a direct result" standard which is tied to impairment.

Also introduced in this hearing was a copy of Texas Workers' Compensation Commission Appeal No. 960407, decided April 10, 1996, which affirmed a finding of entitlement to SIBS for the seventh quarter for this claimant.

With no indication that the hearing officer incorrectly applied the law to the issues before him, and having reviewed questions of direct result and inability to work, along with all other elements of SIBS, under a standard of whether the findings and determination were against the great weight and preponderance of the evidence, we find sufficient evidence to affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge