APPEAL NO. 971936

This appeal after remand arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 21, 1997, a contested case hearing (CCH) was held. The issues at the CCH were: (1) the impairment rating (IR) of the appellant/cross-respondent (claimant); (2) whether the Texas Workers' Compensation Commission (Commission) abused its discretion in returning claimant to the designated doctor, Dr. L, for a reevaluation; (3) whether claimant was entitled to supplemental income benefits (SIBS) for the first through 12th quarters; and (4) whether claimant permanently lost entitlement to SIBS. The hearing officer determined that: (1) claimant's IR is 14%, in accordance with the designated doctor's first certification of IR in January 1994; (2) the Commission did not abuse its discretion in returning claimant to the designated doctor; (3) claimant was not entitled to SIBS for the 12 quarters in question; (4) claimant permanently lost entitlement to SIBS because she was not entitled for 12 consecutive months; (5) claimant did not prove that she met the SIBS good faith requirement for the 1st, 2nd, 3rd, 4th, 5th, 6th, 10th, 11th, and 12th quarters; and (6) claimant had no ability to work at all and met the good faith criterion for the 7th, 8th, and 9th quarters, but that claimant was not entitled to SIBS because her IR was not 15% or more. On appeal, claimant contends that the hearing officer erred in: (1) according presumptive weight to the 14% IR, for several stated reasons, (2) determining that she was not entitled to SIBS for the first 12 quarters, and (3) determining that she permanently lost entitlement to SIBS. Respondent/cross-appellant (carrier) replies that it was reasonable for the hearing officer to determine that claimant's IR was 14% and that the evidence supports the hearing officer's SIBS determinations. In its cross-appeal, carrier contends that the hearing officer erred in determining that the Commission's action in returning claimant to the designated doctor for reevaluation was "improvident" but not an abuse of discretion. Claimant did not respond to carrier's cross appeal. The hearing officer's direct result determination in claimant's favor regarding the 12 SIBS quarters in question was not appealed and became final.

DECISION

We affirm.

Claimant complains that the hearing officer found that her IR was 14% in accordance with the designated doctor's first report from 1994, rather than according presumptive weight to his 1997 amended report. Claimant contends that the designated doctor's first IR of 14% did not include a full assessment of the extent of her injuries, that the designated doctor did not rate conditions which were not "present or contemplated" at the time the designated doctor certified the 14% IR in 1994, and that there was a delayed diagnosis or misdiagnosis of the extent of her injury. Claimant also asserts that the great weight of the other medical evidence is contrary to the designated doctor's report, noting that even the designated doctor himself amended the IR. Claimant further contends that there was a "substantial change in condition" justifying a revised IR. She asserts that the ongoing treatment and diagnostic testing as well as the surgical treatment revealed the substantial change in condition.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant sustained a compensable injury on _____, while working as a housekeeper for (employer) and she first underwent chiropractic treatment. She then received physical therapy and anti-inflammatory medications from Dr. MA. Medical records indicate that claimant treated with Dr. MA for her back and with Dr. SE for her hip and underwent hip surgery in October 1991. In January 1993, Dr. MA said that he did not believe claimant would require back surgery. In March 1993, Dr. MA noted that claimant had an "improving chronic lumbar musculoligamentous injury," that she was "status post right hip synovectomy and right hip dysfunction," and that claimant was continuing with rehabilitation. He said he expected her to reach maximum medical improvement (MMI) within the next three months. Claimant's statutory MMI date was June 24, 1993. On July 23, 1993, Dr. MA certified that claimant's IR was 19%, which he said included 8% impairment for loss of lumbar range of motion (ROM), 5% for diagnosis-related impairment, and 7% for hip impairment. He also said claimant was not making progress, that she remained symptomatic in her back, that she had no interval change in her physical examination, and that she was given a sedentary work release. In November 1993, Dr. IS stated that bone scans and x-ray films revealed no objective findings to relate to claimant's complaints, that claimant sat without apparent discomfort, that she changed positions readily, and that there were physical findings of symptom magnification. He stated that claimant's IR should be 5% based on impairment for specific disorders of the lumbar spine. In June 1994, Dr. MA noted that claimant had no change in her clinical complaints. In November 1994, Dr. TR stated that an October 10, 1994, lumbar MRI showed disc bulging and that he recommended a series of epidural blocks. In July 1995, Dr. CA stated that claimant had degenerative disc disease shown by an MRI but that a myelogram CT did not reveal any herniation of discs or nerve root compression. He noted that claimant "continued to deteriorate," that she is considering back surgery, that she said her leg sometimes gives out, and that she uses a cane. Dr. CA noted that claimant was able to get on and off the examination table with minimal difficulty, that she could flex at the waist to only 60 degrees without discomfort, that her sitting straight leg (SLR) raise was 90 degrees without difficulty, that she had diminished reflexes, that she appeared to be suffering from disabling chronic progressive low back pain, that he strongly recommended a neurological evaluation and psychological evaluation before surgery was considered, and that he felt that the chance of returning claimant to work through back surgery was quite low. In August 1995, Dr. C stated that claimant had disc bulges but that an MRI showed no herniation, that she was at increased risk for surgery because of her diabetes, that he believed claimant had severe radicular pain, that Dr. MA felt a fusion was needed, and that surgery may benefit her based on the degenerative disc disease, but such was not guaranteed.

In January 1994 the designated doctor certified that claimant reached MMI on January 17, 1994, after the statutory MMI date, with a 14% IR, which included 5% impairment for her hip and 9% impairment for loss of ROM and for diagnosis-based impairment regarding her "sacroiliac problem." His worksheets show that he invalidated lumbar flexion and extension based on the SLR test. In August 1996, the designated doctor replied to a Commission benefit review officer and stated that he had reviewed the operative reports for the January 1996 lumbar fusion that were sent to him, that claimant should be reevaluated to determine her impairment after Dr. MA was sure that the disc had fused, and that he could not say whether her IR would change. In February 1997, carrier objected to any reevaluation by the designated doctor. In April 1997, the designated doctor filed a Report of Medical Evaluation (TWCC-69) amending his IR and certifying a 19% IR.

The hearing officer determined that: (1) the designated doctor certified that claimant's IR was 14% on January 19, 1994, which was about six months after the date of statutory MMI, June 24, 1993; (2) the designated doctor's 1994 certification of the 14% IR "included a full assessment of the extent of claimant's injury"; (3) there was no delayed diagnosis or misdiagnosis by the designated doctor during his January 19, 1994, medical evaluation of claimant; (4) the designated doctor's diagnosis from January 19, 1994, "would not have changed if the results of the October 10, 1994, MRI of the lumbar spine had been available"; (5) the designated doctor's certification of the 14% IR has not been overcome by the great weight of the other medical evidence; and (6) there was no active recommendation for surgery at the time the designated doctor certified the 14% IR in January 1994, and claimant's spinal surgery in January 1996 did not equate to a substantial change in condition justifying an amended IR more than three years later.

In cases where a claimant has surgery after the designated doctor certifies an IR, the Appeals Panel considers whether the designated doctor's MMI and IR certification took place before or after the date of statutory MMI. Where a claimant is determined to have been at MMI by statute, a distinguishing factor is whether the surgery was "under active consideration" at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995; Texas Workers' Compensation Commission Appeal No. 950496, decided May 15, 1995; Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994. In this case, claimant's treating doctor certified her IR in July 1993, which was after her statutory MMI date of June 24, 1993. In 1993, her treating doctor stated that he did not think claimant would require surgery and surgery was not mentioned in claimant's medical records until July 1995, some 25 months after the statutory MMI date. Claimant had surgery in January 1996. In Appeal No. 950861, *supra*, the Appeals Panel, quoting Texas Workers' Compensation Commission Appeal No. 941265, decided November 1, 1994, stated:

> [W]hile there may be those rare, exceptional cases where "compelling circumstances," such as the need for further surgery, might affect the claimant's ultimate IR, "it is certainly not open-ended and even surgery undergone at some future time that was not actively considered at the time of statutory MMI and the rendering of an IR will not necessarily permit an amendment or revision of the IR."

In this instance, claimant had surgery over two and one-half years after statutory MMI and two years after the designated doctor certified her 14% IR, and the surgery was not under active consideration at that time. Further, the hearing officer could and did find from the evidence that there had been no substantial change in the claimant's medical condition. Appeal No. 941243, *supra*. We agree that the hearing officer could determine that this case does not fall within the parameters of the cases where we have permitted reconsideration of the claimant's IR following post-statutory MMI surgery. The hearing officer did not err in determining that the amendment of the IR in this case was not within a reasonable period of time. We conclude that the hearing officer did not err in giving presumptive weight to the designated doctor's 14% IR, rather than to the 19% IR certified in 1997. *See* Appeal No. 950861, *supra*.

Claimant asserts that the 14% IR was invalid and that the designated doctor did not comply with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) in that the full extent of the injury was not considered and there was no proper rating under Table 49 regarding specific disorders of the spine. The hearing officer determined that the designated doctor's certification of the 14% IR "was in full compliance with" the AMA Guides. We note that claimant did not contend at the benefit review conference or at the CCH that the designated doctor's first certification was not valid because of noncompliance with the AMA Guides. We have reviewed the evidence and claimant's contention and conclude that the hearing officer did not err in making his determinations in this case. *See* Texas Workers' Compensation Commission Appeal No. 971733, decided October 20, 1997; and Texas Workers' Compensation Commission Appeal No. 971777, decided October 22, 1997.

Claimant asserts that the designated doctor's April 10, 1997, amendment of the IR was within a reasonable period of time after the January 1994 report. Claimant asserts that the delay was reasonable considering the fact that claimant was undergoing treatment the entire time. The hearing officer noted that claimant underwent spinal surgery on January 8, 1996, almost two years after the designated doctor's January 19, 1994, certification of the 14% IR, and almost 30 months after the date of statutory MMI, June 24, 1993. The hearing officer determined that the designated doctor's reevaluation of claimant and amendment of the IR in April 1997 "was not within a reasonable period of time from his original report on January 19, 1994." What is a "reasonable time" for amendment of a designated doctor's IR certification may vary according to the particular facts of the case. Texas Workers' Compensation Commission Appeal No. 970885, decided June 26, 1997. We have considered claimant's contentions regarding the delay in the amendment of the IR and the medical evidence in this case and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Regarding SIBS, the claimant contends the hearing officer erred in determining that she was not entitled to SIBS for the first 12 quarters. She appeals the hearing officer's determinations that she had some ability to work during the filing periods for the 1st, 2nd, 3rd, 4th, 5th, 6th, 10th, 11th, and 12th quarters, that she did not look for work, and that she did not make a good faith effort to obtain employment commensurate with her abilities.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant did not elect to commute her impairment income benefits (IIBS); and (3) claimant was unemployed during the 12 filing periods in question. The filing periods for the 12 quarters in question are set forth in the decision and order and, together, encompass the period from approximately April 29, 1994, to April 24, 1997.

The 1989 Act provides in Section 408.142(a) that an employee is entitled to SIBS if on the expiration of the IIBS period he or she has an IR of 15% or more, has not returned to work or has returned to work earning less than 80% of his or her average weekly wage as a direct result of his or her impairment, has not elected to commute a portion of his or her IIBS, and has attempted in good faith to obtain employment commensurate with his or her ability to work. Further, Section 408.143 states that after the Commission's initial determination of SIBS, the employee must file with the insurance carrier a quarterly statement stating that the employee has earned less than 80% of his or her average weekly wage as a direct result of his or her impairment, the amount of wages earned in the filing period, and that the employee has in good faith sought employment commensurate with his or her ability to work.

In this case, our review of the record does not indicate that the hearing officer's good faith determinations regarding the 1st, 2nd, 3rd, 4th, 5th, 6th, 10th, 11th, and 12th quarters are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.* Therefore, there is no basis for disturbing his decision on appeal. The hearing officer reviewed the medical evidence and determined that claimant had some ability to work during these filing periods. There was evidence that claimant was released to sedentary work in 1993. Therefore, given that claimant did not seek work during the filing periods for these quarters, the hearing officer did not err in determining that claimant did not meet the good faith criterion. The fact that the evidence could have allowed different inferences under the state of the evidence does not provide a sufficient basis for reversing the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992. We would also note that the hearing officer did not err in concluding that claimant was not entitled to SIBS for the 1st, 2nd, 3rd, 4th, 5th, 6th, 10th, 11th, and 12th quarters because her IR was not 15% or over.

Regarding SIBS for the 7th, 8th, and 9th quarters, the hearing officer determined that claimant proved that she acted in good faith, but denied SIBS, presumably because claimant's IR was not 15% or more. The hearing officer's determination that claimant had no ability to work at all during the filing periods for the 7th, 8th, and 9th quarters was not appealed and became final. We have already addressed the IR issue in this decision and affirmed the determination that claimant's IR was 14%. Thus, we affirm the hearing officer's determination that claimant was not entitled to SIBS for the 7th, 8th, and 9th quarters because her IR was not 15% or higher.

Claimant contends the hearing officer erred in determining that she permanently lost entitlement to SIBS. She notes that the fact that she did not file a SIBS application does not always preclude entitlement. However, for the reasons set forth above, claimant was not entitled to SIBS for the first 12 months. Therefore, we affirm the hearing officer's determination that claimant permanently lost entitlement to SIBS.

In its conditional cross-appeal, carrier contends the hearing officer erred in determining that the Commission's action in returning claimant to the designated doctor for reevaluation was "improvident" but not an abuse of discretion. In reviewing a Commission action using an abuse of discretion standard, the hearing officer was to consider whether the Commission acted without reference to any guiding rules or principles. *See generally* Texas Workers' Compensation Commission Appeal No. 941281, decided November 4, 1994. Given the fact that the hearing officer did not use the amended IR from the designated doctor's reevaluation in deciding claimant's IR, any error on the hearing officer's part in finding an absence of an abuse of discretion in this regard was harmless error.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Christopher L. Rhodes
Appeals Judge