APPEAL NO. 980060

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 December 8, 1997. The issues at the CCH were whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his 10th and 11th quarters of eligibility, in addition to three issues added by agreement concerning his entitlement to SIBS for the ninth and 12th quarters of eligibility, and whether he had good cause to set aside a benefit review conference (BRC) agreement. It was the claimant's contention that he had no ability to work during the applicable filing periods for the four quarters in question.

The hearing officer determined that the claimant was not entitled to SIBS for the quarters in question. Although the hearing officer agreed that the claimant's inability to work for each of the disputed quarters was a direct result of his impairment, he found for each quarter that the claimant had not made a good faith search for employment commensurate with his ability to work. There were no express fact findings (in light of the very disputed contention and evidence offered that he had no ability to work) that the claimant had some ability to work during the applicable filing periods. The hearing officer further found that the claimant had not proven that he had good cause for setting aside a BRC agreement that he was not entitled to SIBS for the ninth quarter of eligibility.

The claimant had appealed the determinations with regard to all disputed issues. He argues, for the BRC agreement, that while he understood it he was not in agreement and stated to the benefit review officer (BRO) that it was "not right." He argues in his appeal that he was under pressure and coercion to sign it. Claimant argues that he is entitled to SIBS for the quarters in issue because, due to his medical condition, he has been receiving them since 1995. The claimant argues that the doctor for the carrier, Dr. William Blair (Dr. B), did not consider important past medical records along with his functional capacity evaluation (FCE). He argues that, in any case, Dr. B stated that he could *at best* perform sedentary work. He points out that Dr. B said he could not use public transportation. He argues that all doctors involved with his treatment have assessed him as "permanently" disabled. For the 10th quarter, where some search was undertaken, the claimant argued that although unable to work, he undertook some efforts to find employment that were consistent with his abilities. Other factual inconsistencies not going to the substance of the decision are pointed out in the appeal. The carrier responds that
the hearing officer is the sole judge of the weight and credibility of the evidence and the Appeals Panel should not substitute its judgment for that of the hearing officer. The carrier argues that the hearing officer could consider that the claimant made no effort to obtain a GED to better his qualifications. The carrier argues that Dr. B opined that the claimant "could perform" sedentary work, and he failed to search within these requirements. The carrier finally argues that the job search undertaken during the filing period for the 10th quarter should not count because it was undertaken only over a period of days.

DECISION

Affirmed as to the BRC agreement and good cause issue, reversed and remanded on ability to work for the 10th through 12th quarters.

The claimant was injured on _____, while employed as an oiler in a coal mine. The claimant said he lifted up a steel bar to throw in the back of a pickup truck while cleaning up the work area and, as he threw and twisted, popped something in his back. Claimant had lumbar surgery in July 1992, and was assigned a 23% impairment rating. He returned briefly to work for his previous employer, but he said he was unable to continue working after April 18, 1993, due to progressive pain in his back and down one leg. Medical records indicated that at the times for quarters determined at the CCH, the claimant was 44 years old. He said he lived in a small town where there were not many businesses.

The parties stipulated that the claimant was entitled to SIBS for the eighth quarter of eligibility. The filing periods for the quarters in issue were stipulated as follows: November 1, 1996, through January 30, 1997 (9th quarter); January 31 through May 1, 1997 (10th quarter); May 2 through July 31, 1997 (11th quarter); and August 1 through October 31, 1997 (12th quarter).

The CCH began with telephonic testimony from claimant's treating doctor, (Dr. J), a board certified family practitioner. Dr. J had treated the claimant since July 3, 1997. She stated that he currently had laminectomy pain syndrome. Dr. J was emphatic in her belief that the claimant was unable to perform employment of any kind. She stated that he could not sit or stand for very long and must lay down several times a day. Dr. J indicated that the claimant, during examinations, would get up and move around and prop his upper body by supporting the weight with his arms. It was her belief that he could not do even sedentary work. Dr. J stated that she had not referred the claimant for a separate FCE because she considered that her examinations included assessments of his functional capacity. Dr. J stated that she usually referred patients for FCEs when she was in an adversarial position with her patients who claimed an inability to work, when she felt that they were trying to get something from "the system." Dr. J was emphatic in her testimony and her written reports that she did not consider the claimant to be one of those types of patients. She stated that due to his depressed financial conditions, the claimant would have sought work if he were able to do any. She stated that the claimant's pain was not subjective but was objectively verified in clinical examination. Pressed in cross-examination as to what, if anything, claimant could do, Dr. J stated that she did not think he could work more than an hour or two a day, and even that not every day. She stated that she did not believe he could do telemarketing because of the need to sit at a telephone for long stretches of time. Dr. J considered the claimant totally disabled from work.

Dr. J's written report of December 7, 1997, recapped the claimant's medical treatment and records. She noted that he was in obvious pain during his examinations, and

that his lower back and sacral area were painful upon palpation, with significant guarding in his back and hips. His neurological exam was intact. Her diagnoses were post laminectomy syndrome with chronic pain, disc herniations, epidural fibrosis with permanent nerve damage, degenerative osteoarthritis of the spine, and deconditioning due to disuse. She emphasized that she concluded that "this is one of the few times that I have concluded that one of my patients is disabled for workers' compensation purposes." Her report was based upon seeing and treating the claimant six times.

Claimant's previous treating doctor had been (Dr. E), who, at some point around a year before the previous BRC at which the disputed agreement was made (on March 24, 1997), had stopped treating the claimant. However, Dr. E's records in evidence indicate that he saw claimant on November 7, 1996. In this letter, directed to the Texas Workers' Compensation Commission (Commission), Dr. E stated that he was trying his best not to be claimant's treating doctor. He felt that claimant had cervical and lumbar symptoms which had reached the chronic pain stage, and that surgery would not help him. In another letter of the same date directed to the carrier, Dr. E stated that he did not know why an FCE would be required because claimant was "quite limited" in his activities, but that he encouraged claimant to be cooperative. On December 19, 1996, Dr. E appears to have completed a brief statement assessing the claimant's capabilities. Dr. E checked that the claimant could do sedentary work, lifting 20 pounds occasionally. He stated that claimant was released to work for 12-19 hours per week. He stated that in an eight-hour day, the claimant could stand and walk one to four hours a day, and sit one to three hours a day, and nothing was indicated for driving. The accompanying letter stated that claimant was advised, however, not to operate a vehicle or heavy equipment. He stated that the claimant could not use his feet for repetitive movement in operating foot controls, and could never bend, twist, squat, and climb, and could occasionally reach above his shoulders. There is a prohibition from some activity set forth in a remarks portion that is illegible. He stated that he last treated claimant on November 7, 1996. Dr. E stated that claimant was unlikely to improve in the future.

On February 10, 1997, Dr. E wrote again to the carrier, stating that although he had indicated there was a "possibility" that claimant might perform sedentary work, this was not a recommendation that he actually do so. Dr. E noted he had repeatedly recommended to the carrier that the claimant be evaluated by someone qualified to assess his work capacity, "if any," which Dr. E stated he was not qualified to evaluate. That same date, Dr. E wrote to claimant emphasizing that he was not the claimant's treating doctor, that he could not handle repeated requests that had been made for the claimant's disability status, and that Dr. E had only stated that claimant could "possibly" perform sedentary work but this would have to be verified by a disability examiner. Dr. E stated: "please understand that we did not send you back to work and we are not recommending that you work."

Dr. B, the carrier's choice of doctor, had seen the claimant throughout the course of his injury. An examination conducted on July 1, 1993, yielded the opinion that the claimant could not return to his previous employment, that his destroyed disc at L4-5 resulted in an

incomplete shock absorber and mechanical dysfunction increasing as the day progressed. He recommended that the claimant be put into a light-to-medium-work category, subject to various limitations and flexibility to move around. By May 5, 1995, Dr. B found no appreciable changes to his prior exam, but stated in this letter that it was doubtful that claimant was capable of gainful employment. He noted that additional surgery would not improve claimant's ability to work and that claimant was fearful of additional procedures.

Claimant had an FCE on March 17, 1997, which was then evaluated by Dr. B. The raw scores indicate that claimant could not or did not perform many of the tasks requested. There was some question as to the validity of his hand strength testing. The evaluator noted that there was minimal effort on five out of five trials in whole body strength testing. Dr. B stated twice in his attached report that "at best," claimant "would be confined" to a sedentary position. He stated that claimant showed "residuals consistent with either epidural fibrosis or permanent nerve damage encompassing the L5/S1 nerve root." His conclusion stated:

> It becomes obvious at this time that [claimant] would be unable to ambulate for long distances greater than 100 yards. He would also have difficulty climbing and descending stairs. Likewise, he could not participate in any repetitive bending, twisting, turning, stooping, lifting, and crouching. This patient, likewise, should not work at a height or climb. He is incapable of performing mechanically paced tasks. Based on current findings at best, I would maintain [claimant] in a sedentary position, however, I am uncertain how he would travel to and from work. He obviously would be incapable of utilizing public transportation.

In this letter, Dr. B stated that the "concurrence" of ongoing pain behavior was suggested. However, there was no physician in any records submitted that stated that claimant was faking his pain.

Concerning the disputed BRC agreement, which purported to resolve issues over entitlement to the eighth and ninth quarters of SIBS, both claimant and his mother testified. Claimant said that although an ombudsman was there to assist him, he did not really discuss the proposed agreement with her. Claimant said that the carrier representative left the room and that the BRO then asked him if he would agree that he was not entitled to the ninth quarter of SIBS if the carrier agreed to pay him for the eighth quarter. She stated that "some money was better than none," according to claimant. At the CCH, claimant clearly stated that he did not misunderstand the agreement as written, and he agreed that he signed it when the carrier representative came back into the room. However, he maintained that he told the BRO that he did not think it was right because his condition had not changed from quarters when SIBS was not disputed. At the CCH, claimant specifically declined the assistance of a Commission ombudsman.

The hearing officer asked the claimant several times to explain, "in his own words" why he had filed the Statements of Employment Status (TWCC-52) for each quarter in issue. Clearly puzzled by these questions, claimant indicated he filed them because it was the law and he was required to do so. We note that he stated that he had signed and filed all but the 11th quarter, which was filed by his attorney. Notwithstanding the hearing officer's recitation in the discussion of the evidence that there were some items not checked on some of these forms, there was no issue raised that they were not complete or valid TWCC-52s.

During the filing period for the 10th quarter (at a time chronologically after the BRC agreement), the claimant actually made job contacts. He said he looked in the paper and then actually contacted three businesses which did not offer him jobs. Claimant said he took with him the restrictions described in Dr. B's letter. He prepared statements that were signed by persons for these businesses indicating that there were no jobs that they had within those restrictions. He agreed that these contacts were made in April over a period of a few days. Claimant agreed that he did not seek work during any other disputed quarters. Claimant indicated that he drove occasionally, taking his 13-year-old daughter to school (not every day), although he usually rode with others and could not ride long distances. He said that while he might go to a coffee shop in the morning, he came home and rested most of the day.

First of all, although the claimant alleges on appeal that he was coerced to sign the BRC agreement, there was no testimony to this effect at the CCH. Claimant reiterated only that he told the BRO that he did not think the agreement was right. He nevertheless agreed that he signed and understood it. Section 410.030(b) states that an agreement is binding on a claimant who is not represented by an attorney unless he is relieved of the effects of the agreement for good cause. The hearing officer's determination in this case that there was no good cause shown is sufficiently supported by the record. We therefore affirm his decision that the agreement cannot be set aside.

What causes us to reverse and remand is the great weight of evidence concerning the claimant's limited or nonexistent ability to work during at least some of the quarters in issue and, given the lack of specific findings on ability to work during the quarters in issue, when this was the essence of the matter sharply disputed, our concern that the hearing officer has focused somewhat disproportionately on the word "sedentary" read in isolation from other medical opinions set out by the three primary doctors, Dr. E, Dr. B, and Dr. J.

Most of the discussion of evidence in the decision concerns the issue over the BRC agreement and details comments over what the TWCC-52s did or did not check off, although there was no issue as to the content of the TWCC52s and such observations do not appear relevant to the issues before the hearing officer. Discussion of the medical evidence in this case is consigned to 14 sentences out of a three-page discussion. The hearing officer states that Dr. B opined that claimant "could perform" sedentary work. He further states that Dr. J did not "articulate" how she arrived at the "conclusory" statement

that claimant was totally and permanently disabled, notwithstanding her live testimony and responses on direct and cross-examination to such questions. Finally, the hearing officer indicates that Dr. J "admitted" that she usually referred her patients for an FCE and also "admitted" that she did not do so in claimant's case. The hearing officer has not summarized, however, Dr. J's explanation as to why she did not do this in claimant's case--because she believed that claimant, unlike other patients she treated, was not trying to unfairly reap benefits from the system. Nor does the summary address what weight the hearing officer gave Dr. B's other observations included in the same report.

Because we do not agree that Dr. J's opinion can be fairly characterized as "conclusory" and because Dr. B's opinion about the sedentary work level is couched in terms that this is what claimant can do "at best" while expressing concerns that he cannot work due to physical inability to get to and from work, we believe that the medical evidence in this question raises matters which must be resolved in express findings of fact or indications that the complexities in the medical evidence have been fully considered and weighed. This is especially important because the effect of the hearing officer's decision is to foreclose future eligibility for SIBS entirely. Section 408.146(c). Although the Appeals Panel has stated that medical evidence from outside a filing period can be considered to shed light on a claimant's medical condition within that filing period, we must emphasize that the medical evidence which is most relevant to a SIBS period is that which pertains to the applicable filing period. 34 TEX. ADMIN. CODE § 130.104(a) (Rule 130.104(a)); Texas Workers' Compensation Appeal No. 941649, decided January 26, 1995. We note that at least for the last two quarters, when claimant was actively treated by Dr. J, there were no opinions within those periods actively assessing a sedentary work level. Because we cannot agree that Dr. J's opinions can be accurately characterized as "conclusory" (and noting further that the simple fact that an opinion is "conclusory" does not preclude it from being given any weight), we cannot otherwise determine the basis upon which her opinion would be given no weight for the quarters during which she treated the claimant.

For these reasons, we reverse and remand the decision for more consideration and, if need be, development of the evidence on the appealed issue of job search for the 10th, 11th, and 12th quarters (as the ninth quarter has been disposed of by agreement of the parties, which is binding).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeals No. 92642, decided January 20, 1993.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge