

APPEAL NO. 980155
FILED MARCH 6, 1998

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 8, 1997, a contested case hearing (CCH) was held with hearing officer. The issues heard at the CCH were whether the respondent (claimant) sustained extended injuries constituting depression and reactive airways disease; whether the claimant had disability from her compensable injury and if so, the periods of time involved; and whether she could obtain reimbursement of travel expenses to and from some doctors involved in her case. The injury initially claimed had been a chemical exposure, with a date of injury of _____, while the claimant was employed by (employer).

The decision was appealed by the appellant (carrier) when determined in favor of the claimant on the issues of disability and depression (although no reactive airways injury was found) and on some, but not all, of the requested travel reimbursement items. The Appeals Panel, in Texas Workers' Compensation Appeal No. 971922, decided October 30, 1997, affirmed the determination of the hearing officer on the claimant's depression, but reversed and remanded as to disability, noting that earlier periods than those found by the hearing officer were indicated in the record. Portions of the hearing officer's determination not to allow reimbursement for some of the medical travel were affirmed and some were remanded to clarify some requests for reimbursement that appeared not to have been determined.

No remand hearing was held and additional information and briefs were filed by written submission. A new decision was issued on December 18, 1997, in which the hearing officer repeated her affirmed finding that depression was being considered part of the compensable injury and she found disability for May 30 through June 5, 1995; June 9 through 19, 1995; January 12 through 22, 1996; and March 26, 1997, through the date of the CCH. The hearing officer allowed additional expenses for travel to and from the office of (Dr. G) on March 29, 1996.

The carrier has again appealed the finding that depression is part of the claimant's injury. On the issue of disability, the carrier argues that the Appeals Panel's remand of this issue was for a limited purpose and time period only and the hearing officer erred by finding disability within the period of time that was not remanded. In this argument, the carrier urges that when it first appealed the disability finding, it did not intend to appeal an apparent implied determination that there was no disability prior to the date found by the hearing officer. Finally, the carrier argues that the hearing officer erred in admitting claimant's exhibits on remand. Although the remand resulted from its own prior appeal, the carrier argues that new evidence cannot be admitted because it allows the claimant a "second bite at the apple." The carrier argues that admission of such documents without a finding of good cause was "clearly error." Finally, the carrier argues that there was no showing that claimant's travel for the allowed visit was necessary and reasonable. The claimant

responds by asking that the Appeals Panel repeat its affirmance of the injury issue. The claimant argues that there is apparently a typographical error in the determination of disability in that the hearing officer should have found a date of March 26, 1996, instead of 1997. Cautioning that psychological opinions are "highly subjective," the claimant argues that the carrier's peer review opinion against claimant's contention on disability be rejected, although pointing out that psychological opinions that claimant's doctors have offered support a decision in her favor. The claimant responds that the terms of the remand were not limited as argued by carrier and that the jurisdiction of the hearing officer to decide the entire period of disability was supported. On the matter of admission of evidence, the claimant argues that carrier has not shown an abuse of discretion. She argues that documents offered as evidence were not in possession of the claimant within 15 days after the benefit review conference (BRC) and were timely exchanged when received. In response to the point of error on travel expense, the claimant argues that the hearing officer's finding that medical travel to the office of (Dr. K) was reasonable and necessary should stand. There is no assertion that there has been a typographical error in the hearing officer's determination as to allowable medical expense.

DECISION

Affirmed on extent of injury and disability, with clarification as to the maximum period of income benefits entitlement payable for disability; reversed and rendered on travel expense.

Our recitation of the facts set forth in Appeal No. 971922, *supra*, are repeated and incorporated herein by reference and we affirm the finding that depression was part of the compensable injury. We further note that an earlier CCH decision which determined panic attacks to be part of claimant's injury was included in the record within an exhibit of miscellaneous documents. The underlying circumstances that were found to give rise to the panic attacks are similar to those asserted in this hearing that gave rise to the additional diagnosis of depression.

The remand was conducted on written submission without objection from either party. The parties submitted briefs on issues remanded and the claimant submitted additional documentary evidence. As part of its brief, the carrier filed a general objection to any additional documentary or testimonial evidence being admitted. Specific objection was made to an affidavit from claimant (setting out testimony which might have been given at a live remand hearing), a letter from the claimant dated January 30, 1996, and a deposition on written questions of a doctor. Carrier argued that these documents were not exchanged until December 4, 1997.

Additional evidence submitted on remand by the claimant which is pertinent to our decision here is as follows:

- Answers to a deposition on written questions (Dr. Q), who said he was not engaged in the practice of full time medicine in Texas. Dr. Q had

treated claimant and opined that he advised her to quit work or change jobs. He stated that due to claimant's persistent symptoms, which had "more or less" become chronic, she was physically and mentally disabled to continue working. Dr. Q said she was unable to perform her duties due to depression and related conditions.

- An evaluation by (Dr. H), Ph.D., who examined the claimant on August 19, 1997, at the request of the carrier, and indicated that she had somatic symptoms which produced secondary gain for her. He noted she was unable to accept any alternative views of her problem other than a rigid view that she had multiple chemical sensitivities. He recommended vocational counseling and rehabilitation. He agreed that she was depressed and dependent. While he did not assert that she was fabricating her emotional state, he nevertheless noted that her problems stemmed not from any objective, cognitive cerebral dysfunction resulting from chemical exposure, but from a preexisting personality disorder prone to manifest through somatic complaints.
- An affidavit from the claimant in which she asserted that Dr. K was her treating doctor and that she saw him on March 29, 1996, relating to an examination by him in order to get more prescription medicine. Claimant also asserted that she was not paid by the carrier for a March 1, 1996, visit to Dr. G, although the visit was paid for by the carrier. This affidavit also details how claimant is, on a daily basis, unable to concentrate on simple tasks, is in a constant state of anxiety, and is subject to panic attacks roughly every three weeks. Claimant states that due to these problems she is unable to return to work.

As we read the carrier's brief on remand, we believe that it preserved objection based on failure to exchange for only three exhibits: claimant's affidavit, claimant's January 30, 1996, letter, and answers by Dr. Q to deposition on written questions. We cannot agree that a claimant's affidavit submitted in lieu of live testimony qualifies as a document that is subject to the exchange objection, any more than the claimant could be excluded from a live CCH for this reason. See Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992; Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992. Concerning her January letter and the answers to written deposition, we believe that admission and consideration of these on written submission implies a finding of good cause. We would agree that such does not exist with respect to the January 1996 letter from the claimant, but such would be harmless error in light of its marginally relevant content to the issues at hand on remand here (it is a letter to Dr. K complaining of claimant's symptoms and employer) and our conclusion that its inclusion did not result in the rendering of a decision which would not otherwise have been rendered. The answers to the written questions from Dr. Q are date-stamped by claimant's attorney as received on December 3, 1997, and the hearing officer could conclude that they were

timely exchanged the following day. We therefore do not hold that there was harmful error in admitting these three documents.

We do not agree with the carrier that the remand relating to the disability issue was limited in any way by the Appeals Panel or that carrier's original appeal should be construed as limited to the period of time for March 26, 1996, onward. When a party appeals a determination on an issue, the remedies available to the Appeals Panel to dispose of that appealed issue are to affirm, reverse and render, or reverse and remand for additional development and consideration of the evidence (one time). Section 410.203(b) and (c). Any time a case is remanded for additional evidence, either party arguably has a "second bite at the apple." Given that a remand is, by statute, for the primary purpose of additional development and consideration of evidence, we cannot agree that there is any "fundamental unfairness" when the Appeals Panel remands, especially when both parties have equal opportunity to clarify the record through additional evidence.

Our previous decision noted the dearth of evidence in the record at that time to support disability after March 26, 1996; however, we did not preclude the submission of additional evidence on this point at a remand but stated that there should be:

[E]vidence offered which directly appraises the impact of claimant's panic attacks and depression on her ability to perform gainful employment in general, not just work for her previous employer, and that such must be identified as the producing cause of any inability to work, given that there appears to be other numerous incidents and conditions claimed by the claimant. The periods of time that inability to obtain and retain employment equivalent to the pre-injury wage due to the compensable injury of February 6, 1995, which was determined by the hearing officer to be panic attacks and depression, must be found by the hearing officer as the primary fact finder.

We tend to agree that, notwithstanding a threefold repetition of the March 26, 1997, date as the inception of the final period of disability, the hearing officer intended to repeat her earlier finding that one period of disability began on March 26, 1996. This is evident from the discussion. The periods of disability found by the hearing officer, although an opposite result could have been derived from the evidence by another finder of fact, are supported by the evidence in the record and on remand.

We would only add the clarifying point, in light of the hearing officer's finding that disability continued to the date of the CCH, that entitlement to temporary income benefits (TIBS) ends 104 weeks after the date that such benefits accrue (the eighth day of disability). The eighth day of disability according to the hearing officer's remand decision was June 9, 1995. Thus, her order to pay TIBS for the period of disability in accordance with the decision but also in accordance with the 1989 Act will mean that entitlement to TIBS ended sometime in June 1997 (the date representing 104 weeks after June 9, 1995, and not up to the day of the CCH).

The determinations of the hearing officer on the matter of travel reimbursement are muddled because she allows reimbursement for a visit on March 29, 1996, to Dr. G. Her findings of fact and conclusions of law are:

FINDINGS OF FACT

1. On March 29, 1996, claimant received treatment from [Dr. K] which was related to the compensable injury and therefore it is appropriate and necessary medical treatment for the compensable injury.
2. Claimant was reimbursed for travel expenses to [Dr. G and Dr. D] and travel expenses to [Dr. G and Dr. D] are not at issue.

CONCLUSIONS OF LAW

1. The claimant is entitled to reimbursement of travel expenses for medical treatment obtained from [Dr. G] on March 29, 1996.

The decision paragraph repeats the entitlement of claimant to reimbursement for a visit to Dr. G on March 29, 1996.

Clearly, the findings of fact and conclusions of law are at odds. The discussion recites in a somewhat conclusory fashion that claimant made a trip to Dr. K on March 29, 1996, which was reasonably necessary to obtain medical treatment (notwithstanding a visit three days earlier to Dr. Q). The facts underlying the hearing officer's assertion that claimant was already paid for travel expenses to Dr. G and Dr. D apparently comes from her analysis of the claimant's reimbursement request chart showing travel to Dr. G on March 1, 1996, as having been paid and claiming no amounts for travel to Dr. D.

It appears that a typographical error was made in the conclusion of law and decision paragraph allowing expenses for Dr. G rather than Dr. K for the March 29, 1996, examination. We cannot agree with the factual finding of the hearing officer that treatment by Dr. K on March 29, 1996, insofar as it was "related to" the compensable injury, for that fact alone was "necessary medical treatment" for purposes of reimbursement of travel expense. Although claimant asserts in her affidavit that Dr. K was her treating doctor and that she was required to go to him for prescriptions, our earlier decision noted that claimant was seeing Dr. K on referral from Dr. Q in June 1995. The previous hearing decision concerning claimant's panic attacks described Dr. Q as her treating doctor. In any case, the prescription justification given by the claimant in her remand affidavit for traveling to see Dr. K, whom she had seen once during the previous year, does not square with the fact that she saw Dr. Q merely three days before. The evidence does not support the assertion that Dr. K was claimant's treating doctor on March 29, 1996, if indeed he had ever been. As the hearing officer has not found sufficient basis for justification of payment for Dr. K's travel, and the fact that his treatment was "related to" her illness, standing alone, is insufficient, we reverse this fact finding. We reverse the determination that claimant is

entitled to travel reimbursement for her March 29, 1996, visit to Dr. K and render a decision that carrier is not liable for travel. We expressly note that the issue of whether payment need be made for Dr. K's services on that date is not before us and should not be considered to be adjudicated, even by implication, in this decision which is based solely on the record and issues before the hearing officer at the CCH.

For the reasons stated herein, we affirm the determinations on injury and disability and reverse and render on the finding that carrier was liable for reimbursement for travel expenses for the March 29, 1996, visit to Dr. K.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Christopher L. Rhodes
Appeals Judge