APPEAL NO. 980181
FILED MARCH 13, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 5, 1998, a hearing was held. She (hearing officer) determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 12th and 13th compensable quarters. Appellant (carrier) asserts that claimant can do some type of work, as shown by a functional capacity evaluation (FCE), and did not attempt in good faith to find work in either filing period; carrier adds that because claimant did not make a good faith effort, his unemployment is not a direct result of the impairment. Carrier also objects to admission of one medical document. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

At the time he was injured in 1991, claimant was doing sandblasting. His account was not clear as to the accident but it did involve an extension ladder--whether he slipped and fell while carrying it or while climbing it was not clear. There was no dispute that claimant injured his low back, neck, and shoulders. He has had two lumbar spine operations, three cervical spine operations, and one shoulder operation with another shoulder operation to come and another lumbar spine surgery contemplated.

The parties stipulated that claimant sustained a compensable injury on _____, that the filing period for the 12th compensable quarter began on June 3, 1997, and that the filing period for the 13th quarter began on September 2, 1997. Claimant undoubtedly has an impairment rating of at least 15%, but it is neither mentioned in the medical records nor stipulated to by the parties; since no question is raised on appeal, it will not be discussed further.

Claimant's last cervical surgery was on October 13, 1997, when he had disc surgery at both C3-4 and C4-5 with fusions over both levels. This fusion surgery of two levels was said to be "above his old fusion." Medical records of claimant's past surgeries to the neck and low back were not provided, but a medical report of (Dr. M) provided in December 1997 refers to claimant as now having a "4-level cervical fusion." Prior to that surgery, claimant had right shoulder surgery by (Dr. B) in November 1996. Dr. B, in August 1997, checked a box on a form that said claimant was "unable to work," while choosing not to check other boxes which provided for "restricted work" and "regular work." Dr. B added that claimant's return to work will be determined by Dr. M.

Dr. M frequently used the expression that claimant is "totally disabled." While that phrase is neither found within Section 408.142 and related sections addressing SIBS, nor in sections of the 1989 Act addressing "disability," past Appeals Panel decisions have

considered whether the phrase was used in a context that could be interpreted to equate to an inability to do any work. *See* Texas Workers' Compensation Commission Appeal No. 961881, decided November 7, 1996. In the case under review, Dr. M ,on March 17, 1997, said that claimant was still recovering from the shoulder surgery of November 1996 and indicated that recovery would continue for one year after surgery. Dr. M then said that he would "get a[n] [FCE] done to see if the residual capacity is adequate enough to warrant vocational services." While this sentence is not entirely clear, it does indicate that Dr. M was looking to an FCE to help indicate claimant's future course. Dr. M thereafter described preparations for claimant's neck surgery. On April 28, 1997, Dr. M reported that the FCE had been done and indicated that the FCE showed claimant could work with a 17-pound lifting restriction. Dr. M again wrote of the pending neck surgery. He addressed the FCE statement that referred to work hardening by saying that it was not appropriate because claimant's "residual pathology is extremely high."

The FCE was performed on April 1, 1997; it said, among the numbers and times provided, that "to further clarify and improve his physical capabilities . . . [claimant] should benefit from physical strengthening program progressing into a work hardening program." This is the recommendation that Dr. M dismissed because of claimant's pathology. *See* Texas Workers' Compensation Commission Appeal No. 972589, decided January 27, 1998, which said that a doctor could consider a report of limitations placed on his patient just as he did any other report in reaching his medical opinion as to whether a claimant could do some type of work. The hearing officer could conclude that Dr. M chose to consider the FCE along with other aspects of claimant's impairment, but not to follow the FCE alone, in directing claimant's treatment.

Dr. M, on May 28, 1997, just before the beginning of the filing period for the 12th quarter, said that claimant needs cervical surgery. On July 16, 1997, Dr. M said both C3-4 and C4-5 show herniations; he indicated that claimant has shown that without the surgery he has no chance of improvement "and has proven this over time," referring to severe pain. Dr. M said claimant was "totally disabled." While the record provides neither a report of Dr. M just prior to surgery, nor the operative report of surgery, Dr. M's October 22, 1997, report does refer to fusion surgery having been done nine days before. Dr. M found that claimant was intact neurologically, but said he has been disabled and is totally disabled. Dr. M then mentions some elements that are not factors in determining whether medically a claimant can do no work of any type, claimant's age and training. He also mentions "physical defects" which should be considered in determining whether any work can be done, not whether a claimant could be successful in getting a job. The record also has a short form from Dr. M that says claimant is "totally incapacitated" from June 2nd to August 31, 1997.

On December 4, 1997 Dr. M's focus shifts in his note from the neck to the low back, when he says "the low back continues to be a major problem." He adds that the neck surgery must heal further before surgery to the low back is done. He does indicate that the cervical surgery went well and claimant has made improvements. Dr. M's letter of December 15, 1997, was the subject of carrier's objection at the hearing and assertion of error on appeal. At the hearing claimant testified that he did not pick up his mail for a

period of time during the Christmas holidays. He said that when he did pick it up after Christmas on December 28, 1997, a copy of the letter in question was there, and he then exchanged it right away with carrier. We note that this letter was not addressed to claimant or a lawyer for claimant. The hearing officer heard arguments from both parties and ruled that good cause existed in that claimant exchanged the letter when he received it. The determination that good cause existed for an exchange of documents more than 15 days after the benefit review conference will not be overturned unless the hearing officer abused her discretion. With claimant testifying that he exchanged the document as soon as he received it, the hearing officer acted reasonably in finding good cause, although the applicable rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) may not even require a finding of good cause when a party exchanges a document "as it becomes available."

In addition, Dr. M's December letter, while useful in explaining what he had said before, does not contain new evidence of recent studies or even report his observations of a recent examination; it merely adds detail to points made in previous progress notes of his that are already in evidence. For instance, Dr. M's 1997 notes primarily addressed the need for cervical surgery, and the results of that surgery undertaken in October 1997; his December 4th note then referred to the "major problem" in the low back. The December 15th note then says that the lumbar pathology is "severe" with "multilevel instability." He cites the extent of cervical fusions, claimant's lumbar surgery in the past, and the need for more lumbar surgery in saying that claimant is "not fit for employment." He again uses the phrase that has no clear meaning in the 1989 Act, "totally and permanently disabled." The December 15, 1997, letter of Dr. M was not admitted in error, but even if it were, it was not calculated to result in an outcome different than would have been provided had it not been admitted. Therefore the admission was not reversible error.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. Credibility of medical evidence is also for the hearing officer to determine. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997, which said that the fact finder in considering medical evidence had to determine the weight to give it even when only conclusory statements, such as the "unable to work" short statement of Dr. B, are made. The Appeals Panel will then review the decision of the hearing officer on any factual determination based on whether it was against the great weight and preponderance of the evidence. In this case, Dr. M has continually cited claimant's cervical problems, Dr. B has cited claimant's shoulder problems, and Dr. M emphasized the lumbar problems, including past multiple operations, when the cervical surgery of October 1997 was concluded. We note also that Dr. M also refers to instability in claimant's back which could also be a basis for the hearing officer to conclude that claimant could do no work even though some evidence of a lifting restriction implied that some work could be done.

In the case under review there was no medical evidence indicating that claimant could do some work at any time during the filing periods; the FCE predated the filing period and has been shown to have been considered by the treating doctor, Dr. M; Dr. M also

explained why he did not follow it, whereas Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, cited by the carrier, involved an FCE which the treating doctor never acknowledged. In addition, the filing period for the 13th quarter began on September 2, 1997, with claimant having cervical fusion surgery on October 13, 1997; therefore claimant did not have an ability to work from that surgery for over one-half of the filing period. *See* Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995, which said that entitlement to SIBS resulted because the direct result requirement was met.

With claimant not being able to return to his past employment because of the significant continuing impairment from the compensable injury and with Dr. M and Dr. B indicating that claimant could do no work, while no physician's report in the record says that claimant can do any work at all, the hearing officer was sufficiently supported in finding that claimant was entitled to SIBS for the 12th and 13th quarters. Since the evidence sufficiently supports the decision and order, they are affirmed. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

Alan C. Ernst
Appeals Judge