APPEAL NO. 990192

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 20, 1999, a hearing was held. She (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Claimant asserts various points about certain findings of fact (such as her date of injury being stated incorrectly by eight days) that do not warrant reversal of the case; she also states that the medical evidence shows she has no ability to work, that a video should not have been admitted, and that her unemployment is a direct result of the impairment. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm the decision and order.

Claimant worked for (employer) on _____, when, she testified, she hurt her low back by lifting a box. Claimant further testified that she has had two operations to her low back, and medical records indicate those surgeries took place in February 1994 and June 1995, with the latter being a fusion at L5-S1. Dr. G is claimant's treating doctor; he states fairly consistently, throughout his records that are in evidence, that claimant cannot work. On November 23, 1998, he stated that claimant has a left foot drop and wears a brace on that extremity. He added that she has to use a cane "all the time" and the brace "100% of the time." He said that claimant, if working, would have to have a job that allowed her "to sit for 10 minutes with 15 minute rest periods." He added that claimant's problems include muscle spasms, restricted motion, leg atrophy, and lost sensation, and concluded, "she cannot gain and maintain any type of meaningful employment." (Dr. G also restricted claimant's lifting to five pounds.)

The hearing officer is the sole judge of the weight and credibility of the evidence, including medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997, which said that the hearing officer, as fact finder, may weigh medical evidence, whether conclusory or fully explained, and decide from all the medical evidence which opinion should be given significant weight. The hearing officer could have credited Dr. G's opinion that said claimant could not work, but she did not have to; she could also give more weight to other medical evidence. As stated in Texas Workers' Compensation Commission Appeal No. 980220, decided March 13, 1998, in a SIBS case in which an assertion of total inability to work is made, the hearing officer may determine that a claimant has not shown a total inability to work based on evidence other than medical evidence. In this case, there was medical evidence contrary to that of Dr. G--a report by Dr. L, who performed an examination for carrier. In addition, the hearing officer could question why Dr. G changed his limitation on sitting from 30 minutes at a time in February 1998 to 10 minutes at a time in November 1998, when his records between those dates do not appear to indicate any reason for a problem with the 30- minute limit of February; two points made in the period between February and November by Dr. G were

that claimant's back is stable and that Dr. L provided a report with which he (Dr. G) disagreed.

Before addressing Dr. L's report, claimant's assertion that a video should not have been admitted, saying that she objected to it on relevance grounds since it predated the filing period in question, will be considered. The hearing officer questioned whether claimant had been provided a copy of the video, and when claimant said that she had, the hearing officer ruled that it would be admitted, but said she would consider its date when determining the weight to give it. Claimant acknowledged at the hearing that the person depicted in the video was her. The video included sequences involving claimant beginning in April 1997 and ending in October 1997, while the filing period in question began in July 1998. Admittance of the video was not an error.

Dr. L examined claimant in May 1998. He observed that when claimant removed her foot brace at his request and demonstrated walking without it, she "would drag the left lower extremity without picking the foot up off the ground in a most dramatic manner." He then observed that the left leg had "no signs of any tan lines, any signs of wear lines from the edges of the AFO to indicate any routine, chronic usage." He found her ankle jerk was decreased but was present, and he found "no volitional contraction of any of the muscles from the knee down." He said that the MRI showed the fusion to appear to be solid. He noted that he had viewed the videotape, primarily showing claimant at a laundromat. (The video was observed to show claimant on several different dates walking in shorts which clearly showed that the foot brace was never worn on the dates the video was taken; it showed her walking without any apparent limitation or gait abnormality; it showed her carrying laundry baskets of clothes without a problem; it showed her squatting down for significant periods while putting air in her car tires, also without apparent problem; and finally, it showed her in October going to an office (which she described as a doctor's office for an MRI) wearing the brace and walking with a cane, while two days earlier the prior sequence showed her walking with no brace or cane without apparent effort.) He questioned what he saw on the video in regard to claimant's earlier representation to him that she "never had a good day." He said the "contrasting behavior" between the video and what claimant presented in his office were "totally inappropriate" and observed that any impairment rating claimant had received for range of motion limitations should be invalidated. He concluded by saying:

> It would appear that the patient is dramatizing her symtomatology to a greater extent than I have ever seen in my career.

Claimant acknowledged that Dr. L had been one of the second opinion doctors in regard to her surgery.

The hearing officer could consider the video and could give it weight in determining whether claimant had no ability to do any work at all. *See* Appeal No. 980220, *supra*. She could also choose to give more weight to Dr. L's opinion indicating that claimant was not as limited as either claimant or Dr. G said she was. The evidence sufficiently supports the determination that claimant did not show that she was unable to work. Based on the finding

of fact that says claimant did not show no ability to work and claimant's testimony at the hearing that she did not look for work during the filing period, the determination that claimant is not entitled to SIBS is sufficiently supported by the evidence and findings of fact.

While a finding of fact that the unemployment is a direct result of the impairment will generally be warranted when a serious injury and restrictions keep a claimant from returning to the type of work done prior to injury, irregardless of whether claimant has attempted in good faith to find work or not, in this case, the finding of fact of no direct result may be affirmed. Claimant did have a serious injury as shown by her two operations; however, with the evidence as presented, the hearing officer did not have to accept that the limitations placed on claimant by Dr. G are accurate. She could therefore conclude that claimant has not shown that she could not return to her prior job as a PBX operator for employer and find that her unemployment was not a direct result of the impairment.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *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

_____
Thomas A. Knapp
Appeals Judge