APPEAL NO. 990319

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 1, 1999, a hearing was held. She determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fourth, fifth, sixth, seventh, and eighth compensable quarters. Appellant (carrier) asserts that claimant had some ability to work during the five quarters and did not attempt to find work, citing medical evidence; it also stated that claimant did not timely file his application for SIBS for the fifth quarter and that carrier did timely dispute fifth quarter SIBS. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____. Claimant's testimony about the injury was hard to understand but there was reference to "something gave way in rough terrain"; medical records indicate both that there was a forklift accident and that claimant had materials on his back when his back gave. Injury is not an issue at this point, however.

It is not clear why so many quarters are being tried at one time since the quarters do not begin at the beginning of SIBS as is seen when there is recent impairment rating (IR) that causes a leap forward in time lines. The parties did not stipulate to the IR and the hearing officer did not make a finding of fact as to IR, but the carrier does not appeal the absence of any finding relative to that requirement to receive SIBS. Because there is no appeal as to the absence of a finding relative to this requirement and because the record contains a November 1995 report of Dr. E which states that the IR is 30%, the absence of a finding does not require reversal. Whether Dr. E is a designated doctor, referral doctor, or of some other description is unknown. There was a finding of fact that benefits were not commuted, and that is not appealed.

The filing periods in question began November 10, 1997, so the first relevant filing period began approximately August 12, 1997. Succeeding filing periods began on November 10, 1997; February 9, 1998; May 11, 1998; and August 10, 1998.

Claimant stated that he had spinal surgery at L4-5 in August 1994. He said that because his pain and problems returned, a second surgery was recommended but was delayed. Documents in the record show that second opinion doctors in 1995 thought claimant should have more tests, but thereafter comments occur indicating that carrier would not authorize such tests. They were eventually done and second opinion doctors in 1997 concurred in surgery, but by that time claimant had had second thoughts about surgery since he was told it could paralyze him.

Functional capacity evaluations (FCE) were done in January 1998 and in October 1998. Dr. B was claimant's treating doctor until he died in July 1998. After that, in August

1998, Dr. Ei began treating the claimant. Dr. Bl examined claimant on behalf of the carrier and Dr. Bu examined claimant to determine ability to work on behalf of the Texas Workers' Compensation Commission (Commission).

Claimant stated that he has pain in his back and down both legs with numbness. He has trouble walking and his left leg gives way. He also said he was on medication. He stated that he reported to the Texas Rehabilitation Commission in 1997 but was told that he could not be helped while in his present condition.

On October 24, 1997 (during the first filing period in question), Dr. B stated that claimant is "unable to work," saying also that he was "totally disabled." This note alone is conclusory, citing only spinal stenosis, but Dr. B had other comments in the record. In February 1998 he noted that claimant's January 1998 FCE was "perfectly valid" and opined that a request for a second FCE was "appalling," adding that the carrier was "shopping around." In March 1997, Dr. B had stated that claimant has "gotten worse" since the 1994 surgery. Claimant's pain was said to be "severe, intractable." Dr. B added that claimant "has been unable to stand up . . . [h]e can't work; he can't do anything he wants to do." He referred to transverse process fractures and osteoporosis. He referred to the inability to have studies performed. He said claimant walks with a "severe limp bent forward" and also said his strength on the left was limited.

Dr. Ei said on November 2, 1998 (during the last filing period in question) that claimant "has been unable to work during the period of August 16, 1998, to November 8, 1998." He added that claimant could not work in air conditioning "or any other occupation." He cited mechanical low back pain, lumbar nerve root compression and osteoporosis in saying that claimant could not bend, lift, or squat. He said the back pain was constant and that he prescribed Darvocet N 100 and Flexeril for pain and spasms and Xanax for nervous tension. He concluded by saying, "I find it deplorable that [claimant] and his family have been subjected to such a 'run-a-round' with lawyers, doctors, and insurance companies. This patient is 100% disabled and has adequate paperwork and medical examinations to attest this fact."

Dr. Bu saw claimant at the request of the Commission in October 1998. He said that the October 1998 FCE showed a sedentary work ability with less than 10-pound lifting "from a physical standpoint only. I have severe reservations about the patient's ability to work secondary to psychological overlay and chronic pain syndrome." He later said in this report, "[I] doubt that the patient has any ability to work secondary to the chronic pain syndrome." The record also contains a psychological opinion from Dr. H dated November 15, 1995 (there is no later opinion indicating any change from this opinion), which states that claimant has a "chronic back condition" which "has produced serious, psychological consequences." He then referred to "depression" but said claimant's "religious faith" provides support. He concluded, "no symptom exaggeration noted."

Dr. Bl saw claimant on behalf of carrier. In September 1997, Dr. Bl said that claimant had not even reached maximum medical improvement. He stated that "surgery which has been recommended" will not return claimant to his past ability and then said

immediately thereafter, "at best, I feel he will qualify within . . . category of sedentary to light." Then in February 1998, Dr. Bl said that based on the FCE of January 1998, "he would be qualified within the DOT category of sedentary."

The FCE of January 1998 did not reach a conclusion about ability to work at a certain level, but did say that claimant could sit for 12 minutes, stand for 3 minutes, could not bend, and could lift 6 pounds occasionally. The October 1998 FCE, according to Dr. Bu, said that claimant was limited to less than 10-pound lifting.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She could give significant weight to Dr. Bu, who examined claimant toward the end of the filing periods in issue (October 1998). She did not have to discount his opinion because he referred to the psychological overlay since the record provides evidence that the psychological overlay was produced by the back condition--noting also that the psychologist specifically mentioned "no symptom exaggeration." (We observe that there was no appeal of the findings of "a direct result" made relative to any period under consideration.) While Dr. Bu also used the word, "employable," as in "not employable," he provided other statements, as noted, that addressed ability to work. The hearing officer judges the medical evidence and decides whether to give weight to opinions that could be said to be "conclusory." *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997.

In addtion, both treating doctors used language indicating that claimant could not work at all. While the FCE's could be interpreted as indicating some very limited ability to work, an FCE provides information to a physician or physicians which may be considered like any other test or study in determining what a claimant's condition is or what his treatment should be. *See* Texas Workers' Compensation Commission Appeal No. 972663, decided February 6, 1998. Also, claimant described his left leg as "giving way"; while the medical records did not state that point, the instability and mechanical problems with claimant's back were mentioned, and the hearing officer specifically noted in her Statement of Evidence that claimant's back is mechanically unstable. The medical evidence sufficiently supports the determination that claimant was unable to work during the filing periods of the fourth, fifth, sixth, seventh, and eighth quarters.

Also at issue at this hearing was whether the claimant timely filed his application for fifth quarter SIBS. Claimant produced evidence that the application was "faxed" from his attorney's office (paralegal initials indicating faxing was completed) on January 5, 1998 (the fifth quarter began on February 9, 1998), while the carrier provided the adjuster who testified that no application was received prior to a benefit review conference (BRC) in June 1998. The adjuster did testify that the carrier's fax number was as shown on the claimant's faxed document. Carrier said it then disputed the next day after the BRC in June 1998. The hearing officer found both a timely application and an untimely dispute and the evidence sufficiently supports those findings.

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:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge