APPEAL NO. 990480

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 8, 1999, a hearing was held. She determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the seventh and eighth compensable quarters. Appellant (carrier) asserts that the hearing officer erred in excluding a video of claimant from evidence and also states that the medical evidence does not show an inability to do any work at all. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

This SIBS case was tried under a theory that claimant was unable to do any work at all, which, if found, indicates that no attempt to find work is in fact an attempt in good faith to obtain employment commensurate with claimant's ability, which is none. *See* Sections 408.142 and 408.143. There is no question of, and no authority for, "excusing" a claimant from attempting to find work commensurate with that claimant's ability.

In addition, while the weight to give medical evidence is a determination for the hearing officer to make (this case presented medical evidence of both inability and ability to work so that either a determination for carrier or for claimant could be affirmed), there is insufficient evidence to support that part of Finding of Fact No. 2 and Finding of Fact No. 3 which say that "inability to work is so obvious as to be irrefutable." Findings of Fact Nos. 2 and 3 are reformed to say that claimant was unable to perform any work during the filing period for the seventh and eighth quarters as a direct result of her impairment based on the medical evidence. We note that Findings of Fact Nos. 2 and 3 attempt to combine both the direct result and good faith standards into one finding, and there is no finding of fact stating specifically that claimant's unemployment was a direct result of the impairment; with no appeal as to direct result this will not be discussed further.

At the hearing, closing argument was made by claimant's attorney that Dr. M was selected by the carrier to perform an IME and, "Dr. M will say whatever they tell him to say." There was no evidence in the record for this argument.

The carrier first states that the hearing officer erred in excluding a video of claimant's activities from December 18 to December 30, 1998. The benefit review conference (BRC) in this case was held on December 8, 1998; filing periods for the two SIBS quarters in issue ran from approximately May 21, 1998, to November 18, 1998. Neither party needed to wait for the BRC to determine what the relevant filing periods would be. The hearing officer heard evidence that the video was made in late December 1998 but was not exchanged with claimant until sent on January 22 and received on January 25, 1999. The hearing officer found that it was not timely exchanged with no good cause for late exchange. She noted that video evidence could have been available earlier; we note that carrier did not

exchange within 15 days of the generation of this evidence, so the hearing officer's determination to exclude may be affirmed. The hearing officer did not refuse to admit the video because it contained evidence from outside the filing periods but because of the failure to timely exchange. Her determination was not an abuse of discretion and was not error.

Turning to medical evidence, which must be present to support the determination of the hearing officer concerning total inability to do any work, we will look to see if there is medical evidence in, or near, the filing periods in question and will consider that further removed but will not discuss it unless necessary.

The parties stipulated that claimant sustained a compensable injury (claimant testified that she injured her back and shoulder lifting a credenza) on _____, that the impairment rating (IR) is 15% or greater, that the claimant commuted no benefits, that the seventh quarter began on August 19, 1998, that the eighth quarter began on November 19, 1998, and that claimant did not look for any work in the relevant filing periods. The record includes a designated doctor's IR of 45%; he refers to cervical fusion surgery in 1994.

Claimant's treating doctor is Dr. G, a board certified family physician. The only document he generated during the filing periods that is offered in evidence, was an "addendum" to interrogatory answers dated May 28, 1998. He commented that claimant "has been diagnosed with brachial plexopathy," which he states is a severe condition and which will require surgery. He states that any type of work would cause her condition "to further deteriorate," although he says that the condition has already "severely deteriorated" because of the delay in obtaining "necessary surgery." He also stated that any use of the (left) arm would cause further damage which "may . . . be irreversible." (In a July 1997 letter to claimant's lawyer, Dr. G noted that claimant's "type of injury is very difficult to diagnose." Dr. G's July 1997 letter also spoke very highly of Dr. O. In March 1998, Dr. G stated that claimant's condition had "become worse" and she "cannot work at this time whatsoever."

The hearing officer points out in her opinion that Dr. R was appointed by the Texas Workers' Compensation Commission (Commission), but what he was appointed to do was not stated; he was also referred to at the hearing as a Commission- appointed doctor with his appointment arising in response to a prior Appeals Panel decision. At any rate, on June 17, 1998, he wrote to claimant's lawyer, not to the Commission, and stated, as the hearing officer states in her opinion, that he could not rule out brachial plexopathy and that he did "not have any objections" to the surgical procedure if the claimant "is willing to undergo" it. Other parts of Dr. R's letter of June 17, 1998, that could have been referred to include: that Dr. R was willing to provide a report even though he acknowledges that he does not have a copy of an MRI report (which was normal), that Dr. V found no significant abnormality in the EMG he did of claimant, that he Dr. R found no atrophy, that different EMG studies yielded different results, that Dr. B believed claimant had "only a cervical radiculopathy," that he Dr. R says his own examination is "puzzling" and notes, "I believe she is stronger compared to my previous examination and the pain is less" (Dr. R previously saw claimant in _____), that Dr. R does not know of any test that can make the diagnosis of brachial plexopathy,

and that claimant's "consistency in terms of the distribution of the pain perhaps adds to its validity." His last comment highlights the disparity of medical opinion in this case when he emphasizes the "conflict amongst five neurologists, four of whom did EMGs in the same area, probably attests to the difficulty in this patient's condition."

While the above quotes include both favorable and unfavorable points relative to claimant's condition, Dr. R, as a Commission-appointed evaluator (a designated doctor without presumptive weight as is given in regard to IR and maximum medical improvement), had one other comment which could have been considered extremely important in this case. He said that he was not familiar with the studies that Dr. O said show benefits from the proposed surgery, but added:

> However, I also have a very high regard to [Dr. O's] opinion, his surgical abilities, and his integrity as a surgeon.

Dr. O in 1997 said that claimant does have brachial plexus problems and advised that brachial plexus surgery would be helpful. In April 1998 (just before the beginning of the filing periods in issue) Dr. O said claimant's brachial plexopathy is "so severe" that she cannot perform "any job." He again advised surgery to help alleviate the problem. We observe that while Dr. R refers to an EMG showing no abnormality and a normal MRI, only determinations as to IR require objective findings. In a question of weight to be given medical evidence regarding ability to work, a hearing officer may give weight to medical opinion whether reflective of objective findings or not. However, a hearing officer may choose to give more weight to an opinion that references objective evidence.

While there was repeated comment at the hearing that the medical opinion was divided between the neurologists on one side and orthopedic surgeons on the other, Dr. R's opinion does not show that dichotomy.

The carrier relied, in part, on the report of Dr. V, which was provided on May 5, 1998. (Dr. R had mentioned it above.) Dr. V did not believe there was evidence that brachial plexus surgery would be helpful. He added that his "nerve conduction velocity and needle EMG" indicate "a normal study and the patient would not have restriction. Some of the findings clinically on examination suggested them to be nonphysiologic." The MRI referred to by Dr. R was dated April 3, 1998, and was an "MRI of the Brachial Plexus on the Left"; it showed, "Negative MRI evaluation of the brachial plexus region as described."

In addition to the comment above concerning objective medical findings, much of the medical evidence in this case addressed the advisability, or not, of surgery of the brachial plexus. Surgery was not the issue at this hearing; while the hearing officer states that "as of the date of the hearing the carrier had not approved the surgery for the claimant," the records indicate that the Commission in 1997 acted on a request for left brachial plexus neurolysis" by determining it was "nonauthorized."

The carrier relied significantly on the opinion of Dr. M. Dr. M is an orthopedic surgeon who in February 1998 provided a report concerning claimant. He, like Dr. R, found

no atrophy and, not unlike Dr. V, he found "no abnormal neurological findings." He found inconsistencies. He did not have an "organic explanation for the patient's presentation." He did not think surgery was called for. He believes that claimant can do light work. He continued that opinion after seeing a report of a functional capacity examination which showed some ability to do sedentary work.

Having opened the medical discussion with Dr. G, we now note references to another of his comments. He provided carrier in January 1998 with restrictions that claimant should observe, including that claimant should not lift over five pounds and should not raise her hands over her head. In March 1998, he said, "I would recant any assumptions from my answering the letter . . . that the patient could work." Dr. G did not have to recant anything; he could point out that, although his statement in January 1998 is probably accurate, it is not inconsistent with his professional medical opinion that claimant should not do any work. Carrier's argument was, in effect, that any restriction is indicative of some ability to work, for instance, some ability to lift, since the restriction provided above began at five pounds. *See* Texas Workers' Compensation Commission Appeal No. 972663, decided February 6, 1998, which said that a doctor may consider restrictions imposed but still advise a patient not to do any work based on "other factors, concerns, or simply her best medical judgment." Restrictions usually emanate from a functional capacity evaluation, but that evaluation may be considered by a physician just as any other study, such as an MRI, is considered in the context of the doctor's judgment and all other studies when the doctor provides advice as to treatment or a course of conduct. Dr. G stated, in advising that claimant should do no work, that any use of the left extremity would cause further damage which may be irreversible. The hearing officer could weigh all of Dr. G's opinions in determining whether Dr. G stated that claimant could work or not. Dr. G had also stated in March 1998 that claimant's brachial plexus condition had worsened and she could not work at all.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The Appeals Panel is not a fact finder and will only overturn a hearing officer on a factual determination when that determination is against the great weight and preponderance of the evidence. As stated, the medical evidence, including all the relevant evidence of record, some of which has been cited herein, is sufficient to support either a determination of no ability to work or some ability to work. As both Dr. G and Dr. R noted, claimant's condition is difficult to diagnose. In such a setting, medical practitioners do not necessarily lack in integrity or competence when they conflict with each other. The determination of the hearing officer that claimant could not do any work in either filing period is sufficiently supported by the medical evidence with emphasis on that of Dr. G, Dr. O, and Dr. R.

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:

_____
Susan M. Kelley
Appeals Judge

_____
Alan C. Ernst
Appeals Judge