APPEAL NO. 991045

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 13, 1999, a hearing was held. He (hearing officer) determined that respondent (claimant) was not entitled to supplemental income benefits (SIBS) for the second and third compensable quarters, but was entitled to SIBS for the fourth compensable quarter. Appellant (carrier) appeals only as to the determination relative to the fourth quarter, stating that there is no evidence to support the determination of no ability to work, adding that the surgery which occurred during the filing period for the fourth quarter was elective. Claimant replied that the medical evidence sufficiently supports the determination of the hearing officer.

DECISION

We affirm.

Claimant worked for A (employer) on _____, when she injured her back moving either a washer or dryer or a combination model of the two. She had fusion surgery from L4 to S1 in 1995; in 1996 she had another operation to place hardware in the site of the fusion; and on December 15, 1998, she had surgery to remove the hardware because she had a loose screw.

The parties stipulated that the injury of _____, was compensable, that no benefits were commuted, that the impairment rating is 15% or more, and that the three SIBS periods in issue began on July 6, 1998, October 5, 1998, and January 4, 1999. From these dates, the parties considered the filing periods to have begun on April 6, 1998; July 6, 1998; and October 5, 1998. As stated, the only issue on appeal addresses the fourth quarter, in which the filing period began on October 5, 1998, and continued to January 4, 1999.

Claimant was followed both by a chiropractor, Dr. S, and an orthopedic surgeon, Dr. H. Dr. H commented on April 2, 1999, that he had treated claimant since December 1994. He said that claimant has been "totally disabled" throughout the time he has treated her. He stated that her restrictions included no bending or lifting and he said that, if claimant did not follow these restrictions and sustained added injury, "the consequences could be very severe." Prior to the surgery on December 15, 1998, Dr. H had noted on November 18, 1998, approximately half-way into the filing period of the fourth quarter, that claimant had been "doing quite well until about 1 to 1-1/2 months ago" when her symptoms in the low back, left hip, and left leg recurred, with numbness. At that time, Dr. H said that surgery was proposed, which he called "elective."

The operative report dated December 15, 1998, was consistent with the November note, above, in that it noted a significant change in claimant's condition "2-1/2 months ago." The fusion was said to appear to be solid and the hardware was removed. On January 6, 1999, after the filing period in question, Dr. H noted that the claimant was doing well and

said that he gave her permission to "initiate vocational rehab. counseling." In his April 1999 comment, Dr. H indicated that recovery would probably take from six to nine months.

Dr. S testified by telephone that he first treated claimant in 1995. He recommended the functional capacity evaluation (FCE) claimant had in January 1998, adding that claimant could not finish the evaluation. He pointed out that the doctor who conducted the study said that claimant could do sedentary work if modified, which Dr. S stated meant that she could do less than sedentary work. (The FCE said that claimant could occasionally lift weight that is considered to be in the "light" work level--note that Dr. H did not say claimant could not physically lift any weight but that she should not lift any weight.) A large part of his testimony dealt with a recommendation that claimant have work hardening or something similar which had not been approved. Dr. S stated that he did not think claimant had an ability to work (during the filing period in question) and could not perform any duties. He stated that he does not believe a patient has to be pain-free to go back to work.

There was no medical evidence indicating that claimant could work other than the FCE. While carrier maintains that the only thing different during the filing period for the fourth quarter was that surgery was performed on December 15, 1998 (over two-thirds of the way into the filing period), Dr. H consistently pointed out claimant's change in condition beginning in the first part of October 1998. In addition, both he and Dr. S maintained that claimant was "totally disabled" or could not work during the filing period in question. While Dr. H labeled the last surgery as "elective," no definition of that word is provided; we note that a claimant generally has the option of consenting to, or rejecting, any recommendation for surgery.

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:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge