APPEAL NO. 991084

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 14, 1999, a hearing was held. He (hearing officer) determined that the appellant (claimant) has an impairment rating (IR) of 13%, as found by the designated doctor, Dr. L, that he was not entitled to any supplemental income benefits (SIBS), and that the respondent (carrier) did not waive its right to dispute the first compensable quarter of SIBS. Claimant asserted that findings of fact and conclusions of law that support the hearing officer's reliance on Dr. L's March 1997 report of IR, that reject Dr. L's 1998 reports of IR, that state that claimant was not eligible for and not entitled to SIBS for any of the first six quarters, and that state that carrier did not waive its right to contest entitlment to SIBS, constituted error. Carrier replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____, when he injured his back lifting. The parties stipulated that claimant sustained a compensable injury on _____, that the Texas Workers' Compensation Commission (Commission) appointed Dr. L who, as the designated doctor, provided multiple IRs from May 1995 through August 1998, and that claimant reached maximum medical improvement (MMI) by operation of law (statutory MMI) on July 14, 1996.

When Dr. L provided his first IR in May 1995, stating that claimant reached MMI on January 10, 1995, with a seven percent IR, he noted that spinal surgery was planned for May 1995. That surgery was performed on June 13, 1995, by Dr. S; it involved a laminectomy and discectomy at L4-5. Thereafter, Dr. L again examined claimant on February 28, 1996; he noted the surgery of 1995 and assigned an IR of 10%, all of which came from Table 49, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); no IR was provided for range of motion limitations. Dr. L noted in this 1996 report that Dr. S was again planning surgery "in the near future."

Claimant then had surgery to "redo laminectomy, foraminotomy, [and] diskectomy" on May 24, 1996. Dr. L then examined claimant on March 27, 1997; he noted the surgery of May 24, 1996 (before the date of statutory MMI of July 14, 1996), and provided an IR of 13%, based on 12% IR from Table 49 of the AMA Guides and one percent based on right lateral flexion limitations; he noted that all sensory modalities were unimpaired. His report did not indicate any surgery was pending, planned, or even being considered, and he referred to no processing of future surgery at the time of statutory MMI which had been reached eight months before. Neither party asserted that Dr. L's report of March 1997 was an improper amendment of earlier reports.

Claimant did have surgery again on November 14, 1997 (16 months after statutory MMI). A Recommendation for Spinal Surgery (TWCC-63) indicates that the second opinion process was initiated in August 1997, after the March 1997 report of Dr. L. A second opinion of Dr. G, dated September 17, 1997, recites claimant's history of prior surgery in June 1995 and May 1996; Dr. G stated that claimant said he did "fairly well for some time" following the second surgery. Dr. G added that claimant reported having "persistent back pain" for the last six months. Dr. G later repeated that claimant has "persistent back pain." Dr. G noted that a myelogram and MRI "done this year" do not show any significant lesions. He stated that a pseudoarthrosis does not show up well on studies and exploration is needed to determine its presence.

Dr. L, in his next examination of claimant in March 1998, referred to the November 1997 surgery at L4-5 and said it was performed "because of persistent back and leg pain," which is consistent with what Dr. G had written in September 1997 about the reason for the proposed surgery. The operative report of November 14, 1997, gave a postoperative diagnosis of "pseudoarthrosis L4-5," which was the same as the preoperative diagnosis. These facts provide sufficient support for the absence of any finding of fact indicating that claimant's condition substantially changed after statutory MMI and for the absence of any finding of fact indicating that a proposal for surgery was being processed at the time of statutory MMI.

Dr. L, in his report of April 1998 (examination of the claimant took place in late March 1998), referred to the November 1997 surgery (as having been done for persistent back and leg pain) and stated the lumbar IR should be 14%; he also noted claimant's treatment for depression and combined the 14% with five percent for psychological conditions, resulting in an 18% IR. The Commission inquired of Dr. L in May 1998 concerning whether he thought the depression would be permanent. Dr. L answered in June 1998 that the depression would not be permanent and that it would improve upon claimant's return to employment; he also said that there was no evidence to support that the depression would be permanent. However, Dr. L then saw claimant again in August 1998 and again provided an IR in which five percent for depression was included; this time the total IR was stated to be 19%.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In regard to determinations of IR, Section 408.125 provides that presumptive weight will be given to the opinion of the designated doctor, Dr. L. In this case, no IR from any other doctor was argued as controlling; the question in regard to IR was which of Dr. L's opinions should be used by the hearing officer to determine IR. The hearing officer provided a very accurate Statement of Evidence in which he explained why he did not give presumptive weight to any designated doctor's report rendered after the last surgery in November 1997 (after statutory MMI). Included within his reasoning was the fact that two of such reports included an IR for depression which Dr. L had said was not shown to be permanent. In this regard, one statement in the Statement of Evidence does raise a question. The hearing officer noted that even though Dr. E, who was treating claimant, said the depression was permanent, "this hearing officer tended to give [Dr. L] more credence." That statement may imply that Dr. L is not entitled to presumptive weight in regard to

whether an injury is permanent; if it does so, it is wrong. Permanence is necessary to IR and Dr. L's opinion as to permanence should be given presumptive weight under Section 408.125.

In determining that Dr. L's opinion that the IR is 13%, based on surgeries that took place prior to statutory MMI, the hearing officer is also supported by Texas Workers' Compensation Commission Appeal No. 971339, decided August 28, 1997, which noted that there is a greater reason for finality once MMI has been reached by operation of law. Texas Workers' Compensation Commission Appeal No. 990058, decided February 24, 1999, reversed a hearing officer's decision that found IR based on a surgery after statutory MMI and rendered that the correct IR was provided by an earlier opinion, stressing that no surgery was being considered at the time that claimant reached statutory MMI. The determinations that there was a valid reason to amend Dr. L's reports through the March 1997 report (13% IR), that there was not a proper reason for amending Dr. L's report thereafter in 1998, and that the great weight of other medical evidence was not against Dr. L's first three reports, including the one of March 1997, are sufficiently supported by the evidence.

With an affirmed determination that the IR is 13%, there can be no SIBS. *See* Section 408.142. Since claimant does not have an IR of at least 15%, the Commission's initial assessment that claimant should receive SIBS for the first quarter did not comply with the requirements of the 1989 Act.

The hearing officer also found that the Commission records show that the Commission telephonically contacted the carrier on April 29, 1998, and told the carrier that the Commission approved the first quarter of SIBS for claimant. Carrier was said to have questioned the appropriateness of such a decision when it was disputing the IR. The note shows that the Commission said it was going to set a benefit review conference (BRC) at claimant's request to speed "the process" and also noted that it would add the issue of IR to that BRC. While claimant's appeal states that the carrier did not dispute the first SIBS quarter, the note of April 29, 1998, clearly shows that carrier did dispute the amount of IR when informed of entitlement to the first quarter of SIBS and the Commission added that to the pending BRC. *See* Texas Workers' Compensation Commission Appeal No. 93046, decided March 5, 1993, which said that a dispute of the underlying certification of MMI by a doctor (by stating that certification was not done by a doctor) was a dispute of IR because it showed that an IR had never been established. Therefore, the carrier, when informed by the Commission of the determination that first quarter SIBS should be paid, disputed that the underlying IR was 15% or more which, in effect, disputed any award of SIBS. The determination of the hearing officer that the dispute by carrier was timely is sufficiently supported by the evidence.

Finally, the determination that the claimant was unable to work at all for only a six-month period after surgery in November 1997 is sufficiently supported by the evidence. A finding of fact that claimant did not attempt to find work at any time after "his impairment period," which we interpret to mean after he ceased receiving impairment income benefits, was not appealed. With no attempt to find work and an affirmable finding of no ability to

work only for a six-month period, any other SIBS period would not result in an award of SIBS to claimant even if the IR were 15% or greater. As stated, the determinations of no entitlement to SIBS for any period are sufficiently supported by the determination that claimant's IR is 13%.

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:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge