APPEAL NO. 991162

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 4, 1999, a hearing was held. She (hearing officer) determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first compensable quarter. Claimant asserts that part of her medical evidence was disallowed because of a "technicality" and that the hearing officer "limited my participation" to reviewing documents. She states that her medical evidence shows that she had no ability to do any work of any kind. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____, when, as shown by her responses to interrogatories, she "felt excruciating pain" in her "hand that went through my arm to my shoulder and neck," while "removing heavy clothes from an overhead rolling rack." The hearing was conducted without any testimony. The parties stipulated that claimant has a 47% impairment rating (IR), that the filing period for the first quarter began on November 13, 1998, and ended on February 11, 1999, and that claimant did not work during the filing period. There was no stipulation as to commutation of benefits but no one appealed on that basis. Similarly, there was no stipulation that claimant did not attempt to find any work of any kind during the filing period of the first quarter, but this point was included in the discussion at the hearing; at any rate, the claimant has provided no evidence of any job contacts or any other actions indicating that she was seeking work during the filing period in question.

At the beginning of the hearing, the hearing officer gave the oath to the claimant and told her that the ombudsman is here for her assistance but that she, the claimant, will have to answer questions. She announced that there would be an opportunity for "examination of witnesses." She told the claimant that the burden of proof was on her and also told her to ask if she has any questions at any time in the hearing, after which claimant replied, "I will. Thank you." Claimant also agreed that she wished to proceed with the assistance of the ombudsman. The hearing officer then said, "Now then, I think since we're just going to have documentary evidence presented that we'll just make one argument," adding the times allowed for arguments and rebuttal. At the end of the statement about documentary evidence and arguments, the hearing officer asked claimant, "is that all right," to which the claimant replied, "That's fine." Carrier also agreed. Claimant, herself, then agreed as to the issue to be tried and that her position was that she is entitled to SIBS because her doctor has her "on a no-work status." We do not agree that the hearing officer limited claimant's participation. The above summary indicates that the parties decided to only provide documentary evidence. Claimant personally responded throughout the hearing, but never suggested that she wanted to testify. In claimant's closing argument there was no suggestion that she had been denied her right to testify or that any evidence, other than

medical evidence, needed to be developed about which claimant's testimony may have been addressed. There was no error in the hearing officer's announcement that "we" are going to have documentary evidence, to which both parties agreed.

Claimant's exhibits were offered into evidence with carrier objecting to Claimant's Exhibit Nos. 7, 8, and 9. The hearing officer denied admittance to Claimant's Exhibit Nos. 7 and 8 based on untimely exchange, but admitted Claimant's Exhibit No. 9, finding good cause for late exchange. Claimant's Exhibit No. 7 was a medical record with the date of January 29, 1999, typed on it in a different type. While the ombudsman said it was exchanged at the benefit review conference (BRC), the carrier said it was not; no other evidence of a timely exchange was presented, and the hearing officer denied admission. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) which provides for exchange of documents within 15 days of the BRC. The BRC was conducted on March 25, 1999, while the exchange from claimant was received April 30, 1999. The next documents objected to were medical records dated March 15, 1999, and April 12, 1999. The ombudsman replied to the objection of late exchange that these were also exchanged at the BRC along with the January 29, 1999, document just ruled to be inadmissable. The hearing officer then observed that it was obvious that a document dated April 12, 1999, was not exchanged at a BRC held on March 25, 1999. The hearing officer ruled that the document dated April 12, 1999 (exchanged on April 30, 1999), was provided as soon as possible and admitted it as Claimant's Exhibit No. 9. She observed also that she questioned whether a doctor's document dated March 15, 1999, would have been available by March 25, 1999, and concluded that when it did become available it should have been exchanged before April 30, 1999. At this time no other evidence of an exchange at the BRC was offered in addition to the statement earlier made that both the April 12th and March 15th documents were exchanged at the BRC of March 25th.

The only other record not admitted that was offered by claimant was a pharmacy list of drugs provided. This exhibit was said to have been in claimant's possession at the time of the first preparation visit with the ombudsman, shown to be April 5, 1999, but was not exchanged until April 30, 1999. The hearing officer in ruling on the objections based on timeliness of exchange listened to arguments of both sides, with one side saying exchange had occurred timely at the BRC, except for the pharmacy record; the other side said it received none of the documents in dispute until April 30, 1999. When the hearing officer asked for any other evidence to show an exchange, none was forthcoming; the hearing officer could also consider the declaration that all documents, except for the pharmacy log, were provided to carrier at the BRC of March 25th, including a document dated April 12, 1999. As the hearing officer stated earlier in the hearing, the burden of proof was on the claimant. We believe that this summary of why documents were not admitted shows admission was denied because of the time of exchange as governed by Rule 142.13. We find no abuse of discretion in the hearing officer's decisions regarding claimant's exhibits offered into evidence.

If the exchange of documents within a certain time is a technicality as stated by claimant, the hearing officer also applied it to the carrier. When carrier offered its exhibits, claimant objected to the offering of a copy of the most recent medical examination report,

by Dr. T–relating to a late April examination. The hearing officer excluded it, too, even though carrier stated that it was exchanging material acquired after the BRC as soon as it received a copy, which was said to have been "that morning." The hearing officer did not admit this document either, commenting that the carrier should have obtained a required medical examination report sooner.

For a claimant to show that he or she has no ability at all to do any work for any period of time, medical evidence is required to show that status or it must be so obvious as to be irrefutable. *See* Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994. The medical evidence in this case included an IR report showing that the psychological impairment constituted 40 of the 47% IR. Claimant's treating psychiatrist, Dr. B, provided two reports within the filing period in question. One was dated December 17, 1998, and said claimant is "feeling much better with her depression," although she states that claimant remarked, "I am still not the way I used to be." The report from January 11, 1999, said that claimant had had some setbacks regarding her depression but that she is in "more control of her emotions." Dr. B concluded by saying, "she cannot be consistent because of still having some mood swings and still having severe pain." While Dr. B's report of March 15, 1999, was not admitted, her last report, dated April 12, 1999, was admitted. In it she says she has treated claimant since 1994 for "severe depression and anxiety." She noted claimant's problem in concentrating. Dr. B stated that claimant is "totally disabled because of her severe depression, anxiety, and chronic pain syndrome."

Claimant saw Dr. C in June 1997 for a psychiatric evaluation. He referred to claimant's ability to return to work "after her depressive episode in 1992 or 1993" (the injury in question was in May 1994). Dr. C said then that her activities of daily living were mildly to moderately impaired, her social functioning was moderately impaired, her concentration was mildly to moderately impaired, and her "deterioration/decompensation in work or work-like setttings" was moderately impaired.

Dr. W is claimant's treating doctor. In a report dated March 25, 1999, Dr. W said that claimant has a sprained right shoulder, a sprained low back, major depression "recurrent and severe" and anxiety disorder. (Dr. W's earlier, short report of January 29, 1999, was not admitted.) Dr. W also said claimant's depression has "affected her perception of her physical condition" and "her perception of her low back pain according to the . . . questionnaire is 64%, which places her in the crippled disability category." She added that claimant's "rotator cuff bones and joints and soft tissues were all normal." Dr. W also mentioned "chronic disruption of the ligamentous integrity of the right shoulder due to the initial sprain." She referred to a functional capacity evaluation (FCE) provided by claimant in December 1998 (within the filing period in question) as showing that she could not meet "work demands" that were "required by her job." She agreed that the evaluation showed claimant's physical capacity as being capable of sedentary work levels of work. Dr. W then added that notwithstanding the physical ability shown by the FCE, "I believe her major psychiatric impairment makes this impossible."

The FCE in question of December 1998 does show a sedentary work ability.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The hearing officer commented in her Statement of Evidence that the records during the filing period did not convince her that claimant is unable to do any work despite her "problems with depression." Claimant points out that the hearing officer in that quote only referred to depression, but that her depression is "major." We note that earlier in the hearing officer's Statement of Evidence she had quoted from Dr. W who referred to the depression as a "major psychiatric impairment" so we do not conclude that the hearing officer did not appreciate the level of depression involved. Claimant also questioned why the hearing officer commented that "the medical did not address basic personal hygiene," but the hearing officer commented that "for a period of time, she did not address basic personal hygiene"; Dr. B had stated in May 1996 that "about three days per week she does not take care of her personal needs" and Dr. B also provided in May 1996 a psychiatric IR of 40%, which included consideration of "activities of daily living," so we do not agree with claimant when she implies that the hearing officer should not have been concerned about this area because of its lack of importance.

Claimant also states the hearing officer made a mistake in referring to "several episodes of depression" and that she recovered therefrom. Dr. C's medical report refers to "a depressive episode" in 1992 or 1993. He also referred to claimant having felt that she was being treated unfairly by her supervisor at work, resulting in a bad review. Otherwise, we agree with the claimant; the medical records seem to refer to one episode in 1992 or 1993, plus events such as the bad review and her daughter's exposure to lewdness, but Dr. C did not label the latter two as depressive episodes. However, this apparent confusion is not reversible error; the point that claimant had depression prior to the compensable injury was not misstated. Claimant also stated that the hearing officer commented "flippantly" about claimant's right to appeal as if her decision was prematurely made. The transcript shows, however, that the hearing officer commented to claimant when one of claimant's exhibits was not admitted that that "does give you an independent ground of appeal," but the hearing officer later told the carrier when not admitting one of its medical records, "[s]o that gives you ground of appeal. I'm sure that's where this case is going." We find no flippancy directed to claimant.

With the FCE providing some evidence of ability to work, with some other medical reports provided during the filing period indicating that claimant had improved, and with the hearing officer being able to observe the claimant during the hearing, we do not find that the determination that claimant did not show she was unable to do any work at all is against the great weight and preponderance of the evidence. Therefore, since there was no evidence that claimant sought work of any kind, the determination that claimant did not attempt to obtain work commensurate with her ability is sufficiently supported by the evidence.

While the evidence provided in the FCE and Dr. W's reference to the FCE showed that claimant could not return to her old job for physical reasons, and would provide a sufficient basis to find that the claimant was unemployed as "a" direct result of the impairment (emphasis added), the hearing officer did not so find. In view of the affirmed

determination as to the absence of a showing of good faith, there is no need to consider a remand in regard to whether the unemployment was "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:

_____
Philip F. O'Neill
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge