APPEAL NO. 991456

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 18, 1999, a hearing was held. She (hearing officer) determined that respondent (claimant) had no ability to work and was entitled to supplemental income benefits (SIBS) for the 12th through 17th compensable quarters, but that appellant (carrier) was relieved of liability for payment of SIBS for the 13th, 14th, and 15th quarters entirely and was relieved of that part of the 16th quarter from February 26, 1999, through April 29, 1999. Carrier asserts that it was error to determine that claimant was unable to work, emphasizing the comment by the hearing officer that claimant has deteriorated as being "not true"; carrier also took exception to the comment that "both doctors" (Dr. M and Dr. R) explained their opinions of inability to work; carrier did not assert that any different standard should be applied to the filing period of the 17th quarter as opposed to those of the 12th through 16th. Claimant replied that she agrees with all findings of fact and conclusions of law and calls attention to her "deconditioned" status.

DECISION

We affirm in part and reverse and remand in part.

Claimant worked for (employer) on _____, when, she said, material being handled (claimant did not say she was lifting it) "shifted on to" her. She said she pushed it away (the audio was very faint at times) but claimant indicated that she felt as if she were "on fire." She was taken to a hospital. Her injury was stated to be to her low back, neck, and right arm. Unfortunately, no records from treatment provided in and near the time of injury were provided. She then had low back surgery in September 1992, after which there was an infection. No medical records were provided of the surgery or resultant infection. The parties stipulated that claimant reached maximum medical improvement on April 28, 1994, with an impairment rating of 19%. No benefits were commuted. The parties also stipulated that the filing period for the 12th quarter began on November 28, 1997, and ended on February 26, 1998. (Stipulations for other filing periods prior to the 17th were also made.) The parties initially defined the filing period for the 17th quarter as beginning on February 26, 1999, but then agreed that the filing period for the 17th period began on February 12, 1999, and ended on May 14, 1999.

The hearing officer is the fact finder and the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The Appeals Panel will only overturn a hearing officer's determination of factual issues, including SIBS, when it is against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996. The hearing officer may give weight to medical opinion even when it does not explain why a certain conclusion is reached; credibility of medical evidence is also a matter for the hearing officer to weigh. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997.

The carrier states that there is no basis for the hearing officer to state that claimant's condition has deteriorated. We find some evidence of deterioration in the opinion of Dr. R. The record only contains one opinion of Dr. R, but it is thorough and generally provides a basis for points he makes therein. *See* Texas Workers' Compensation Commission Appeal No. 93119, decided March 29, 1993. Unfortunately for claimant, most of Dr. R's opinion may be interpreted as not supporting his conclusion that claimant is "disabled for any and all occupations." However, the hearing officer may choose to give more weight to certain points made in the opinion than she does to others. In regard to the hearing officer's comment about deterioration, Dr. R does say in March 1999 that "around December 24th, she was diagnosed as having osteomyelitis discitis"; there is no medical document from on, or near, that date that says that, but the hearing officer may accept Dr. R's statement and reasonably infer that he had more medical records to examine than were provided at the hearing (even though Dr. R talks of not having "her chart" he says that in reference to her surgery; he also comments that he only has one report of one study; but, throughout his report, he refers to "a note from" and "an examination note" which are then described sufficiently to tell us that such notes are not in this record). The hearing officer may consider osteomyelitis discitis diagnosed in December 1998 as a deterioration. Similarly, she may reasonably infer that Dr. R's comment that claimant is "horribly deconditioned" in March 1999 to be a process, together with other evidence that claimant has done no work since 1992, that has reached its present point of "deconditioning"over a period of time. While Dr. R states that there has been "no change whatsoever objectively" when compared to past years, his reference to deconditioning is an observation, not just a symptom that claimant related to him. We do not find that the hearing officer's statement of deterioration was "not true." We observe that Dr. R says at the end of his opinion that the only treatment for claimant is to "manage her pain" and that she "is disabled for any and all occupations" after he had discussed claimant's condition in detail.

The hearing officer also commented that "both" doctors (Dr. R and Dr. M) gave opinions that were "more than conclusory" and were "adequate explanations." Dr. R's opinion may easily be so characterized. The record contains two short statements from Dr. M in 1999; one is only one sentence long. The more complete statement provided in April 1999 says that claimant has "a lot of back pain" for which she needs "a lot of medications." Dr. M also says that her pain has been "up and down." He does say that claimant has "clinical evidence of inflammation of the joints." Dr. M then concludes by saying about claimant that "to this day she is unable to work." The one line report says claimant has "multiple medical problems" and "uses a back brace." While claimant's list of exhibits from Dr. M specifies the two reports just discussed, it also lists three other documents from 1999 and four from 1998; unfortunately, no other records from 1999 and none from 1998 are in evidence. Besides the two short reports mentioned, Dr. M's reports are dated May 2, 1997, and earlier. His May 1997 note only makes observations about claimant's vascular system, her heart, lungs and abdomen. In March 1997 Dr. M does mention carpal tunnel syndrome (CTS), but does not assess anything about the back except for urinary incontinence. In February 1997, he mentioned CTS and cervical spondylosis and planned to get a CT scan of the low back. In January 1997, Dr. M observed claimant's vascular system, her heart, lungs, and shoulder. He then assessed bilateral cervical radiculopathy, cervical spondylosis, and lumbar radiculopathy. Other reports from Dr. M were dated 1996 or 1995,

and with the filing period of the 12th quarter having begun at the end of November 1997, those other reports will not be discussed. It would not be unreasonable to interpret Dr. M's reports in 1997 as indicating that claimant was getting better insofar as her compensable injury was concerned. As stated, there is nothing in 1998 and 1999 except two short opinions in 1999 to consider. While Dr. M's reports appear to provide little explanation as to why claimant is unable to work, the hearing officer may choose to give his conclusory statement about work some weight anyway. *See* Appeal No. 970834, *supra*.

The carrier provided the opinions of Dr. K, who examined claimant in June 1997, and Dr. B, who examined her in January 1998. Dr. K says that he sent claimant for a functional capacity evaluation (FCE) and would provide an addendum when that evaluation was finished. The record does not contain such an addendum. The FCE was done later in June 1997; it does say that claimant could do light work for at least four hours a day. Dr. B thought that claimant could do "light or sedentary work" in January 1998 but also said he would refer her for an FCE, which was done but was said to be inconclusive. The hearing officer noted that claimant has "deteriorated" since being seen by Dr. K and Dr. B. Both of these doctors did provide updates in May 1999 after reviewing "reports" from Dr. R and Dr. M; both indicated that their opinions as to claimant's ability to work remained as each had previously provided.

The hearing officer could choose to give more weight to the conclusory statement of Dr. M and to the opinion of Dr. R, indicating that claimant could do no work, than she did to the opinions of Dr. K and Dr. B. The reports of Dr. R and Dr. M do provide some evidence of inability to work and the determination that claimant has no ability to work is not against the great weight and preponderance of the evidence.

The determination of entitlement to SIBS for the 17th quarter, however, must be reconsidered in light of different standards imposed by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100 to 130.109, which went into effect January 31, 1999; those rules said that effectiveness is determined by the "rules in effect on the date a qualifying period begins." With the filing (qualifying) period for the 17th period beginning on February 12, 1999, the new rules were in effect. Since the hearing officer made no findings of fact specific to the 17th quarter and did not indicate in her Statement of Evidence that she applied different rules to the question of entitlement for the 17th quarter, the case is remanded for the hearing officer to make findings of fact about the 17th quarter consistent with the new rules. While the carrier did not assert the applicability of the new rules as a basis for appeal, Texas Workers' Compensation Commission Appeal No. 991330, decided August 9, 1999, does not require an appeal to identify a correct standard in regard to a matter in order for a remand to be ordered.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings,

pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

CONCUR IN RESULT:

_____
Thomas A. Knapp
Appeals Judge