

APPEAL NO. 991472

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 15, 1999, a hearing was held. He (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 17th through 20th compensable quarters. Claimant asserts that he still had no ability to do any work even if he had not had a separate injury to his hand which became infected, in part because of diabetes, and necessitated several operations during the filing period for the 17th quarter. He cites medical records to support his assertion that he met the direct result criterion relative to the 17th and 18th filing periods and for his assertion that he was unable to work during the filing periods for the 19th and 20th quarters, adding that he has not been released to return to work. Respondent (self-insured) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for the (employer) on _____. He testified that at that time he was preparing floors for the coming school year when, while "scrubbing" he felt pain in his left shoulder. He said that thereafter he had three operations to his neck and one to his low back. There was no issue as to compensable injury or extent of injury.

The parties stipulated that there was a compensable injury, that there is an impairment rating of 15% or more, that no commuting of benefits has occurred, that the filing period for the 17th period began on April 2, 1998, the 18th began on July 2, 1998, the 19th began on October 1, 1998, and the 20th began on December 30, 1998.

There was no appeal of findings of fact that stated claimant was unemployed and sought no work during all relevant filing periods; that he hurt his hand in early April 1998; that he incurred a diabetes-related infection therein and underwent several operations to the hand; and that this malady did not resolve until October 1998. See Texas Workers' Compensation Commission Appeal No. 960791, decided May 30, 1996, which said that surgery for a condition unrelated to the compensable injury may affect the question of direct result.

There is no dispute that claimant had a nonwork-related injury to his right hand for which he had operations on April 28, May 5, May 12, June 19, and June 22, 1998. (During this sequence of surgery, claimant had three fingers of the right hand amputated.)

Claimant stated that his treating doctor is Dr. MH, who, he said, has been treating him since 1993. Dr. MH did not do the surgery to claimant's hand. The record contains two opinions of Dr. MH which discuss claimant's ability to work. One is dated July 25, 1998 (submitted by claimant), which stated that claimant would still not have been able to work at all even if he had not had the gangrene and amputation relative to his right hand. The

reasons Dr. MH gave for claimant not being able to work, regardless of the hand surgeries, were "ongoing problems with his back and leg pain." Dr. MH said, "as you recall, he has had surgery on both his cervical spine and lumbar spine." She talked of claimant's legs causing him "a lot of trouble." Dr. MH concluded this July 1998 letter by saying that she has not released claimant for work, repeating that he could not work because of his back and neck injury, "which have both required surgery."

The tone of Dr. MH's July 1998 letter did not appear to indicate that lumbar surgery had recently occurred, but did appear to refer to both the cervical and lumbar operations as part of the basis for saying claimant should not work. As claimant stated (although he gave no times for any surgery), he has had three neck operations and one low back surgery.

Dr. MH nevertheless said in short letters provided in succeeding months, dated September 15, 1998, December 30, 1998, and March 25, 1999, that claimant "recently underwent lumbar surgery," in opining that he could not work; in the first two letters she said that claimant was "awaiting surgery for his hands," while in the March 1999 letter she changed the reference to the hand by saying that claimant "recently underwent lumbar surgery and hand surgery." The record contains no operative reports of any surgery other than the hand surgeries of April, May, and June 1998, as previously discussed.

Also in the record is an October 29, 1998, summary from Dr. MH (the second opinion which discusses claimant's ability to work) submitted by the carrier. It said claimant's hand is "healing well." Dr. MH added that claimant continued to have pain in his back and legs. She adds that most of the pain is in the bottom of the back, saying that claimant "has had surgery on his back by [Dr. M]." She then mentioned that the carrier "at this time" is not considering the back as compensable. She then said that claimant has "some numbness and tingling in his toes." Dr. MH then said that claimant "would go back to work if he could find a job that he could do," mentioning a crossing guard position. This opinion did not say when the lumbar surgery occurred and therefore did not say it was recent or even that it was within the last year.

A functional capacity evaluation in November 1998 indicated that claimant could do some very restricted work.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. His findings of fact indicate that he did not give significant weight to Dr. MH's opinions stating that claimant could not work; they also show that claimant could not do any work for a limited period because of his hand injury; this latter finding should be read in conjunction with a finding of fact that said claimant's unemployment relative to the 17th and 18th quarters was not a direct result of the "compensable injury." (While the standard is whether or not unemployment is a direct result of the impairment [not of the compensable injury], there is no evidence indicating that this reference to compensable injury affected the finding of fact or the decision.) In addition, there is a finding of fact that says claimant had some ability to work during the filing periods of the 19th and 20th quarters. (We note that claimant contends he was never released to work; an absence of a release to work was found insufficient to support an inability to work in Texas Workers'

Compensation Commission Appeal No. 941559, decided January 5, 1995; in this case, Dr. MH's opinions do provide some evidence that claimant could not work.)

The hearing officer in his Statement of Evidence and Discussion indicates, however, that he gave little weight to Dr. MH's reports concerning a total inability to work, saying that they are conclusory and basically only indicated that claimant "is still in pain and still under her care." With both parties agreeing that the hand injury/diabetes/infection was not part of the compensable injury, the only medical evidence that said claimant could not work was that of Dr. MH. The hearing officer did not err in considering Dr. MH's reports, including those relative to claimant's lumbar surgery, as being insufficient to show that claimant was unable to work at all.

With an affirmed determination that claimant did not seek employment during any filing period in question, with the hearing officer indicating that he placed no significant weight on any opinion of Dr. MH that said claimant could not work, and with an affirmed determination that when claimant was unable to work it was because of an unrelated sequence of surgeries and infection, the determination that claimant was not entitled to SIBS for the 17th through 20th quarters is sufficiently supported by the evidence.

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

Dorian E. Ramirez
Appeals Judge