APPEAL NO. 991473

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 11, and June 4, 1999, a hearing was held. She closed the record on June 17, 1999, and determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Claimant asserts that it was error to admit, and give weight to, a report of Dr. S; to admit two videotapes and reports thereof into evidence; to admit, and consider, a report and curriculum vitae of Mr. G; that the decision is against the great weight of the evidence; and that there is no evidence that the medical evidence in this case is conflicting and that claimant has not shown "no ability to work." Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

A determination of whether or not a claimant is entitled to SIBS is basically a factual determination for the hearing officer to make, exercising her responsibility to weigh the evidence and to determine credibility. *See* Sections 408.143 and 410.165. She also weighs medical evidence and may choose to give little or no weight to a particular medical opinion or opinions while giving significant weight to other medical opinion. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997.

Claimant testified that she had fallen at work in _____ and injured her left hip at that time. She had an open reduction with internal fixation after that injury. (Her history shows that at age 12 claimant had her first fracture of the left hip "with reconstruction.") After another fall at work in 1993 (the compensable injury relevant to this case), claimant had left hip replacement surgery by Dr. B. Claimant testified that she did not recover after the _____ injury but that she did return to work. Claimant's son, JEM, testified that claimant has been disabled since the _____ injury. Claimant's husband, JM, said that the first fracture (91) "slowed her down pretty good"; he added that she now cannot stand or walk for a long period of time and cannot drive a long distance; he said that he guessed that she took medication when in pain, but added that her hip gives her trouble when she first arises in the morning.

Claimant stated that when she takes medication she is pain free. She said that Dr. S did not examine her back when he evaluated her. She said that she did not think she could "report to a job reliably five days a week" and also said that she could not work "an eight hour shift" without taking medication. (Claimant did not address whether she could report to work less than five days a week and did not state whether she could work less than eight hours a day.) On cross-examination claimant said that she developed a limp after the _____ injury. Ms. M said that she accompanied claimant when she was evaluated by Dr. S; she said claimant did not refuse to take any tests administered.

The claimant's position is that she is unable to do any work of any kind. The parties stipulated that there was a compensable injury, that claimant was assigned an impairment rating of 33%, that there has been no commuting of benefits, that the filing period for the eighth quarter began on November 11, 1998, and ended on February 9, 1999, that claimant sought no work, and that claimant earned no wages.

To support a determination of no ability to do any work there must be medical evidence to that effect. *See* Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994. However, a determination that a claimant has failed to prove a total inability to work does not have to be based on medical evidence; it may be based on medical evidence, on other evidence, or a combination thereof. *See* Texas Workers' Compensation Commission Appeal No. 990767, decided May 24, 1999.

Claimant relies on the medical opinion of Dr. B. While Dr. B stated in short letters dated February 2, and February 19, 1999, that claimant "is not able to return to work at this time" and that she is not able to return to "any kind of job," and also commented in the first letter that he did not agree with Dr. S, he only mentioned the hip as a source of any problem to claimant.

In addition, Dr. B's opinions themselves may be considered to be in conflict. For instance, in a lengthy deposition dated May 7, 1999, Dr. B said that claimant had certain limitations, such as that she could stand for either 30 or 15 minutes, while in a series of questions from claimant's counsel dated April 14, 1999, Dr. B said that claimant could stand for 60 minutes without changing position, a difference of at least 100% in the length of time claimant may stand. This example was not the only distinction between the April and May responses. In addition, Dr. B said on March 16, 1999 (just beyond the filing period in question), that claimant has a limited education and has only worked manual labor. He then said:

> I think that she could potentially do sedentary duty, but there is not a market at this point for someone who again is not educated and has nothing but heavy manual labor. She cannot return to the kind of work that she has done before.
>
> * * * *
>
> In the absence of her old employer coming to me with a modified job that I would be willing to release her to or some other options made available to me, I would have to consider this patient still disabled and unemployable.

The only "new problem" Dr. B alluded to in the above March 1999 comment that he did not identify in the earlier February 1999 letters, in which he said claimant could not do "any kind of job," was that claimant had been "under surveillance." Certainly the February 1999 letters (no work) and the March 1999 note (sedentary work–modified job) could be reasonably considered by a fact finder to indicate a conflict also.

In addition, on November 9, 1998 (two days before the beginning of the filing period in question), Dr. B had only said that claimant could not return to "any kind of work that she had done previously." He added that he did not know what kind of work she could "return to," but he did not rule work out in that note. On December 1, 1998, Dr. B said that claimant "can possibly do a sedentary type position if she can find that kind of job, but not one she can stand for long periods of time and so forth." He also mentioned some falls claimant has had and indicated he was told of claimant having been videotaped (which he did not mention subsequently in either of the February 1999 short letters).

The hearing officer said in her Statement of Evidence that the medical evidence was conflicting (the evidence described above sufficiently supports that comment) and that the claimant did not prove she has no ability to work. The claimant states that the only medical evidence from which a conclusion "ineluctably" may be reached that claimant can do some work is that of Dr. S. However, the hearing officer is not constrained to only reach a conclusion based on evidence that is "ineluctable" (inevitable) but may resolve conflicts regarding less than perfect evidence and may draw reasonable inferences from that evidence also. In addition, claimant's premise is incorrect; the hearing officer included other evidence in her recitation that claimant did not show an inability to work, and as stated in Appeal No. 990767, *supra*, she may determine a failure to prove an inability to work from all evidence, including lay evidence. Even without the evidence of Dr. S, the evidence sufficiently supports the determination that claimant has some ability to work and did not attempt in good faith to obtain employment commensurate with her ability.

Claimant asserts error in the admission of Dr. S's report, but claimant's objection to admission at hearing was not based on a failure to exchange or a late exchange; rather it was based on Dr. S's "incomplete examination" and a comment by Dr. S that claimant "may find numerous positions in the excellent employment market," that such a comment is not relevant and that "in previous rulings of the Commission [Texas Workers' Compensation Commission] that type of language in doctor reports is to be stricken"; finally claimant states that Dr. S referred to a videotape dated "11-4-98" when claimant has received no copy of such a videotape. The hearing officer committed no error in admitting Dr. S's report which indicated some ability to work. The hearing officer determines the weight to give medical reports and may choose to give less weight if "an incomplete examination" is reflected. The hearing officer may also consider that Dr. S's focus on the hip rather than the low back was matched by both February 1999 short letters of Dr. B, which did not mention the low back. We note that no citations were provided by claimant about striking certain language, but we acknowledge that several cases have said that medical evidence is necessary to show a complete inability to do any work at all; when the doctor bases an opinion of no ability to work on factors such as education and job positions available, that opinion should only be considered in regard to the medical capability to work because nonmedical factors cannot be a basis for a determination that a claimant has no ability to work at all. *See* Texas Workers' Compensation Commission Appeal No. 960008, decided February 16, 1996.

The hearing officer's Statement of Evidence does not indicate that the hearing officer gave any consideration to Dr. S's opinion regarding numerous positions being available.

See Section 408.143, which says that a claimant only has to attempt to find work commensurate with her ability, not that she has to find a job. The hearing officer indicates that the reference by Dr. S to a "11-4-98" video is a typographical error; there was no evidence that any other videos than the ones exchanged and admitted were shown to Dr. S; the hearing officer's conclusion that a typographical error was made is based on a reasonable inference and no error was committed. It was not error to admit and consider Dr. S's report, which could reasonably be considered to conflict with certain reports of Dr. B, but to be consistent with other notes of Dr. B.

Claimant also states that two videos and accompanying reports were inadmissable, again not contending that any objection was based on a failure to exchange or a late exchange. Claimant states that one investigator was unlawfully conducting surveillance because he was not registered with the Texas Board of Private Investigators. Claimant does not indicate what effect any lack of registration had on the evidence collected, much less state that the evidence was tainted, or addressed a person other than claimant, or was altered or fabricated in any way; claimant does not cite any authority indicating that such evidence may not be admitted in a dispute under the 1989 Act unless there is a showing of proper registration of the investigator. While carrier provided copies of claimant's "motion to strike" these videos and its answer thereto, the hearing officer only stated on the record that she had earlier denied the objection to admission and did not admit or take notice of any of the motions, response and records attached to carrier's response which showed the processing of the investigator's registration with the Texas Board of Private Investigators. We may not consider these documents on appeal.

Claimant does cite Tex. Ins. Code Ann. Art. 21.21 § 4(10)(a)(viii) in saying the carrier breached a duty to conduct a reasonable investigation. This citation addresses a Certificate of Authority from the Commission of Insurance, not the Private Investigators Agency; it also prohibits unfair and deceptive acts, including unfair settlement practices, which include refusal to pay a claim without conducting a reasonable investigation. That reference does not say that the evidence from an investigation will not be admissible; it does not say that a registration question with a different agency will determine whether the investigation is not reasonable; it appears to address a separate cause of action, unrelated to admissibility of evidence before a dispute resolution under the 1989 Act. The hearing officer did not find the investigation to be not reasonable and the evidence supports the absence of such a finding.

Claimant also states that the probative value of the evidence is outweighed by the "danger of unfair prejudice, confusion of issues, and/or misleading the trier of fact." We find no such criteria for not admitting evidence in the 1989 Act; we note that Section 410.165 states that the conformity to the rules of evidence is not necessary; we also observe that the trier of fact under the 1989 Act is a hearing officer, not a jury. We find no merit to claimant's contention, although we applaud the argument that there should be no "confusion of issues." (Emphasis added.) Finally, on this point claimant says that the hearing officer "substituted her opinions for the medical opinion of Dr. B" in regard to the videotapes. The hearing officer is the fact finder. She may choose to give no weight to medical evidence. *See* Appeal No. 970834, *supra*; in addition, videotapes are not medical

evidence. *See* Texas Workers' Compensation Commission Appeal No. 952106, decided January 24, 1996. The videotapes may provide sufficient evidence to determine some ability to work without any medical interpretation thereof. *See* Appeal No. 990767, *supra*. The hearing officer did not err in admitting the videotapes and report thereof.

Finally, claimant asserts error in the admission of a report by Mr. G (and admission of his curriculum vitae). Claimant says that Mr. G's report refers to an opinion of a physician's assistant in the office of Dr. B. The hearing officer admitted that report; hearsay is admissible since the 1989 Act does not follow the rules of evidence, so therefore the report and curriculum vitae were not admitted in error. Again, there was no assertion that either was not timely exchanged. In addition, the hearing officer does not even mention Mr. G's report or its content in her Statement of Evidence or in any finding of fact. Even if admission were in error, it was not reversible error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

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:

Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

Gary L. Kilgore
Appeals Judge