

APPEAL NO. 991586

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 21, 1999, and June 30, 1999, a hearing was held. She (hearing officer) determined that respondent (claimant) did not prove that his cataracts were a result of the compensable injury of _____, but that appellant (carrier) did not timely dispute compensability of the cataracts so that condition became compensable; she also found claimant entitled to supplemental income benefits (SIBS) for the seventh and eighth compensable quarters. Carrier asserts that the hearing officer erred in excluding a peer review opinion from evidence; it added that it did not waive the right to dispute compensability of claimant's cataracts, citing whether the written notice was received, whether it was legible, and adding that the notice did not apprise carrier of a claim for cataracts, plus that the notice only said cataracts were "possibly" caused by the treatment for the injury; that claimant was able to work so no SIBS were due; and that the hearing officer was biased. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer). He testified that he hurt his groin and back while lifting on his knees. The parties stipulated that claimant has a compensable low back injury, was assigned an impairment rating of 22%, did not commute any benefits, and that the seventh quarter began on November 10, 1998, while the eighth quarter began on February 9, 1999. (The filing period for each would have begun 90 days before each quarter.) See Sections 408.141 - 408.150 and applicable rules.

Both claimant and his treating doctor, Dr. P, D.C., testified that claimant received a significant number of steroid injections to alleviate his back pain. Dr. P testified that an orthopedic surgeon, Dr. K, had also diagnosed that claimant has a nerve entrapment, adding that the results of a steroid injection at the iliac crest showed that there is a nerve entrapment. Dr. P went on to say that while claimant has tested to show that he can physically do very limited work (10-pound lift), when claimant does anything, even including taking a functional capacity evaluation (FCE), the inflammation set up by his condition, including the nerve entrapment, thereafter causes significant pain precluding any activity or causes claimant's legs to give way so that a fall results, as it did after the FCE. Dr. P summed up by stating that claimant could not work because of the "long-term nerve entrapment and subsequent symptoms that follow" including pain, muscle spasm, leg weakness, and other muscle problems. (We note that Dr. P's restrictions on claimant provide for occasional standing and walking with sitting allowed up to three hours, that claimant can lift up to 10 pounds once an hour, but should never twist, climb, crawl or kneel, while he can push or pull an unknown amount once an hour.)

Claimant testified that he has fallen "on many occasions." The record shows that Dr. P referred claimant to a neurosurgeon who advised that decompression of the nerve was

"risky," with a low success rate. Dr. P testified to steroid injections having been started on claimant before he started treating claimant; he referred to the fact that claimant received eight injections on one day, another five-day dose, the injection(s) previously referred to by Dr. K, plus other administration of steroids.

Carrier provided a chiropractic peer review indicating that claimant needed no more treatment. It also provided a medical examination report of claimant performed by Dr. S on December 30, 1998 (within the filing period of the eighth quarter); an FCE was performed at that time which Dr. S said showed that claimant could do light work; she added that he had given "maximal effort on all testing." Carrier's records, provided primarily in regard to the question of written notice of the cataract condition, also show that carrier obtained an investigator to document claimant's activity; the notes showed that the report indicated no activity. Claimant did testify that in 1996 he tried to sell Amway brand merchandise but found that after activity (he had to stand for up to an hour) he could not function for a period from a day to a week.

The hearing officer found that claimant made a good faith effort to seek work commensurate with his ability to work. While the evidence is conflicting and both Dr. P and Dr. S indicate some ability to physically perform certain tasks, the hearing officer could give weight to Dr. P's testimony as to the exacerbating effect activity had on claimant during the next and succeeding days, including claimant's repeated instances of his legs giving way, causing falls. The evidence sufficiently supports the determination that claimant is entitled to SIBS for the seventh and eighth quarters.

A significant part of the hearing dealt with claimant's issue of whether his cataracts result from the steroids he took. Claimant testified that Dr. M told him that his cataracts were not the "old-age cataracts" (claimant was 46 years old) but a thinning of the wall of the lens cover which is "usually caused by steroids or diabetes." Claimant acknowledged that he did not have this in writing from Dr. M.

Carrier objects that the hearing officer denied admittance of its peer review report in regard to cataract causation. Admission was denied because carrier had timely provided a copy of the report to claimant, unsigned and unidentified as to the name of the doctor, in January 1999, but did not provide the name of the doctor until forwarding a letter to claimant dated April 9, 1999. The hearing was held on April 21, 1999, and the applicable benefit review conference was held on March 11, 1999. Carrier's lawyer argued that carrier could not get the name of the doctor from the service, which carrier had selected, which provided medical peer review reports. The hearing officer did not find good cause for delay in providing the name of the doctor and did not admit the report. (See Tex. W.C. Comm'n, 28 TEX ADMIN. CODE § 142.13 (Rule 142.13)). Even if the denial of admission were error, it was not reversible error since the hearing officer ruled that claimant did not prove that his cataracts were caused by the steroid treatments he received in regard to his compensable injury.

On November 4, 1998, Dr. P provided a copy of his limitations concerning claimant to carrier. On that document, he added that "very limited activities of daily living cause

significant exacerbations.” (Emphasis as written.) He then added that claimant was "currently recovering from a catarac [sic] surgery that has a possible cause of steroid use during treatment on back." This document was found by the hearing officer to have been received by carrier between November 11 and November 16, 1998; she also found that carrier did not dispute compensability until January 29, 1999.

Ms. EB testified that she "handled" claimant's claim on behalf of carrier. She answered a question from carrier's attorney which asked when was the first time she saw or heard an indication that claimant "as claiming the cataracts were related to his work injury." She replied that claimant called her "on or about November 11, 1998," and added that they were discussing SIBS issues. Carrier's attorney then asked, "[w]hen you talked to him on the phone that day, November 11th, you were discussing a report that he had faxed to you that had work restrictions on it from [Dr. P], right?" to which Ms. EB said, "[t]hat's correct." (Emphasis added.) Carrier's attorney next asked, "and that it said at the bottom that his cataracts may possibly be related to steroid therapy?" to which Ms. EB replied, "[t]hat's correct." Then Ms. EB added that claimant did not say "he was going to claim those cataracts." Ms. EB then responded further to a question about whether she had seen any doctor's statement that says "his cataracts within reasonable medical probability were caused by his steroid therapy" by saying, "No." Later in her testimony, Ms. EB answered a question from the hearing officer about a definition of written notice by saying, "something in writing from either claimant or the doctor that not only makes vague references to problems, but specifically says that it's related to the injury and that it's being claimed as part of the injury." (Emphasis added.)

Then, in answer to claimant, Ms. EB said, in regard to a question as to whether the document showed "that this is possibly a worker's comp case," . . . "I didn't see it as that at the time, and then you and I discussed it and you specifically told me you were not claiming your cataracts on your work comp injury," to which claimant then directed Ms. EB back to her own notes which said, "[h]e did not claim his surgery for cataracts." (Those notes made by Ms. EB also show an entry for November 16, 1998, which says that SIBS for the seventh quarter were denied. It added, "received restrictions from Dr. noting claimant can do some work which then goes back to the fact that he has not looked for work within these restrictions." Ms. EB did not testify that she had received more than one document providing claimant's restrictions. Carrier also questioned Ms. EB about the quality of the fax she received which provided the comment about the cataracts and she said it was very "light" and not "this legible." (The questionable fax was not offered into evidence.) Claimant testified that he had already paid for the cataract surgery and was not trying to get carrier to pay for that, but did want carrier to acknowledge his cataract surgery because that also had an affect on his ability to work during the SIBS periods in question.)

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. She could consider Ms. EB's notes, together with her testimony, in which she indicated that she could read the restrictions on the fax and did not note at the time that she could not read any part of the document, as indicative that the fax received was legible. She could also consider that while a written notice of injury must be in writing, Ms. EB was on notice about this fax through the telephone communications she had with

claimant in which he mentioned the reference to the cataract surgery. With all the identification provided as to the fax in question in November and that it was part of a document which contained restrictions from Dr. P, the hearing officer could reasonably conclude that the entry of November 16, 1998, by Ms. EB showed that carrier had received the fax in question no later than by that date. The evidence sufficiently supports that the written notice was legible and that it was received by November 16, 1998.

Carrier states that written notice did not apprise it of a "claim for cataracts." Nothing in the 1989 Act or applicable rules requires written notice to address whether or not a claim will be made. This assertion is without merit.

Carrier also states that it is insufficient notice because it only said that the injury "possibly" caused the cataracts. This is carrier's strongest point. There is no case directly on point, but several will be referenced in addressing sufficiency. A doctor's reference to a history given by a claimant of "low back pain" was found not sufficient to impart notice. (See Texas Workers' Compensation Commission Appeal No. 980177, decided March 13, 1998.) Similarly, a designated doctor's rating of a body part was not considered sufficient to impart notice. See Texas Workers' Compensation Commission Appeal No. 981579, decided August 24, 1998 (there was a dissent in that appeal). Texas Workers' Compensation Commission Appeal No. 970675, decided June 2, 1997, reversed a determination that written notice was given when a doctor's note said that "he does not know whether claimant's arm pain is related to the claimant's workers' compensation injury."

On the other hand, Texas Workers' Compensation Commission Appeal No. 990510, decided April 22, 1999, said in reversing and remanding on the written notice issue, "written reports that consider whether a condition is work related may constitute written notice of injury under Rule 124.1, whether or not a concrete diagnosis is made." (The case under review does not involve a question as to the diagnosis.) Texas Workers' Compensation Commission Appeal No. 941655, decided January 26, 1995, in affirming a decision that written notice was not given said that it was a question of fact for the hearing officer; that case involved notice which did not "suggest anything more than a current medical condition of the employee." Texas Workers' Compensation Commission Appeal No. 951959, decided January 3, 1996, reversed a determination of no written notice (with a dissent) as to a right hand injury, based on a doctor's report that said "possible sympathetic mediated pain right hand"--there was an acknowledged left hand compensable injury. Texas Workers' Compensation Commission Appeal No. 982235, decided November 4, 1998, reversed and remanded for the hearing officer to determine whether a medical bill review document which listed a diagnosis of depression and panic disorder and "indicated that payment of part of the bill is recommended," constituted written notice of injury; this case did not indicate that causation was mentioned in the bill.

A doctor's statement that one injury was "possibly" caused by another injury, or by the medical care provided for that compensable injury, may be considered by a hearing officer as not as indefinite as the statement in Appeal No. 970675, *supra*, that said merely, "he does not know whether . . . is related to . . ." In addition, there are a number of cases

stating that even "reasonable medical probability" may be communicated without using those words (written notice does not require "reasonable medical probability" or its equivalent to be sufficient notice). Cases such as Insurance Company of North America v. Kneten, 440 S.W.2d 52 (Tex. 1969), provide that a doctor's use of "possible" may even, depending on the other evidence in the case, prove causation without a statement based on "reasonable medical probability."

In the case under review, carrier also argued that it should not have to search through medical records to see if some relationship is shown. We do not disagree with carrier; however, based on the evidence shown in this case involving claimant's calls on several days alerting carrier to the character of the doctor's note, which carrier had asked for in regard to the restrictions thereon, the hearing officer could reasonably determine that no undue burden to search records had been imposed on carrier.

In affirming the factual determination of the hearing officer that written notice was provided, we do not say as a matter of law that a doctor's opinion as to a possibility will always constitute sufficient notice to begin the running of the 60 days allowed to dispute by Section 409.021. In this case, the determination that Dr. P's November 4, 1998, opinion constituted sufficient notice is not against the great weight and preponderance of the evidence.

Carrier also states that the hearing officer was biased by citing some questions she asked, and comments she made, about notice. The record has been reviewed; this hearing officer regularly attempts to understand the position of the parties by asking incisive questions. No bias or lack of impartiality was seen in the record, and we find that none occurred.

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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge