APPEAL NO. 991614

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 30, 1999, a hearing was held. He (hearing officer) determined that appellant (claimant) was entitled to supplemental income benefits (SIBS) for the ninth compensable quarter but was not entitled to SIBS for the eighth compensable quarter. Claimant asserts that the determination that she was able to work during the filing period of the eighth quarter is against the great weight of the evidence, stating that a medical opinion of Dr. B was made without reference to a cervical MRI and an opinion of Dr. W was predicated on treatment and rehabilitation, and adding that a later independent medical examination (IME) doctor said that claimant "had no ability to work." Claimant believes that her treating doctor's opinion that she could not perform any type of work should be heavily weighed. Respondent (carrier) replied that the decision concerning the eighth quarter should be affirmed. (No appeal was made as to the determination that claimant was entitled to SIBS for the ninth quarter.)

DECISION

We affirm.

Claimant worked as a nurse for (employer) on _____. The medical records indicate that she sustained a low back injury on that date when she supported a falling patient.

The parties stipulated that there was a compensable injury for which an impairment rating of 15% or more was assigned, that claimant has not commuted any benefits, that the filing period for the eighth quarter began on July 2, 1998, that the filing period for the ninth quarter began on October 1, 1998, and that claimant was unemployed and earned no wage. While not a finding of fact or a stipulation, the hearing officer reports in his Statement of Evidence that claimant "did not make any effort to obtain employment during the respective periods"; the appeal indicates no disagreement with that declaration.

Claimant had fusion surgery at L4-5 and L5-S1 in 1995. On July 20, 1998, claimant was hospitalized for a variety of conditions including a "severe flare-up of reflex sympathetic dystrophy [RSD]," urinary incontinence, and degenerative cervical disc disease, with a history of fibromyalgia, thoracic outlet syndrome, bursitis in hips, attention deficit syndrome, post-traumatic stress disorder, hypertension, mitral valve prolapse, and headaches. She was discharged on August 3, 1998. An MRI of the cervical spine taken while hospitalized in July 1998 showed "central canal stenosis at C5-6 produced by mild posterior subluxation of the C5 or C6, and a combination of posterior bulge and spurring."

One week into the filing period for the ninth quarter, on October 8, 1998, claimant had cervical spine surgery. As stated, SIBS for the ninth quarter were approved and that determination was not appealed.

Dr. T, claimant's treating doctor, said in a letter dated October 9, 1998, "I do not believe [claimant] was capable of performing any type of work during the period in question" (July 2 through September 30, 1998). He added that he did not think she could work one or two hours a day. He agreed that there was "an element of psychological overlay" but pointed out that there was "objective evidence" of both low back and cervical spine pathology. He then added that she had bilateral carpal tunnel syndrome (CTS), "a myofascial component," and RSD.

Dr. B examined claimant on June 11, 1998; he noted no numbness or tingling in the lower extremities and no "giving way or falling." He said that claimant reported attempting to return to work in April 1997 but "was unable to do so." He reviewed an MRI of the cervical spine from 1997 that "suggested degenerative disc disease at C4-5 and C5-6 and either small bulge or protrusion at C5-6 producing bilateral foraminal encroachment greater on the left." Dr. B noted no manifestations of RSD and said that he did not believe the CTS was related to the compensable injury. He noted symptom magnification, saying that her cervical motion was restricted when measured but was "completely normal" when he asked her to turn her head to the side at another time. He concluded that claimant could do sedentary work.

Dr. W then examined her on August 21, 1998, after the hospitalization. He said that claimant "has some pain issues." He referred to "her situation" with "other parties" and said she needs "reduced stress and a supportive, flexible environment." He then said "that accomplished, I feel the patient could pursue vocational activities but within the limits of her pain tolerances." Dr. W then responded to a letter from "TWCC [Texas Workers' Compensation Commission]" in September 1998, by saying that claimant can work "1-2 hours a day provided she has frequent breaks and she lifts no more than 5 lbs." Dr. W did have the results of the 1998 cervical MRI.

Claimant's point in her appeal that "carrier's new IME physician was of the opinion that claimant had no ability to work," referred to an evaluation by Dr. H provided in April 1999. While claimant's assertion is certainly one interpretation of Dr. H's opinion, it is not the only one. He gave a history of claimant having worked as a nurse in an obstetric unit of the hospital; he said that her symptoms and treatment related to the "cervical, dorsal, and lumbar appear to be accepted as related to her injury" (he did not say that they were related to the injury); he could not say that CTS was related to the compensable injury; he described her incontinence as "urge incontinence" and opined that he did not think it related to nerve problems in the low back; he also questioned the RSD by mentioning the thoracic outlet syndrome "in the past"; he said the fibromyalgia was not related, if that condition was present. Dr. H then answered questions, one of which was, "can this person return to work with restrictions?", to which he answered, "No. She will be unlikely to ever return to work." His next sentence then said, "[s]hould she return to work physically at this point she would be able to do only sedentary work intermittently, would have to change positions, move around and would not be able to do much repetitive work or grasping with her hands."

While Dr. H answered, "no," the question related to "return to work," when that question is coupled with claimant's work history, the answer may be open to interpretation

that claimant could not return to nursing, specifically obstetric nursing. This is not inconsistent with the next sentence which appears to contradict an inability to do any kind of work, by saying, "sedentary work intermittently."

Claimant also argued that Dr. B did not have the July cervical MRI in his June evaluation. This is so, but he had a 1997 cervical MRI and specifically questioned claimant's cervical limitations based on his observations. The fact that Dr. B did not have the 1998 cervical MRI was argued at the hearing, but the hearing officer did not choose to discount Dr. B's opinion. Given the detail of Dr. B's opinion, including his own observations and other studies reviewed, including the 1997 cervical MRI, we cannot say that the hearing officer erred in giving weight to Dr. B. In addition, the hearing officer referenced Dr. W's opinion, along with Dr. T's notes that indicated claimant could do some sitting, standing and walking and could occasionally carry up to 10 pounds.

Whether claimant could not do any work at all in the filing period for the eighth quarter was a factual question about which conflicting medical evidence was presented. The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. He could choose to give more weight to that evidence indicating some ability to work than he did to that which said there was no ability to work.

The Appeals Panel is not the fact finder. It will not overturn a factual determination unless that determination is against the great weight and preponderance of the evidence. In this case, the determination that claimant had an ability to work in the filing period of the eighth quarter was not against the great weight and preponderance of the evidence. That finding of fact, together with another finding of fact that said claimant has not attempted in good faith to obtain employment, sufficiently support the determination that claimant is not entitled to SIBS for the eighth quarter.

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:

_____
Susan M. Kelley
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge