APPEAL NO. 991731

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 21, 1999. The issues at the CCH were when the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI), what was the impairment rating (IR), and whether he was entitled to supplemental income benefits (SIBS) for the first, second, and third compensable quarters. The hearing officer determined that the claimant reached MMI on December 10, 1997, as originally certified and recertified by a Texas Workers' Compensation Commission (Commission)-appointed designated doctor, and that the claimant's IR was 15% as certified by the designated doctor in an amended report. The hearing officer also determined that the claimant was not entitled to SIBS for the first and second compensable quarters but was entitled to SIBS for the third compensable quarter. The claimant filed a conditional appeal (the condition being that the respondent/cross-appellant (carrier) not file an appeal, which condition was not met as an appeal was filed by the carrier) in which he urges error in findings of fact that the most recent designated doctor report was improperly amended; that the MMI date is December 10, 1997; that an MMI date cannot be amended based on additional treatment; that the claimant's IR is 15%; and that the claimant was not eligible for first and second quarter SIBS. Carrier appeals, urging error in the hearing officer's finding that the second report from the designated doctor was incorrect because it rounded up the measured angle for loss of left lateral flexion in his finding that the certification of the designated doctor dated March 12, 1999, is not contrary to the great weight of the evidence and the finding that during the filing period for the third quarter the claimant was unable to seek or obtain employment due to his full-time participation in a medically supervised rehabilitation program. Both claimant and carrier have filed responses to the appeals.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth fairly and adequately the evidence in this case and it will only be summarized here. The claimant sustained a compensable injury to his thoracic and lumbar spine on _____; has not had any surgery; and has undergone a lengthy period of conservative treatment. Although greatly improved, the claimant indicated he still experiences pain occasionally. He underwent an independent medical examination in December 1997 by Dr. S and was diagnosed with possible spondylitis low back pain, degenerative facet arthropathy (arthritis), minimal disc bulging, and a history of left lower extremity radiculopathy. Dr. S certified MMI as of December 10, 1997, with a zero percent IR. Because of a dispute, a designated doctor, Dr. J, was appointed. He examined the claimant in February 1998; certified that the claimant reached MMI on December 10, 1997; and assessed a 19% IR for the lumbar spine. The Commission requested that Dr. J reexamine the claimant since there was no rating for the thoracic spine. As a result of this examination on June 10, 1998, Dr. J certified that the claimant reached MMI on December 10, 1997, with a 14% IR which included both the

thoracic and lumbar areas. In the lumbar area, he assessed a one percent rating from Table 57 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), for left lateral flexion although the measurement was 18 degrees (at 20 degrees, the rating becomes one percent). Pursuant to a request from the claimant's attorney, the Commission again corresponded with the designated doctor regarding his lower rating for the lumbar spine on the reexamination and to question the one percent rating for left lateral flexion based on Texas Workers' Compensation Commission Appeal No. 980894, decided June 17, 1998, concerning rounding of numbers. Dr. J responded, justifying his rating of the lumbar and thoracic spine together since it was determined both were part of the injury and that a more "valid" or "true" IR would be determined by performing all range of motion testing on the same date since both related to the same body region, namely the spine. He also stated that, based on the Appeals Panel decision, he amended the IR to 15%, assessing two percent for the left lateral flexion under Table 57 instead of one percent.

Although a physical performance test report shows that the claimant was capable of performing light duty on a full-time basis as of March 4, 1998, the claimant did not return to work or seek employment as he had not been released to work by his doctor. In any event, the claimant states he continued to have chronic back pain and resulting depression. He underwent a pain management therapy program but did not feel it did much to improve his pain condition. He was subsequently sent to a tertiary rehabilitation program called PRIDE (Productive Rehabilitation Institute of Dallas for Ergonomics) during a six-week period in February and March 1999. Following completion of the program, the claimant was greatly improved and was released to full, unrestricted duty effective April 6, 1999. Subsequently, the Commission again contacted the designated doctor and forwarded a report from the claimant's treating doctor which stated his view that the claimant had only then reached MMI. This report concerned the completion of the PRIDE program and indicated claimant's improvement and return to unrestricted duty. Dr. J was asked, after review of this report and records from PRIDE, whether he agreed with the treating doctor that the MMI date should be March 29, 1999, the date of discharge from the tertiary care program. Again, Dr. J changes his opinion and states his agreement with the treating doctor's view of MMI since the claimant "seems to have responded well to a tertiary care program" and is able to return to work without restrictions which is material recovery.

The claimant did not seek or obtain any employment during the filing periods for the first or second compensable quarters of SIBS and only sought one prospective job during the filing period (January 21, 1999, to April 21, 1999) for the third compensable quarter of SIBS.

Clearly, this is not a model case for how the designated doctor program should function. Multiple changes in certifications do not enhance confidence in the system and only lead to confusion. In any event, the hearing officer determined that the claimant reached MMI on December 10, 1997, with a 15% IR as certified by the designated doctor in his March 12, 1999, report. The hearing officer accepted the amendments to the certification of IR which were based upon, first, not rating the totality of the injury, and,

second, not complying with the AMA Guides as interpreted by the Appeals Panel. Both of these reasons for amendment were proper and we have held that a designated doctor can amend his report for proper reason and within a reasonable period of time. Texas Workers' Compensation Commission Appeal No. 970954, decided _____; Texas Workers' Compensation Commission Appeal No. 93837, decided October 29, 1993. Regarding the subsequent agreement with a later MMI date based on improvement following a tertiary rehabilitative program, we agree that the hearing officer could determine, based on the evidence, that this was not a proper basis, under the circumstances here, for the designated doctor to amend his three earlier reports regarding MMI. Texas Workers' Compensation Commission Appeal No. 970138, decided March 7, 1997. In that case, we observed that "a TWCC-69 [Report of Medical Evaluation] cannot be amended without a proper reason to do so and that any new information derived from continuing treatment of a claimant does not make the first TWCC-69 fair game for amendment" in and of itself or automatically. Here, conservative treatment continued and the claimant's pain symptoms improved following a tertiary program. Although a claimant is determined to be at MMI, that does not mean he is pain free or that he may not experience some improvement over time. *See* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993; Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. Regarding the amendment changing the left lateral flexion rating from one percent to two percent, this was an amendment to comply with the holding in Appeal No. 980894, *supra*, that it is not permissible under the AMA Guides to round the angle or degree measurements to reach a different category or rating. In any event, we cannot conclude that there is insufficient evidence to support the hearing officer's determination that the March 12, 1999, report of the designated doctor was entitled to presumptive weight and not contrary to the great weight of other medical evidence. We affirm the hearing officer's determination that the claimant reached MMI on December 10, 1997, and that his IR was 15%.

We first note that we evaluated the SIBS issues in this case under the regulatory provisions existing prior to January 31, 1999, the effective date (for a qualifying period beginning on or after January 31, 1999) for new SIBS rules. Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). Regarding the three SIBS quarters in issue, it is clear that the claimant did not seek any employment until the one job contact in the third quarter. However, during the filing period for the third quarter, a considerable period of time was taken up with full-time medical treatment (evaluations for and completion of the PRIDE program). Under the circumstances here of the prior, apparently unsuccessful, pain management treatment and the circumstance that a major part of the filing period had the claimant in a full-time treatment program, the hearing officer determined that the claimant was not able to work during the filing period and that he was thus entitled to SIBS for the third quarter. There was some evidence to support his determination, although a contrary determination could also find support in the evidence. This is not a sound basis for reversal. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994.

To qualify for SIBS, one of the requirements is to attempt in good faith to obtain or seek employment commensurate with the ability to work. Sections 408.142 and 408.143. In this case, there was medical evidence that the claimant was capable of work with restrictions in March 1998. And, while there was contrary medical evidence, this only presented the hearing officer with a factual issue to resolve the conflicts in the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We cannot conclude that the hearing officer's determinations on the three SIBS quarters in issue were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Accordingly, we affirm his findings and conclusions regarding the SIBS issues.

For the reasons stated, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge