APPEAL NO. 991965

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 6, 1999, a hearing was held. She determined that respondent (claimant) was unable to work in any capacity during the filing period of the sixth compensable quarter and awarded supplemental income benefits (SIBS) for the sixth quarter. Appellant (city) asserts that the hearing officer's determination is against the great weight of the evidence, citing medical evidence of exaggeration of symptoms and claimant's own testimony that he sought work at light-duty positions. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

The parties stipulated that the sixth quarter began on April 5, 1999. During the hearing the filing period was referenced as beginning on January 3, 1999. The dates relative to the quarter in question indicate that the amended rules of the Texas Workers' Compensation Commission relative to SIBS were not applicable to this particular quarter.

Claimant testified that he worked for the city as a working crew foreman when he was injured in _____. The parties stipulated that claimant sustained a compensable injury, that his impairment rating was 15% or more, that no benefits were commuted, and, as stated, that the sixth quarter began on April 5, 1999.

Claimant testified that he has no ability to work. He added that his doctor says he is unable to work. He further testified that he nevertheless made 15 contacts with employers during the filing period in question and submitted eight applications. (It was not clear whether the eight applications were made in regard to the 15 contacts or whether the applications were in addition to 15 other contacts.) On cross-examination, claimant restated that he made eight applications during the filing period. The hearing officer's assertion in the Statement of Evidence that claimant "applied for at least 15 positions" is not correct. We note also that claimant's Statement of Employment Status (TWCC-52) shows no job contacts, but he submitted copies of applications and a list of "places that I went but they weren't accepting applications." A great part of the testimony at this hearing was in regard to the job contacts, but claimant did testify that he was unable to work but would have tried if he had received an offer.

The medical evidence upon which a fact finder could find that claimant was unable to work was provided by Dr. J. Although Dr. J states that he did not see claimant until February 16, 1999 (six and one-half weeks into the filing period in question), Dr. J also says in one of two undated letters that claimant was unable to work in any capacity since his injury in 1995. In the other undated letter, Dr. J says only that claimant was unable to work since February 16, 1999. Other references are made in both letters to "gainful employment" but that phrase does not require further examination since Dr. J has stated

that claimant was unable to work in any capacity. Whether the statement that claimant was unable to work in any capacity should be given any weight was a matter for the hearing officer to determine. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997.

In addition, Dr. J referred to claimant having post laminectomy syndrome, radiculopathy, lumbar facet syndrome, bilateral sacroiliitis, myofascial pain sydrome, and a herniated lumber disc; severe pain was mentioned along with claimant's regimen of "powerful narcotics."

Prior to being treated by Dr. J, claimant was treated by Dr. S. Dr. S's letter of December 22, 1998, clearly states that claimant would undergo surgery in "the next quarter" in February 1999, and will be unable to "perform any activity." Dr. S thereafter stated on February 17, 1999, that claimant did not submit to surgery and "is released to return to the work force in a light duty capacity." While there was argument at the hearing that these statements are inconsistent, the two statements are not necessarily inconsistent since the "unable to work" statement was tied to claimant having surgery during the filing period in question, as opposed to the impairment in general. Nevertheless, the hearing officer could choose to give no weight to Dr. S's opinions, although she appears to say in her Statement of Evidence that Dr. S said claimant could not work at all due to the impairment, not the surgery that was scheduled.

Claimant had two functional capacity evaluations (FCE) performed in April 1998 and July 1999. Both stated that all of claimant's Waddell signs were positive. The first said that because of "suspected submaximal effort noted throughout" it was "impossible to determine an accurate work level," but said that based on what was performed, claimant could do light work, just as Dr. S said in his February 1999 statement when surgery was not performed. The July 1999 FCE report noted the Waddell results as stated, plus an inappropriate behavior indicator and inconsistency, but simply concluded that an accurate work level could not be determined, without providing any indication of work level as had been done in April 1998. The hearing officer chose to give little weight to either of these tests.

Perhaps not totally in conflict with the determination that claimant was unable to work was the report of Dr. N, who examined claimant on behalf of the city in June 1998. He also noted positive Waddell signs. Although he mentioned symptom magnification, and found no spasm, no atrophy, but voluntary restriction during the examination, Dr. N referred to "failed spinal surgery. . .significant epidural scarring. . .spinal stenosis" and "disc bulging." He added that the question of "returning to work" is "extremely difficult." He added that claimant could not return to his "regular duty" and said "the future is difficult to predict with regard to any other type of work since the examinee feels he is disabled and expresses complaints of significant back and leg pain."

The hearing officer is the sole judge of the weight and credibilty of the evidence. *See* Section 410.165. While Dr. J's statements do not provide a detailed basis for his conclusion that claimant has been unable to work at all since his injury, Dr. J does provide some reference points of continuing significant injury and severe pain along with providing

some basis to consider the effects of prescriptions on any attempt to work; as stated, some indication that claimant does have a continuing significant injury is also provided by Dr. N, notwithstanding claimant's symptom magnification. Under the applicable rules at the time of the filing period in question, we cannot say that the determination that claimant cannot do any work is without medical support.

The hearing officer could consider claimant's applying for jobs during the filing period as thereby indicating that he could do some work, but she was not required to give weight to this conduct. That other hearing officers would/might not have drawn the same inferences from the medical documents, including the two FCEs, and other evidence, does not govern the outcome of this review. In affirming, we note that future SIBS quarters for this claimant will be considered under the amended rules applicable to SIBS.

Finding that the decision and order is 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:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge