APPEAL NO. 992052

A contested case hearing (CCH) was originally held on March 31, 1999, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 991073, decided July 2, 1999, the Appeals Panel reversed the decision of the hearing officer and remanded the issues of the appellant/cross-respondent's (claimant) impairment rating (IR), whether the respondent/cross-appellant (carrier) is entitled to a reduction of the claimant's income benefits due to contribution from a prior compensable injury and whether the claimant is entitled to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer convened another hearing on August 30, 1999, and rendered another decision on August 30, 1999. He determined that the claimant's IR is 17 %, that the carrier is not entitled to a reduction of the claimant's income benefits due to contribution from a prior compensable injury, and that the claimant is not entitled to SIBS for the first compensable quarter. The claimant appeals the hearing officer's findings that he was engaged in a medium-duty employment at the time of his compensable injury of _____; that he had the ability to engage in at least sedentary employment for eight hours a day; and that he did not make a good faith effort to seek employment commensurate with his ability to work. The carrier replies that the documents attached to the claimant's appeal should not be considered by the Appeals Panel and that the evidence supports the findings and conclusions appealed by the claimant and they are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. The carrier filed an appeal, urging that the hearing officer erred in finding a 17% IR because it includes a rating for depression, arguing that the hearing officer erred in declining to award contribution from a prior compensable injury, and requesting that the hearing officer's decision on these issues be reversed and a new decision rendered that the claimant's IR is 13% with contribution of 8/13, or 62%. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The claimant testified he sustained a low back injury on _____, when he lifted a tank at work. The claimant sought medical treatment with Dr. CG, who performed surgery on April 10, 1997, an anterior lumbar discectomy at L4-5 and L5-S1 and fusion at L4-5 and L5-S1 with BAK internal fixation at L4-5 and L5-S1. The claimant testified that the carrier sent him to Dr. G. Dr. G examined the claimant on October 15, 1997, and assessed a 22% IR. The Texas Workers' Compensation Commission (Commission) appointed Dr. W as the designated doctor. Following the remand, Dr. W was instructed not to use Table 50 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and to retest the claimant for range of motion (ROM). On August 20, 1999, Dr. W reexamined the

claimant and certified that the claimant reached maximum medical improvement on November 21, 1997, with a 17% IR. Dr. W's IR included 13% impairment from Table 49, zero percent impairment for ROM, and a five percent impairment for depression.

The carrier asserts that the 17% IR is contrary to the great weight of the other medical evidence because it includes a five percent impairment for the claimant's depression. According to the carrier, the claimant's depression is not permanent and it relies on the opinion of Dr. B, a peer review doctor. On June 1, 1998, Dr. W responded to questioning by the Commission as to whether the claimant's depression was permanent in nature, stating that he could not state for sure, but if it were permanent, it would be rated at a maximum of five percent impairment. On October 28, 1998, Dr. W stated that "[a] letter dated September 30, 1998 from [Dr. CG], states that [the claimant] was definitely depressed and that the depression was most likely a chronic condition and that he believed it was related to his work injury. He stated that he thought it would be with him for the indefinite future." Based upon a review of additional psychiatric records and a videotape, Dr. W indicated that based upon the AMA Guides, a five percent impairment should be assessed for depression. Following another letter of clarification on the issue, Dr. W, on January 8, 1999, stated:

> I am taking it for granted that the depression is permanent and that this should be assigned. I am not a psychiatrist and I am giving you my best estimate that the depression will be permanent.

On February 15, 1999, Dr. B issued a report based upon the claimant's psychiatric records. When asked if the claimant's psychological impairment would be permanent, Dr. B states:

> Yes. It does appear that the claimant has the disease of chemical dependency. This is a disorder of chemical dependency. This is a disorder that needs to be treated aggressively in Alcoholics Anonymous as well as with support and ongoing treatment. It also appears that the claimant has depressive disorder and a psychotic disorder and again this disorder needs to be treated aggressively.
>
> This is a permanent impairment, however, as stated above, it is not related to the work injury of _____.

Section 408.122(c) provides, in part, that the report of the designated doctor has presumptive weight and the Commission shall base its determination of whether the employee has reached MMI on the report unless the great weight of the other medical evidence is to the contrary. Section 408.125(e) provides, in part, that, if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight and the Commission shall base the IR on that report unless the great

weight of the other medical evidence is to the contrary. An IR "means the percentage of permanent impairment of the whole body resulting from a compensable injury" and "impairment "means any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Sections 401.011(24) and 401.011(23). Mental conditions may be found to result in permanent impairment. Texas Workers' Compensation Commission Appeal No. 950104, decided March 7, 1995.

There is no dispute that the claimant's depression is compensable. The hearing officer found that the great weight of the other medical evidence is not contrary to the report of the designated doctor and that the claimant's IR is 17%. The hearing officer interpreted Dr. B's report as supporting Dr. W's opinion that the claimant's psychological disorder is permanent and we agree, despite the carrier's argument to the contrary. The designated doctor considered the claimant's depressive condition to be permanent and the other medical evidence does not indicate otherwise. The report of the designated doctor indicates that he used the proper Guides to the Evaluation of Permanent Impairment and properly applied them. While the hearing officer did not make a specific finding that the designated doctor's report was given presumptive weight, we can infer that the hearing officer found that the report of Dr. W is valid and is entitled to presumptive weight. The hearing officer's determination that the claimant's IR is 17% is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Section 408.084(a) provides that at the request of the carrier, the Commission may order impairment income benefits (IIBS) and SIBS reduced "in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries." The carrier has the burden of proving an entitlement to contribution. Texas Workers' Compensation Commission Appeal No. 961499, decided September 11, 1996. The requirement that the contributing injury must have resulted in "documented impairment" does not mean that the impairment from the contributing injury must be recorded in medical records, but it does require some indication that there was at least an anatomic or functional abnormality or loss reasonably presumed to be permanent. Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1994. It is not essential for a carrier to prove an exact percentage, but there must be sufficient facts in the record for the trier of fact to find a percentage that is reasonably supportable. Texas Workers' Compensation Commission Appeal Panel No. 980598, decided May 11, 1998.

In determining the reduction, the Commission "shall consider the cumulative impact of the compensable injuries on the employee's overall impairment . . . ." A determination of contribution must be based on medical evidence but the existence of medical evidence arguably supporting contribution does not require an award of contribution. Texas Workers' Compensation Commission Appeal No. 941170, decided October 17, 1994. It is the Commission, not a doctor assessing impairment, who is to determine the extent to which

any contributing injury is one for which a claimant has already been compensated. *See* Texas Workers' Compensation Commission Appeal No. 94618, decided June 22, 1994. The cumulative impact of multiple compensable injuries for purposes of awarding or denying contribution is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941405, decided December 1, 1994.

The hearing officer made the following Findings of Fact regarding contribution:

FINDINGS OF FACT

5. Claimant had sustained a compensable back injury to the L4-5 disc prior to his compensable injury of _____.

6. Claimant had undergone a microdiscectomy to treat the prior L4-5 disc injury.

7. After the microdiscectomy, Claimant had returned to full-time, full duty employment and had been engaged in that employment for approximately one and a half years prior to his _____ injury.

8. The prior compensable injury did not affect the compensable injury of _____ and there is no cumulative effect attributable to the prior injury.

The carrier cites Appeal No. 980598, *supra*, to support its position that impairment attributable to the claimant's prior compensable injury is eight percent based on Table 49 II.D, a surgically-treated lumbar disc lesion without residuals. The record includes a Carrier's Request for Reduction of Income Benefits Due to Contribution (TWCC-33) which indicates that the claimant sustained a prior low back injury at L4-5 which resulted in a 14% IR. The Commission ordered contribution in the amount of 39% "using 7% for prior surgery with no residuals." No medical evidence confirming this IR is in evidence. The carrier relies on Dr. W's report dated December 1, 1997, which states "[h]e has previously been rated for a surgical procedure and disc problem at one level of the lumbar spine, so a re-rating for that problem is not appropriate. He was awarded an 8% for that problem. . . . As previously stated, my [IR] of 11% takes into consideration that he has had a previous rating from Table 49 of 8% for one of the levels, which was awarded in 1994. A second allowance for this same level is inappropriate." We note that Dr. W's report was subsequently amended to include 10% under Table 49 II.E.

The hearing officer considered the evidence presented and noted that the carrier adduced no evidence as to the interplay between the prior injury and the incident giving rise to the current injury. Appeal No. 980598, *supra*, states in pertinent part:

> Where the IR under consideration specifically includes an enhancement from Table 49 for multiple surgeries, which would not have been factored into the IR but for the existence of such prior surgeries from prior compensable injuries, and medical opinions support the fact that there has been a contributing effect (although they disagree as to the percentage), it is error to disallow contribution completely.

We note that in this case, there is no medical opinion or evidence which supports any contributing effect or percentage. The carrier presented only a TWCC-33 requesting contribution. The hearing officer could conclude that the prior injury had resolved with no residual effects and that, for this reason, no contribution was warranted. Texas Workers' Compensation Commission Appeal No. 941074, decided September 23, 1994. Following surgery for the prior injury, the claimant returned to work without restrictions for one and one-half years prior to the _____, injury. Although the claimant has appealed the hearing officer's finding that he was engaged in medium-duty employment at the time of his compensable injury of _____, this finding is supported by the functional capacity evaluation (FCE) which states that the claimant's job as a tank caster is described by the Department of Transportation as medium work. The hearing officer's determination that the carrier is not entitled to a reduction of the claimant's income benefits due to contribution from a prior compensable injury is not against the great weight and preponderance of the evidence.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the IIBS period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. We have frequently noted that the total inability to do any work at all will arise in only rare and unusual cases, as opposed to the fairly common situation where a seriously injured employee cannot return to the previous employment. Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997.

In this case, the claimant contended that he did not seek employment and had no ability to work during the filing period for the first compensable quarter. The first compensable quarter was from November 14, 1998, through February 12, 1999. The

claimant asserted that he has not been released to return to work by his treating doctor, Dr. G. A report from Dr. G on November 11, 1998, states:

> He has chronic pain for which we continue to provide management. [The claimant] is unable to fulfill the duties of his regular employment. He cannot seek gainful employment at this time due to the nature of his complaints. I do not feel [the claimant] will ever be able to seek gainful employment.

The carrier presented an FCE performed on July 2, 1997, which recommends that the claimant be released to sedentary work. While outside the filing period, the hearing officer notes that the FCE and the December 1998 surveillance report indicate that the claimant had the ability to engage in some work throughout the filing period. The hearing officer did not find Dr. G's opinion persuasive.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. The evidence is sufficient to support the hearing officer's determination that the claimant had the ability to engage in at least sedentary employment for eight hours a day during the filing period, that the claimant did not make a good faith effort to seek employment commensurate with his ability to work during the filing period, and that the claimant is not entitled to SIBS for the first compensable quarter.

Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the documents the claimant has attached to his appeal, but which are not in evidence, will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We observe that the documents attached to the appeal which were not offered at the hearing do not meet the criteria for newly discovered evidence. Appeal No. 92400. To constitute "newly discovered evidence," the evidence would need to have come to the appellant's knowledge since the hearing and it would not be due to lack of diligence that it came no sooner; it could not be cumulative; and it must be so material that it would probably produce a different result upon a new hearing. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

We affirm the decision and order of the hearing officer.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge