APPEAL NO. 000049

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 10, 1999, a hearing was held. The hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 11th compensable quarter. Claimant asserts that he is entitled to SIBS, stressing that the physical and psychological problems he has should be considered together as showing an inability to do any kind of work. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant, in his appeal, is basically asking the Appeals Panel to be another fact finder and read doctors' opinions that indicate he can do some level of sedentary work, based on physical injuries from the trauma he sustained, together with opinions about his psychological condition, so as to conclude that all together he has no ability to work. We agree that an approach, which considers all the medical evidence together, is a correct manner of determining ability to work in SIBS cases arising under the old, pre-1999 SIBS rules, by which this case is governed. The conclusions to be reached by considering all the medical evidence are for the hearing officer, as fact finder, to make; his conclusions may be different from those reached by claimant without providing a basis for the Appeals Panel to reverse. The Appeals Panel considers appeals concerning factual determinations under a standard of whether the determination is against the great weight and preponderance of the evidence. Having reviewed the evidence and the appeal, we do not conclude that the hearing officer's determination is against the great weight and preponderance of the evidence.

Claimant was struck by a car while working in construction on _____, for (employer). Medical reports show that he sustained a closed head injury, lacerated liver, and open segmental fractures of the right and left tibia and fibula, among other injuries. He was operated on that day. He returned to surgery on October 29, 1991; November 1, 1991; November 5, 1991; December 3, 1991; April 29, 1992; June 18, 1992; June 25, 1992; and December 1, 1992. Prior to this accident, claimant was in a motorcycle accident in 1983 while in the Air Force, sustaining a crush injury to his right leg and a head injury.

The parties stipulated that claimant's impairment rating is 15% or more, that he commuted no benefits, that the 11th quarter began on September 17, 1997, and that no wages were earned. Claimant offered no evidence of a job search, saying that he had no ability to work.

Claimant's current treating doctor is Dr. D. Claimant submitted reports from Dr. D from 1995 in which Dr. D said that claimant was not expected to improve further, that he

requires a cane for walking, and that he was unable to work from December 1994 to March 1995; he said that his opinion was based "on [claimant's] preinjury job description" and also mentioned claimant's shoulder problems and history of concussion with memory problems and mood changes. He concluded that a detailed job description would need to be evaluated to say whether claimant could perform a particular job.

A functional capacity evaluation (FCE) was performed in March 1997; a six-page report was prepared by Dr. O which said that claimant "gave extremely good effort," but is in "poor residual condition." His report noted that claimant had received a disability of 70% for his head injury and 10% for his right leg injury from the Air Force. Ranges of motion were reduced; loss in strength was observable in some areas; a partial foot drop on the right and hypersensitivity were also noted. Dr. O said claimant could do "any type of job in the sitting position if it did not require him to lift above his head." Dr. D wrote to claimant in April 1997, after Dr. O's report was provided, and said, "from a physical orthopedic surgical standpoint, I, in good conscience, cannot dispute or argue against [Dr. O's] conclusions." Dr. D at that time recognized claimant's concern for his mental state in addition to his physical condition, but added that he was not cognizable of any other "physical incapacities."

Claimant was then evaluated by Dr. S, in January 1998, on referral from Dr. D. His testing showed extreme depression, mentioning reclusive behavior with some consideration of others as threatening. Dr. S diagnosed a pain disorder and a personality change due to head injury. Dr. S believed that claimant's "most appropriate" employment would be one in which he did not have to interact with others and could work at his own pace. In February 1998, Dr. D wrote that he did not disagree with Dr. S's "thorough evaluation."

(psychiatrist) Dr. F, then provided an evaluation in August 1998. Claimant's "emotional ability to be employed" was said to be the reason for the referral. He referred to claimant's college degree and said that it is possible that he once functioned at a higher capacity than now, but still found claimant to have "more than average . . . intelligence." He diagnosed a personality change, a pain disorder, and depression, among other findings. Dr. F acknowledged claimant's problems with relationships in his lengthy report, but said, "I find no psychological reason to preclude his employment." In a letter to Dr. D, Dr. F repeated his statement of "no psychological reason to preclude employment."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could consider that the FCE (March 1997) and Dr. S's evaluation (January 1998) were provided closer in time to the filing period in question, which would have begun in June 1997, than were Dr. D's opinions provided in May 1995. While Dr. S spoke of some types of work that would be better suited to claimant, Dr. F, although finding similar problems in claimant, did not stress limitations on working. In addition, while Dr. F deferred to Dr. D concerning physical injuries, Dr. F is a medical doctor, with added training in psychiatry, and he did indicate in his history an appreciation of the scope of claimant's injuries.

The above-abbreviated account of medical opinions sufficiently supports the hearing officer's comment in his Statement of Evidence that said "all the medical evidence proximate to the filing period" showed that claimant, although extremely limited, had some ability to work. The hearing officer then found that claimant did not attempt in good faith to obtain employment commensurate with his ability to work (*see* Section 408.143); that determination is sufficiently supported by the evidence and is not against the great weight and preponderance of the evidence.

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:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge