APPEAL NO. 000093

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 9, 1999, a hearing was held. The hearing officer determined that the Texas Workers' Compensation Commission (Commission) has jurisdiction to determine respondent/cross- appellant's (claimant) impairment rating (IR) in this case; that claimant's IR is 27% as set forth by the designated doctor, Dr. B; and that claimant is not entitled to supplemental income benefits (SIBS) for the first compensable quarter. Appellant/cross- respondent (carrier) states that there is no jurisdiction to address IR since it was previously litigated in the dispute resolution process and an appeal has been taken to the court system, adding that a prior Appeals Panel decision should have remanded the case if the IR issue was not "ripe" for adjudication. Carrier attacks the determination, previously decided, that claimant sustained a mental injury. Carrier also states that Dr. P, to whom claimant was referred by Dr. B, did not conduct any objective testing; that depression is not normally permanent; and asserts that the 1989 Act does not state that a designated doctor's last report is entitled to presumptive weight. While carrier objects to a finding relative to "direct result" under the criteria for SIBS, its last point is that the hearing officer should not have required it to prove what the correct IR is since that burden is on the claimant. Claimant asserted that she is "totally disabled" and unable to work and should be awarded SIBS. Carrier replied to claimant's appeal.

DECISION

We affirm.

Claimant worked for (employer) in 1994 when she injured her neck and back. A hearing officer in a prior hearing considered issues of extent of injury and IR; he determined that claimant's compensable injury to her neck and back extended to (or caused) depression, but he did not determine the IR, stating that it was not ripe for determination until the designated doctor acts on the determination that the injury extends to claimant's depression. (We note that the issue which asked "what is the IR" was not resolved at the prior hearing and that there was no issue addressing whether or not the IR was ready, or ripe, for adjudication.) The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 980426, decided April 15, 1998 (Unpublished), affirmed the hearing officer's determinations including that the claimant's depression resulted from the compensable injury and that an IR cannot be adjudicated until after the designated doctor, possibly in conjunction with a referral doctor, evaluates the effect of claimant's depression on her total IR. (The hearing officer at that prior hearing also stated that Dr. B's 11% IR provided a "reasonable assessment" for paying impairment income benefits in the interim--*see* Section 408.121(c).)

Texas Workers' Compensation Commission Appeal No. 960094, decided February 26, 1996, said that jurisdiction was retained when the claimant in that case was returned to

a designated doctor for consideration of added effects of the injury. It distinguished Texas Workers' Compensation Commission Appeal No. 951389, decided October 2, 1995, which said there was no jurisdiction, in part because in that case "issues . . . that were already addressed and resolved" were being relitigated. (Emphasis added.) *See also* Section 410.205(b) which provides for an Appeals Panel decision on benefits to be binding pending judicial review. As stated, in the case under review, the issue of IR had not been resolved at the time of the hearing of December 9, 1999. *See also* Texas Workers' Compensation Commission Appeal No. 941511, decided December 22, 1994, which said that a hearing officer has a choice between returning a case (which includes ordering another examination of claimant) to the designated doctor for review of the IR and choosing the IR of another doctor; since the hearing officer in the prior hearing had found that claimant's injury extended to depression, it would not then have been appropriate to apply an IR from another doctor who did not determine the IR based on both physical and mental injuries. The determination that the Commission has jurisdiction to determine claimant's IR is sufficiently supported by the evidence and is not contrary to controlling legal authority.

There was no issue at the December 9, 1999, hearing related to whether or not the claimant's depression (mental injury) results from the compensable injury; as a result, carrier's appeal of the determination, made at a prior hearing, that claimant sustained a mental injury will not be considered in this review.

After the prior hearing and review conducted in Appeal No. 980426, *supra*, claimant was again evaluated by Dr. B. Dr. B had referred claimant to Dr. P for an evaluation of claimant's mental condition, which had been found to be compensable. Claimant stated at the hearing that Dr. P's examination was no longer than 30 minutes and that he did not have her perform any "written tests" or "other objective testing." Dr. P's report to Dr. B, however, not only referred to psychological testing having been done by Dr. R, but also said that he, Dr. P, had conducted objective testing in the form of concentration testing involving serial subtraction. Dr. P also described his observation of claimant (an objective finding, not unlike a designated doctor's invalidation of range of motion testing based on observation of a claimant's ability to move when, for instance, removing a coat or walking--*see* Texas Workers' Compensation Commission Appeal No. 960034, decided February 5, 1996), not merely what she related to him subjectively; he also referred to the "tone" of her answers, her facial expression, and the "drooping" at the corners of her mouth. Dr. P also referred to the use of the "Wechsler Adult Intelligence Scale." He then referred to the "Mental and Behavioral Disorders" chapter of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), as addressing four areas for IR. Dr. P then assigned no IR for limitations on daily living; he assigned five percent for impairment of social functioning; five percent for concentration impairment (specifically referring to her serial subtraction test); and five percent for loss of adaptation; the total IR Dr. P found was 15%. We note that Dr. P's consideration of four factors in assigning an IR are the same factors as are set forth in Table 1, Chapter 14, of the AMA Guides. We also note that Chapter 14, referenced by Dr. P, on page 228 refers to depression following a stressful "life event" as "often" temporary and "may clear up"; it does not say that depression cannot be the basis

for IR, *i.e.*, cannot be permanent. On the same page, 228, reference is made to the specific test mentioned by Dr. P, the Wechsler Adult Intelligence Scale. The AMA Guides do provide that impairment be permanent to be rated, as set forth in the concurring opinion.

Dr. B then used Dr. P's 15% IR for mental injury and combined it with his own assessment of claimant's IR for her back and neck of 14%, to arrive at a total IR of 27%. Carrier asserts that Dr. P did not do any testing. His report indicates that he did perform testing, as set forth previously, even though claimant may not remember that she was being tested at the time. He also referred to psychological testing performed by another doctor. *See* Texas Workers' Compensation Commission Appeal No. 93381, decided July 1, 1993, which said that even a designated doctor does not have to conduct all tests, but may consider testing done by others. *See also* Texas Workers' Compensation Commission Appeal No. 950905, decided July 6, 1995, as indicative that depression may constitute part of the IR.

Carrier is correct in saying that the 1989 Act does not say that the presumptive weight accorded to a designated doctor's decision must be given to the most recent report of that doctor. It is also true that the 1989 Act does not say that the presumptive weight accorded to a designated doctor's decision must be given to the first or preceding report of that doctor. Texas Workers' Compensation Commission Appeal No. 951367, decided September 28, 1995, is an example in which the first report of the designated doctor was given presumptive weight. (Section 408.125 provides that presumptive weight be given to the designated doctor's opinion concerning IR.) Texas Workers' Compensation Commission Appeal No. 981613, decided August 28, 1998, in reversing, instructed the hearing officer to tell the designated doctor what the injury included and to rate all of the injury (the first report of the designated doctor was not given presumptive weight). Presumptive weight may be given to either opinion of the designated doctor, depending on the facts of the case. In the case now under review, the determination that presumptive weight should be given to the more recent opinion of the designated doctor, which included an IR for all of the compensable injury, was sufficiently supported by the evidence and the determination that the IR is 27% is also sufficiently supported by the evidence.

While carrier says the hearing officer erred in placing the burden of proof as to IR on it, the record shows that the hearing officer said that since carrier was attacking the opinion of the designated doctor, it would have to show that the great weight of other medical evidence was contrary to that opinion.

Carrier states that it was error to find that claimant's unemployment for the first quarter of SIBS was a direct rsult of the impairment. The evidence of claimant's significant injury with lasting effects provides a sufficient basis for this finding of fact.

Claimant's appeal of the determination that no SIBS were due, which was based on a determination of some ability to work and no effort to find work, was not timely made. The decision of the hearing officer was distributed on December 30, 1999. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) provides that a party is deemed to have

received a notice from the Commission in five days. Five days from December 30, 1999, is January 4, 2000. Section 410.202 then gives a party 15 days to appeal. Fifteen days thereafter is January 19, 2000. Claimant's appeal is dated January 21, 2000, and is untimely.

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:

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I concur in the result in this case. Chapters 1 and 14 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association and Section 401.011(23) of the 1989 Act require that depression be permanent to be rated. *See* Texas Workers' Compensation Commission Appeal No. 982551, decided December 16, 1998. I concur because the hearing officer acknowledged the requirement for permanence of the condition and he could have determined from the reports of (Dr. B) and (Dr. P) that they considered and rated permanent impairment in this case.

Judy L. Stephens
Appeals Judge