APPEAL NO. 000096

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 29, 1999, a contested case hearing (CCH) was held. With respect to the only issue before him, the hearing officer determined that, during the qualifying period, respondent (claimant) "was unable to work in any capacity," that claimant met the good faith and direct result requirements and that claimant was entitled to supplemental income benefits (SIBS) for the 23rd compensable quarter.

Appellant (carrier) appealed, contending that the hearing officer failed to make findings "as to what medical record actually supports his determination" and appealing the hearing officer's finding "that there was no good cause for the untimely exchange of Carrier exhibits." Carrier contends that claimant failed to show that he met the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) and that the hearing officer considered medical records outside the qualifying period. Carrier's attorney attaches an affidavit to her appeal which attempts to justify the non-exchange of carrier's exhibits. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

First, we address carrier's affidavit attached to its appeal. Normally, we do not consider new evidence for the first time on appeal. We may, however, in very limited circumstances, remand a case when new evidence is presented, if that evidence came to the party's knowledge after the CCH, if it is not cumulative of the evidence presented, if it was not through lack of diligence that the evidence was not presented at the CCH for the hearing officer to consider, and if the evidence is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. In this case, the affidavit adds little to what was represented at the CCH and does not provide for good cause for the untimely exchange. Therefore, there is no indication that the information in the affidavit is so material that it would probably have produced a different result.

Claimant had been employed as a "construction/repair mechanic" and testified how he sustained a low back injury while bending over repairing an elevator. The parties stipulated that claimant sustained a compensable injury on _____, that he has an impairment rating (IR) of 15% or greater, and that impairment income benefits were not commuted. It is undisputed that the qualifying period, under the new SIBS rules, was from July 2 through September 30, 1999. Claimant testified that the doctors told him it would be inadvisable for him to have surgery, and that he has not had surgery but gets steroid injections and that he has aqua therapy. Claimant testified that he is almost unable to do anything and that he spends his days in and out of a recliner and laying down. Claimant

contends that he has a total inability to work. Claimant's treating doctor is Dr. I and carrier's independent medical examination (IME) doctor is Dr. T.

Pursuant to Section 408.142, an employee is entitled to SIBS if the employee has an IR of 15% or greater, the inability to return to work is a direct result of the impairment and the employee has attempted in good faith to obtain employment commensurate with the employee's ability to work. Rule 130.102(d)(3) provides that an employee has made a good faith effort to obtain employment commensurate with his ability to work if the employee:

> (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

To this end, claimant offers a letter dated July 22, 1999, from Dr. I to carrier's vocational case manager which states "I stand firm with my decision . . . that I have not, and do not anticipate being able to release [claimant] to even sedentary work." In another letter, dated October 18, 1999, to carrier, Dr. I writes:

> The specific organic deficits [claimant] suffers from that do not allow him to return to work in any capacity are Phantom Limb Pain and Lumbar Instability which are directly related to his _____ [sic, 1992] work related injury.

In an explanatory letter dated October 25, 1999, Dr. I explains:

> [Claimant] is unable to work due to his Lumbar Instability. His Phantom Limb Pain, or deafferent [sic] pain, is secondary to his work-related injury that caused his Lumbar Instability.
>
> In reference to your handwritten note of 10/18/99 stating, "[claimant] appears to be able to at the very least complete his application for benefits, so [claimant] is capable of doing some things", I do not feel this means [claimant] is employable. (Please see his Physical Capacities Assessment Form dated 7/13/99). [Not in evidence.]

The most complete report is one dated September 1, 1999 (during the qualifying period), from Dr. T, who states this was a repeat IME, recites claimant's history, which includes that claimant says "the symptoms have not improved . . . and if anything have somewhat worsened." The report includes the results of Dr. T's examination and testing, a review of "a recent myelogram/CT scan," gives an impression of "chronic intractable lumbar muscle pain" and concludes:

> In my estimation, this patient is still not able to perform any type of work duty. This patient can not return to any type of work.

The hearing officer, in his Statement of the Evidence, specifically references language from Dr. T's September 1st report in concluding that the "evidence admitted is thus sufficient to meet the Claimant's burden under the 1999 amendments to the relevant rules (i.e., the 'new' rules)." The hearing officer goes on to comment that had Carrier's Exhibit No. 3, a functional capacity evaluation (FCE), been admitted into evidence, "the Claimant would not have met his burden under the 'new' rules." The hearing officer comments that while claimant may have seen a copy of the FCE, there was no evidence when he had done so, and "there was no showing that the Claimant had the FCE as of the deadline for exchanging exhibits."

Carrier, at the CCH, offered Carrier's Exhibit Nos. 1 through 4. The claimant objected to the admission on the ground that the exhibits had not been exchanged. Carrier initially responded that the exhibits had been exchanged at the benefit review conference (BRC), but claimant's ombudsman responded that carrier's representative had arrived late at the BRC and no evidence or documents had been exchanged. Carrier's attorney then replied "I am repeatedly going to contested case hearings and being surprised by documents, being surprised by witnesses because they [the carrier] send them to a post office box in (city) or somewhere. . . ." The attorney said all workers' compensation was being handled out of another office. The hearing officer replied, "[e]ven if that is so, I can't make an exception based on that . . ." or that the exchange was intended. The hearing officer sustained claimant's objection excluding carrier's exhibits.

Carrier appeals the hearing officer's decision on the basis that claimant's medical evidence did not meet the requirements of Rule 130.102(d)(3), was outside the qualifying period and that there is no finding "as to what medical narrative report the Hearing Officer based his decision. . . ." We have held that while it might be desirable that the medical reports are as close to the qualifying period as possible, medical reports outside the filing or qualifying period at issue could be considered. Texas Workers' Compensation Commission Appeal No. 961403, decided August 30, 1996; Texas Workers' Compensation Commission Appeal No. 960901, decided June 20, 1996. Further, we disagree with carrier that the hearing officer did not identify the narrative report which he considered to meet the requirements of Rule 130.102(d)(3). Although not identified by date or doctor, it was fairly clear by use of language that the hearing officer believed that Dr. T's September 1, 1999, report met the requirements. The better practice is for the hearing officer to specify the report or reports he or she relies on as satisfying Rule 130.102(d)(3). We find the hearing officer's decision not to be against the great weight and preponderance of the evidence.

Carrier also asserts error in the exclusion of its exhibits at the CCH. Rule 142.13(c) provides that within 15 days of the BRC, the parties "shall" exchange certain documentary evidence, to include medical reports and records. Carrier cites Appeals Panel decisions that the parties do not have to re-exchange documents, and that the documents at issue "had been exchanged before the BRC and considered at the BRC" (there is no evidence of that and claimant, through his ombudsman, who was present at the BRC, disputes carrier's representation). Carrier contends that it "had a reasonable belief that Claimant was in possession of Carrier's Exhibits . . . not only prior to the [CCH] but also prior to the [BRC]."

That may or may not be so, but, as the hearing officer stated when this argument was made to him, he cannot rule that documents were exchanged based on carrier's "reasonable belief" in the absence of any evidence that they were, in fact, exchanged. We find no error in the hearing officer's ruling excluding the offered exhibits on the basis that there was no evidence (as opposed to speculation and surmise that claimant had the exhibits) that the documents had, in fact, been exchanged pursuant to Rule 142.13(c). If a party is in doubt whether certain documents were exchanged, they should either exchange them or verify that there is evidence of a prior exchange.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge