APPEAL NO. 000154

This appeal is considered in accordance with 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. At issue was the entitlement of the respondent, who is the claimant, to her first compensable quarter of supplemental income benefits (SIBS).

The hearing officer found that the claimant had the inability to work during the qualifying period for the first quarter, and that she was thus entitled to SIBS. She found that claimant's unemployment was the direct result of her impairment, which included total blindness.

The appellant (carrier) has appealed, arguing that there are other medical records showing some capability to work; that the medical evidence shows claimant's depression to be under control and not a barrier to employment; that a sentimental decision was made by the hearing officer; and that claimant did not cooperate with vocational rehabilitation services, and is therefore not entitled to SIBS for the first quarter as a matter of law. The claimant responds that the "other records" that carrier argues show an ability to work are conditional on their face and expressly do not assess psychological effects. The claimant points out the only mental health professional to assess claimant stated why claimant could not work. The claimant does not directly respond to the point of error about noncooperation with vocational rehabilitation.

DECISION

Affirmed.

The claimant, a woman in her mid 50s at the time of the CCH, was employed by (employer) for 28 years. She was traveling on business on _____, when she slipped and fell in a bathtub, striking her head on the wall in back of her. She sustained numerous injuries, to her back, knee and shoulder, and has unfortunately developed a total blindness as a result of conversion disorder. Prior to the accident, she had already had sight in only one eye. Claimant sustained depression as a result of these injuries. Her impairment rating (IR) assessed by Dr. P was 37%. It was stipulated that the qualifying period under review began June 15, 1999, and ended September 13, 1999.

In his October 1997 report, Dr. P noted that the eye disorder itself merited 24%, with an additional 16% due to her spine and one percent for shoulder. In answer to a deposition on written questions, answered on November 30, 1999, Dr. P stated that when he performed his IR in 1997, it was his opinion at that time that claimant could have returned to sedentary work, although he did not do a functional capacity evaluation (FCE). However, Dr. P noted his opinion expressly did not take into account the effects of her psychological diagnosis. Claimant was also examined in a required medical examination by Dr. S, whose June 2, 1999, opinion paralleled that of Dr. P in some respects. Dr. S recommended that an FCE should be done. Asked to address claimant's ability to work, Dr. S stated:

> [W]e must consider that she is totally blind and hence any working relationship that requires vision would not be possible. In addition, at her age she has not been trained in braille reading and so must be considered unable to read. She is able to converse, understand, speak, make judgments, etc., and so her mental function is entirely normal except for loss of vision. She is physically strong but without vision, and is not physically capable of working within more than a very confined environment primarily being strained to a desk. There are certainly people with total visual loss who are in the work force primarily doing desk jobs and so this patient is capable of that level of activity from a physical standpoint. From an emotional standpoint, I think this will represent problems and she will not return to work.
>
> Therefore, in conclusion, I believe she is capable of sedentary work with accommodations for her total loss of vision. This leaves her with almost no feasible employment opportunity, but nevertheless she does have the capability.

The claimant had been to the Texas Rehabilitation Commission (TRC) and Texas Commission for the Blind (TCB). A July 20, 1999, letter from the TCB indicated that she declined training services offered. Claimant said that what she recalls being offered primarily related to coping around the home. She said that if she declined any vocational services, she did so because she was not emotionally up to doing this.

Claimant's treating doctor, Dr. C, wrote on February 23, 1998, that he agreed with Dr. P's assessment of IR. He argued, however, that there was no guarantee that she would ever regain her sight.[1] Although the conversion disorder resulting in claimant's blindness has a psychological rather than physiological basis, it is worth pointing out that there are no medical records indicating that the claimant is malingering or faking, and Dr. C affirmed his strong belief that she was not. He said that her chronic pain symptoms were limiting facts on her ability to work, even if she were to regain her sight. Dr. C had written a much more detailed letter earlier in which he noted that secondary depression preventing her return of sight had been ruled out.

Dr. V wrote on August 6, 1999, that she agreed with Dr. C's assessment that claimant was totally and permanently disabled, and that claimant's depression had improved with medication. She felt it unlikely that claimant would regain her sight, and that for the next three to six months, claimant would be unable to work. Dr. V expanded upon

[1] According to some of the medical records, there is a possibility that her sight could return in the future; this may explain why a claim for lifetime income benefits has not been filed pursuant to Section 408.161(1).

her letter in an August 26, 1999, letter that said she had considered a return to work not just in light of claimant's previous job but for employment generally. She said that claimant's depression was the primary reason she could not return to work, and that this left claimant with an inability to deal with stress. She also said that this, combined with blindness, left claimant unable to work at all. Dr. V closed her letter stating that this was about "as clear as I can make it."

Claimant testified that while she could do some personal hygiene for herself, and some limited functioning at home, she essentially did not leave the house except to briefly walk around the yard to the mailbox, using the sidewalk edge as a guide. She had not searched for employment during the qualifying period. The claimant said she took Prozac over the last year, and that the depression had been somewhat controlled as a result, in the sense that she did not sit around and cry at home. However, she still had difficulty handling stress.

Given that the claimant's contention, and the hearing officer's finding, was that the claimant was unable to work at all, it is worth reciting the version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(d) (Rule 130.102(d)) that was in effect at the time of the qualifying period for the first quarter. This rule indicates the desire of the Texas Workers' Compensation Commission to greatly limit the situations where a total inability to work will preclude making a good faith search for employment:

> (d) Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period;
>
> (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; or
>
> (4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment. [*Effective January 31, 1999.*]

One important point must be emphasized: the decision in this case is for the first quarter only. There is no guarantee that even with the same type of evidence, that the claimant will be found to have discharged her statutory responsibility to make a good faith search. The fact that jobs may be few does not mean they should not be sought. The professionals at TCB and TRC are likely equipped to deal with the psychological sequelae that injuries produce and tailor rehabilitation programs accordingly. Therefore, claimant's position that she was not emotionally ready to deal with participating in these programs should be directly addressed with her treating doctor and these agencies in the future.

In our opinion, the medical records described in Rule 130.102(d)(3) should be those which consider the entire compensable injury, not just isolated portions of it. Where it is conceded that depression or psychological sequelae are part of the compensable injury, those conditions should be taken into account in assessing ability to work. Moreover, contrary records must show that the claimant is "able to return to work," not just that there is a certain level of physical functioning capability. As the hearing officer noted, it was significant to the decision that the medical reports from Dr. P and Dr. S, which stated that claimant had phsyical capability to work, were conditioned on only the physical injuries. (Moreover, Dr. S's report concerning the impact of claimant's blindness on her practical ability to work could have also been interpreted by the hearing officer as assessing the inability to actually perform employment activities, versus the physical ability to sit at a desk and talk.)

The hearing officer evidently believed that the only report that fully assessed the ability to work in light of the entire injury, including depression, was the report of Dr. V, which ratified many earlier observations of Dr. C. Dr. V stated that claimant's ability to handle stress was essentially nil, and that stress would be an aspect of work or searching for work. The hearing officer's conclusion that the claimant had no ability to work during the qualifying period is supported by the record; however, a reassessment for future quarters that took into account the psychological condition and concluded an ability to work would constitute "other records" that would show that the employee was able to return to work. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ).

Concerning whether claimant was sufficiently cooperative with TRC or TCB, we note that there was no requirement during the qualifying period for the claimant to cooperate with TCB or any other private vocational rehabilitation organization, and the hearing officer could determine that the claimant's contact with TRC satisfied the statutory requirement in place for that agency. We cannot agree that claimant's disinclination to follow a TCB program amounts to disqualification from SIBS as a matter of law, although the new statutes regarding participation in other rehabilitation programs may change this analysis for future quarters. *See* Section 408.150(b) (effective September 1, 1999).

We affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge