APPEAL NO. 000787

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 7, 2000. After stipulations were entered into, whether the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second quarter that began on December 16, 1999, and ended on March 15, 2000, depended on whether the requirements for entitlement to SIBs under the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) that were in effect during the qualifying period were met. The hearing officer determined that Dr. O, the claimant's treating doctor, provided a narrative report specifically explaining how the injury caused a total inability to work; that during the qualifying period the claimant was unable to perform any type of work in any capacity because of the pain in his right upper extremity and because of the medication he was taking to control the pain; and that the claimant is entitled to SIBs for the second quarter. The appellant (carrier) requested review, urged that the evidence is not sufficient to support those determinations, quoted part of Rule 130.102(d)(3), noted that in a finding of fact the hearing officer determined that a functional capacity evaluation (FCE) performed by Dr. M concluded that the claimant is limited to sedentary-type work, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBs for the second quarter. The claimant responded, stated why he agreed with the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reverse and remand.

The claimant testified that while working on _____, he slipped on ice, fell, injured his low back, and later had surgery on his back. He said that he slipped on ice on January 5, 1996, the date of the injury in the case before us, and injured both knees and his right wrist. The claimant testified that he developed reflex sympathetic dystrophy (RSD) in the right upper extremity and is treated for the RSD by Dr. O, a pain management doctor. The parties stipulated that the claimant has a 29% impairment rating for the _____, injury. The claimant stated that he has not returned to work, that Dr. O told him not to work until he could control the RSD, and that he could not work because of the pain and the medication he takes. He testified that an FCE was performed in August 1999; that the FCE was not performed by a doctor; that he never saw Dr. M, the doctor who signed a letter stating that he could perform sedentary work; and that Dr. O told him that he disagreed with the report that he could perform sedentary work.

In a letter dated August 16, 1999, Dr. O stated that the claimant had RSD; that during the period of June 4 through September 2, 1999, he had not released the claimant to return to work; that during that period the claimant was not able to perform any type of work due to his severe, excruciating, and intractable pain; and that this inability to work was a direct impairment from the injury. The claimant testified that for about one year or one year and one-half he had received a series of three stellate ganglion blocks about a week apart for the pain from the RSD and that he received relief for about three or four months

from a series of three blocks. He said that later the carrier approved only single blocks and he received relief for only about 10 or 12 days. In a letter dated October 26, 1999, Dr. O said that the claimant continued to have severe, excruciating pain secondary to his RSD and requested that they continue with a series of three stellate ganglion blocks because it had been effective in controlling upper extremity pain. On November 2, 1999, the carrier denied the request.

In an office note dated November 9, 1999, Dr. O recorded that the claimant had severe, excruciating, intractable pain in the right upper extremity secondary to RSD; that nothing seemed to make the pain better; that single stellate ganglion blocks have been very minimal in controlling pain and lasted only a few days; and that radiofrequency thermocoagulation (RFTC) of the stellate ganglion was medically indicated and medically necessary. In a letter dated the same day, Dr. O stated that the claimant continued to take narcotic and non-narcotic medications and performed physical therapy, that none of these were effective in controlling the pain, and requested approval of RFTC. In a separate letter dated November 9, 1999, Dr. O said that during the period from September 3 through December 2, 1999, the claimant had not been released to return to work; that this was secondary to severe, excruciating, and intractable pain in the upper extremity secondary to RSD; that stellate ganglion blocks had been used in an attempt to control the pain, but the longevity is not as significant secondary to the severity of the disease process; and that during that time period the claimant was not able to perform any type of work due to the severity of the pain which was severe, excruciating, and intractable and a direct impairment from the injury. On November 19, 1999, the carrier approved RFTC. In a letter dated January 14, 2000, Dr. O said that the claimant underwent a stellate ganglion block and had pain relief for about one week. On January 17, 2000, Dr. O wrote that the claimant continued to have severe, excruciating, and intractable pain; that he continued to require large doses of narcotic and non-narcotic medications; that because of the amount of medications the claimant had to take, he recommended that the claimant not return to work; and that the medications could interfere with his job, possibly lead to injury on the job, and possibly interfere with his environment.

A report of an FCE dated August 23, 1999, does not contain the name of a physical therapist and indicates that it was performed by Dr. M. A letter from Dr. M dated August 24, 1999, contains much of the same information that is in the report of the FCE. They indicate that the claimant gave a good, concerted effort on all tasks; that his right wrist is fused; that he was placed in the sedentary category for lifting; that he walked for 10 minutes on the treadmill at 2.2 miles per hour; that he is able to sit at 45-minute intervals without substantial increase of pain if he is allowed to stand and walk at 45-minute intervals; that he can stand for approximately one hour at a time, although he needs the ability to walk and not stay in one place for extended periods; that any work above the shoulder would have to be limited to occasional lifts of a maximum of 10 pounds and the ability to rest every 5-10 minutes between activities; that the claimant's primary complaints and problems focused around his low back pain after activity and his right wrist weakness during any lifting activities; and that Dr. M recommended that the claimant be limited to sedentary-type work.

Rule 130.102(d)(3) provides:

> 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:
>
> * * * *
>
> (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor that 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[.]

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer's determination that Dr. O provided a narrative report specifically explaining how the injury caused a total inability to work is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer made Finding of Fact No. 6 that states "[o]n August 23, 1999, Claimant had an FCE performed by [Dr. M] which concluded that Claimant is limited to sedentary type work." He did not make a finding of fact to resolve the question of whether "no other records show that the injured employee is able to return to work." The statement of the evidence in the Decision and Order of the hearing officer does not contain a comment that leads to an inferred or implied finding of fact on that provision in Rule 130.102(d)(3). In view of the lack of such information and Finding of Fact No. 6, we reverse the decision of the hearing officer and remand for him to make findings of fact on the first and last requirements in Rule 130.102(d)(3) and a conclusion of law determining whether the claimant is entitled to SIBs for the second quarter.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge