

APPEAL NO. 000893

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 April 10, 2000. The hearing officer determined that the appellant (claimant) has a 16% impairment rating (IR) and is not entitled to supplemental income benefits (SIBs) for the first and second quarters. The claimant appeals the hearing officer's determinations, urging that the designated doctor did not review all of his medical records; that the designated doctor should reexamine him; that he was not able to seek employment; and that he has been denied medical care and refused medical treatment. The claimant also requests that we investigate the "practices" of the respondent (self-insured). The self-insured replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The claimant testified that he injured his neck, shoulders and upper extremities while at work on _____. On January 12, 1998, the claimant had a cervical laminectomy at C5-7 performed by his treating doctor, Dr. C. The claimant reached statutory maximum medical improvement (MMI) and the Texas Workers' Compensation Commission (Commission) appointed Dr. N as the designated doctor to determine the claimant's IR. Dr. N examined the claimant on January 25, 1999, and assessed a 14% IR based on 11% impairment for specific disorder, 2% impairment for range of motion (ROM) deficit, and 1% for neurological deficit. At the claimant's request, the Commission requested clarification from Dr. N, and the claimant was reexamined on May 5, 1999. Dr. N changed his IR assessment to a 16% IR based on 11% impairment for specific disorder, 4% impairment for ROM deficit, and 1% for neurological deficit. Dr. N states that the claimant has pain in his left arm which needs to be examined further, and possibly have an MRI and/or EMG.

On February 11, 2000, the Commission wrote another letter of clarification to Dr. N, enclosing a report of a December 30, 1999, cervical MRI. Dr. N replied that his rating was done correctly initially, that he reviewed the MRI, and that the MRI findings report no significant change from the previous study in September 1998. It is the claimant's position that the 16% IR is incorrect and should be higher. According to the claimant, he needs additional treatment and testing to support a higher IR and wants this to be accomplished by Dr. K, whom the Commission has denied as a change of treating doctor; he wants to return to Dr. N with the actual MRI films which were not reviewed; and he wants to be reexamined by Dr. N.

An IR is "the percentage of permanent impairment of the whole body resulting from a compensable injury." Section 401.011(24). Impairment is defined as "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Section 408.125(e)

provides that the designated doctor's IR has presumptive weight which can be overcome only if the great weight of the other medical evidence is to the contrary.

The hearing officer considered all of the medical evidence presented and found that the great weight of the medical evidence does not indicate that the claimant's IR is higher than the 16% assessed by Dr. N. The hearing officer found that it would serve no useful purpose for the claimant to revisit the designated doctor, since the claimant had already been examined twice, and Dr. N had the opportunity to review the reports of the claimant's MRI and updated medical records and found it unnecessary to amend his 16% IR. Apparently, Dr. N did not feel the professional need to actually review the MRI films or to reexamine the claimant. This was a matter of professional judgment. The hearing officer gave presumptive weight to Dr. N's opinion and did not find Dr. N's opinion overcome by the great weight of contrary medical evidence. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of the hearing officer that the claimant has a 16% IR.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. The only issue in this case is whether the claimant made the required good faith job search. The qualifying period for the first quarter was from July 13, 1999, through October 11, 1999; and the qualifying period for the second quarter was from October 12, 1999, through January 10, 2000. It is undisputed that the claimant made no attempt to seek employment during the qualifying periods. Tex. W.C. Comm'n, 28 TEX. ADMIN. Code § 130.102(d)(3) (Rule 130.102(d)(3)), the version then in effect, provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee 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 work.

A functional capacity evaluation (FCE) performed on July 29, 1999, indicates that the claimant has the ability to perform at a light to medium capacity with lifting up to 30 pounds. The claimant testified that Dr. C agreed with the FCE. The record does not contain a narrative report, or any medical report, which indicates that the claimant is unable to work. The hearing officer found that the claimant's evidence was insufficient to meet the criteria of Rule 130.102(d)(3). We find the evidence sufficient to support the hearing officer's determinations that during the first and second quarter qualifying periods the

claimant was not totally unable to perform any type of work in any capacity, and that the claimant is not entitled to SIBs for the first and second quarters.

The claimant asserts in his appeal that he has been denied medical care and refused medical treatment by the Commission and the self-insured. Pursuant to Rule 142.7, the hearing officer properly did not address the issue of whether the claimant was entitled to a change of treating doctor. The issue of reasonable and necessary medical treatment is within the exclusive jurisdiction of the Medical Review Division, and investigation of claims practices is within the exclusive jurisdiction of the Compliance and Practices Division.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelly
Appeals Judge