

APPEAL NO. 000900

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 29, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter. Appellant (carrier) appealed, contending that claimant failed to establish that he had no ability to work. Claimant responded that the Appeals Panel should affirm the hearing officer's determinations.

DECISION

We affirm.

Carrier complains that the hearing officer determined that claimant had no ability to work during the filing period for the first quarter and that he is entitled to SIBs. Carrier contends that the hearing officer should have looked only at evidence created during the filing period, that a 1997 functional capacity evaluation (FCE) stated that claimant could work, that other subsequent injuries caused an inability to work, and that other records showed that claimant had an ability to work.

The hearing officer's decision contains a statement of the evidence, including summaries of medical reports. Briefly, claimant sustained a compensable low back injury in _____ and underwent spinal surgeries in June 1996, April 1997, and March 1998. His spinal surgeries have been described as "failed" surgeries, and medical records indicate that doctors have planned a fourth surgery. Claimant said he was totally unable to work during the filing period, which was from October 23, 1999, to January 21, 2000. Claimant said he fell in the shower and hit his head after his compensable injury and also had a motor vehicle accident (MVA) in October 1998, in which he broke his leg. He said he did not injure his back either time. One medical record did say that the October 1998 MVA caused an increased in claimant's pain. Dr. R, who compared the 1996 and 1998 MRIs, stated that claimant had undergone severe degenerative changes since 1996 with concordant pain. Claimant's third surgery was then performed in March 1998. In June 1998, claimant was complaining of a "flare up" in his back pain and in July 1998, a physical therapist noted that claimant said his leg pain had improved but his back pain had increased. About three months later, claimant had his October 1998 MVA.

Rule 130.102(d)(4) provides, in pertinent part:

(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:

* * *

(4) 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[.]

The hearing officer determined that claimant had no ability to work during the filing period. In the statement of the evidence, the hearing officer set forth evidence from various doctors regarding whether claimant could work during the filing period. In addition to that evidence mentioned by the hearing officer, Dr. F stated during the filing period that claimant is about to undergo facet injections, that once these are completed the surgery process will be started, and that “by no stretch of the imagination [would claimant be] able to do any type of physical work. If [claimant] is subjected to any physical labor whatsoever, he may be at extreme risk for a permanent physical impairment with permanent neurological damage.” In a February 14, 2000, letter written a few weeks after the filing period ended, Dr. H wrote that claimant is “100 percent disabled”; that he will remain in this capacity for a period of at least six months while medical practitioners direct full attention toward functional restoration after treatment to the lumbar area; and that claimant is “precluded from mental/sedentary type task[s] secondary to pain sufficient to distract the concentration level” Dr. H noted that claimant is dependent on a cane due to left leg instability and also said that claimant “is unable to perform any type of duties on a basis sufficiently consistent to render him a valuable and useful worker to any employer at this time.” In a November 11, 1999, report, Dr. C said that claimant continues to have pain and loss of function, that a pseudoarthrosis is suspected, and that he has severe back pain radiating into his left leg. In a February 29, 2000, letter, Dr. C stated that claimant continues to have a significant functional deficit; that he has a significant burden of chronic pain and an important anxiety/depressive disorder that keeps him 100% disabled for a period of six months; that he “cannot sit, stand or walk for any length of time”; and that claimant is “presently unable to return to or seek gainful employment at this time.”

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). Medical evidence that concerns the filing period in question is preferable but the hearing officer decides what weight to give to other medical evidence in the record.

Regarding whether other medical records show that claimant had an ability to work, there is no medical evidence dated during the filing period stating that claimant could work during the filing period. In December 1998, a few months after claimant's October 1998 MVA, Dr. R discussed claimant's broken ankle, but did not mention claimant's back.

Carrier asserts that, if claimant could not work during the filing period, it was due to his MVA and other injuries, and not due to his compensable injury. As stated previously, claimant denied that he had otherwise injured his back. The reason why claimant was unable to work during the filing period was a fact issue for the hearing officer. In February 1999, Dr. R stated that claimant had a solid fusion but also noted that claimant complained of increased symptomology in his back and asked whether this was related to his accident. Dr. R stated that if an MRI showed a change, then it would suggest that it is from the MVA. In September 1999, Dr. R indicated that he had considered an FCE for claimant and had planned on releasing claimant to work “with those restrictions,” but that claimant had an MVA and this caused an increase in claimant’s back pain. There is no medical evidence comparing claimant’s 1999 MRI with his prior MRIs and discussing what was the cause of the findings. There is a 1998 medical report from Dr RU; however, it was written before the 1999 MRI and does not discuss that MRI. The hearing officer could consider this medical evidence in determining whether there was a “narrative report from a doctor which specifically explains how the injury causes a total inability to work.” See Texas Workers’ Compensation Commission Appeal No. 000384, decided April 6, 2000; Texas Workers’ Compensation Commission Appeal No. 000227, decided March 21, 2000. The hearing officer determined that the claimant’s medical records explained why the injury caused an inability to work and that no other record showed that he was able to return to work. After reviewing the record, we conclude that the hearing officer’s determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer’s decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge