

APPEAL NO. 001141

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 20, 2000. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 000310, decided March 23, 2000, remanded the case to the hearing officer for further consideration and findings on each element of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) relative to the sixth quarter of supplemental income benefits (SIBs). A CCH on remand was held on April 20, 2000. The hearing officer determined that the respondent (claimant) is entitled to SIBs for the sixth quarter. The appellant (carrier) appeals, urging that the hearing officer's decision is against the great weight and preponderance of the evidence. The claimant replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The carrier contends that the hearing officer erred in finding that the claimant had no ability to work; erred in finding entitlement when there were other records indicating some work ability; and erred in disregarding the medical opinion of Dr. L. The claimant contends that the credible evidence includes narrative reports from Dr. S which specifically explain how the injury has caused a total inability to work and that no other credible report shows an ability to work.

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 to work.

The qualifying period for the sixth quarter was June 23, 1999, through September 21, 1999. The claimant did not search for employment during the qualifying period and asserted that she was unable to work. We previously affirmed the hearing officer's determination that the claimant's unemployment was a direct result of her impairment.

The claimant had four spinal surgeries performed by Dr. S, including an anterior fusion of L3-S1 with pedicle instrumentation. The claimant testified that she requires assistance getting dressed and bathing herself. Dr. S has recommended surgery to remove instrumentation from L5-S1. On October 13, 1999, the Texas Workers' Compensation Commission issued a letter indicating that the carrier was not liable for the costs of spinal surgery, and this was not appealed by the claimant. In evidence is a report from Dr. H, dated September 7, 1999, stating that he concurs with the recommendation for hardware removal and exploration.

The claimant relied on the opinion of Dr. S to support her position that she is unable to work. Dr. S states that the claimant is unable to work; that the claimant is on strong pain medications; and that the claimant is not able to perform any type of activity which requires pushing, pulling, stooping, bending, crawling, lifting, squatting or climbing because they aggravate her lumbar condition. The carrier had the claimant examined by Dr. L on May 9, 1999, and March 30, 2000. Dr. L opined that the claimant is capable of performing light or sedentary work with no repetitive lifting, bending or stooping; that further medical treatment or surgery is not warranted; and that the claimant has a solid fusion at L5-S1.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In this case, the claimant presented evidence tending to demonstrate that she has no ability to work and the carrier presented evidence tending to demonstrate that the claimant has some ability to work. The hearing officer had to judge the credibility of the evidence before her in order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3). The question of whether another record shows an ability to work is a factual question, just as the questions of whether the claimant is unable to work and whether a narrative report specifically explains how the injury caused a total inability to work are factual questions. Texas Workers' Compensation Commission Appeal No. 992920, decided February 9, 2000; Texas Workers' Compensation Commission Appeal No. 000098, decided March 3, 2000; Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000; and Texas Workers' Compensation Commission Appeal No. 000323, decided March 29, 2000.

The hearing officer considered all of the evidence and concluded that the claimant was unable to work in any capacity pursuant to the narrative reports provided by Dr. S; that Dr. S's narrative reports specifically explained how the claimant's injury caused her total inability to work; and that no other records credibly show that the claimant could have returned to work, given her condition from the injury and the medications she was taking for her condition. The hearing officer was not bound by the opinion of Dr. L. In assessing the credibility of Dr. L's report, the hearing officer could consider evidence that Dr. L did not feel any medical or surgical treatment was warranted.

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 hearing officer's determinations that the claimant was unable to work during the qualifying period and that the claimant is entitled to SIBs for the sixth quarter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge