APPEAL NO. 001537

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on June 5, 2000. It is undisputed that the appellant (claimant) sustained a compensable injury on _____; that he has an impairment rating of 16%; that the qualifying period for supplemental income benefits (SIBs) for the third quarter began on January 11, 2000, and ended on April 10, 2000; that whether the claimant is entitled to SIBs for the third quarter depended on whether he met the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) concerning no ability to work during the qualifying period; and that Dr. C is the claimant's treating doctor. The hearing officer determined that during the qualifying period the claimant was not totally unable to perform any type of work in any capacity, that he is not entitled to SIBs for the third quarter, and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in denying the claimant's request to change treating doctors from Dr. K. The claimant filed an appeal that will be treated as an appeal of the sufficiency of the evidence to support the determinations of the hearing officer. The respondent (self-insured) replied, commented on the appeal filed by the claimant, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

We first address the determinations that during the qualifying period 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 third quarter. Rule 130.102(d) 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; or [.]

The claimant introduced medical documents that indicate his condition and treatment he received. A report of a functional capacity evaluation (FCE) dated July 29, 1999, states that the claimant did not give full effort while performing virtually all tests; that his heart rate did not increase significantly throughout the tests and even decreased at times when performing tests; and that the evaluation placed the claimant at a light/medium physical demand classification level. In a letter to the self-insured dated January 3, 2000, Dr. C wrote:

> This is a followup on the [claimant] who had a 1999 MRI with no significant change. In 1998, he was having no to slight left sided problems and findings were mostly left sided findings on his scan where he is having clinical symptoms on the right and the tests, other than the EMGs, were not showing a lot of problems. FCE showed he could lift 35 lbs. doing light to medium type work. He has been on Oruvail. The newest scan showed a little bit of left sided formation spinal canal spurring and perhaps a slight disc bulge, but the foraminal narrowings were very minor and mild, in my opinion, and I don't think significant to his problem particularly when his EMGs showed more of a right sided problem, but yet the MRI did not reveal this.
>
> I have suggested he consider his options that he continue with his medicines and let more time go by, that he return to work under the limitations of the FCE, that he seek a second opinion, or that he go to a Pain Clinic.

The record does not contain a document stating that the claimant could not 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 provisions of Rule 130.102(d)(4) are set forth earlier in this decision. The determinations of the hearing officer that during the qualifying period for the third quarter for SIBs the claimant was not totally unable to perform any type of work in any capacity and that he is not entitled to SIBs for the third quarter are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are 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).

We next address the determinations that the Commission did not abuse its discretion in denying the claimant's request to change treating doctors from Dr. C to Dr. K. Section 408.022 and Rule 126.9(d) contain the criteria to be considered in determining whether or not to approve a request to change treating doctors. Section 408.022(c) states that the criteria may include:

> (1) whether treatment by the current doctor is medically inappropriate;
>
> (2) the professional reputation of the doctor;
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> (3) whether the employee is receiving appropriate medical care to reach maximum medical improvement; and
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> (4) whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired.

Section 408.022(d) provides that a change of doctor may not be made to secure a new impairment rating or medical report.

The standard of review of the action of the Commission in approving or not approving a request to change treating doctors is whether it abused its discretion, that is, acted without reference to guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 941281, decided November 4, 1994. The Employee's Request to Change Treating Doctors (TWCC-53) indicates that it was signed by the claimant on March 7, 2000, and contains the following reason for change:

> My previous treatments were not successful. Currently my condition is worsening and I'm currently receiving very little treatment (Traction and Durvail) to lessen my discomfort. [Dr. K] has previously agreed to see me again for treatment. My confidence in the [Group where Dr. K works] stems from my previous visit with [Dr. K], along with my son's treatment with his pediatric physician there.

The reason given for denying the request is:

> I/W [injured worker] has had previous changes of treating doctor - conversation with I/W indicates he is simply dissatisfied with treatment options offered by current treating doctor. I/W has not presented a valid reason why another change of doctor is appropriate, nor has I/W provided justification why travel to (city) is necessary.

The treatment options are in the letter from Dr. C dated January 3, 2000. The record does not contain additional information about conversations between the claimant and the Commission employee who denied the request to change treating doctors. The hearing officer made a finding of fact that Dr. C enjoys a solid professional reputation in the city area. There is no evidence to support that finding of fact and we reverse it and will not consider it.

The hearing officer also made a finding of fact that although a degree of conflict exists between the claimant and Dr. C, such conflict is not sufficiently severe that the doctor/patient relationship is jeopardized or impaired. The record does not indicate how much of the information on which that finding of fact is based was available to the Commission at the time the request to change treating doctors was made. We will disregard that finding of fact in rendering this decision. The same applies to the finding of fact that the claimant requested the change of treating doctors.

The limited evidence on the information the Commission had at the time the request to change treating doctors was denied and the comments of the Commission employee on the TWCC-53 do not indicate that she acted without reference to guiding rules and principles when she denied the request. The evidence is sufficient to support the finding of fact of the hearing officer that the Commission did not abuse its discretion in denying the claimant's request to change treating doctors from Dr. C to Dr. K. We affirm that finding of fact and the conclusion of law based on that finding of fact.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert E. Lang
Appeals Panel Section
Manager/Judge