

APPEAL NO. 001685

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 June 29, 2000. The hearing officer found that during the qualifying period the respondent (claimant) was unable to perform any type of work in any capacity, that he provided a narrative report from a doctor which specifically explains how the injury caused a total inability to work, and that no other records show that the claimant is able to return to work and concluded that the claimant is entitled to supplemental income benefits (SIBs) for the third quarter. The appellant (carrier) appealed, contended that there is not a narrative report which specifically explains how the injury causes a total inability to work and that there is a record that shows that the claimant is able to return to work, urged that the determinations of the hearing officer are not supported by sufficient evidence, 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 third quarter. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBs for the third quarter.

After stipulations were entered into, whether the claimant is entitled to SIBs for the third quarter depended on whether the claimant met the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) related to the ability of the claimant to work during the qualifying period that began on October 25, 1999, and ended on January 23, 2000. Rule 130.102(d) in pertinent part 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 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 severely injured his right lower extremity. The medical reports in the record on the ability of the claimant to work are from Dr. P, the claimant's treating doctor. A report dated May 4, 1999, stated that the claimant could be gainfully employed, but in a sitting position. In a report dated August 31, 1999, Dr. P said that the claimant was not able to work in his previous-type duties and that the work he could do was essentially

sitting-type work, but not labor-type work. On September 7, 1999, Dr. P recorded that the claimant might need a fusion of his "hind foot" and that he was essentially disabled from all duties. In a report dated September 14, 1999, Dr. P said that the claimant complained about discomfort, pain, and swelling; that he had severe "hind foot" arthritis and walked with a cane; that he, Dr. P, would postpone surgery as long as he could; and that the claimant was not able to work. On October 19, 1999, Dr. P reported that the claimant was progressively losing the mobility in his "hind foot" secondary to arthritis; that he may need a triple arthrodesis; and that he is not able to work. In a letter dated October 26, 1999, Dr. P wrote:

[Claimant] sustained a severe injury to his right lower extremity which consisted of a dislocation of the hind foot, segmental fracture of the tibia and compartment syndrome of the right lower extremity. Most of those problems are being treated and have resolved; however, this patient has significant residuals. This patient also needed extensive surgery for this. The patient has had multiple surgeries for this because of a nonunion and is about to undergo a triple arthrodesis.

For reasons stated above, this patient has not been able to work since the time of injury, not even in a seated position, because all those type of positions require moderate walking. I do not feel this patient is able to work and has not been able to work since the day of injury including all of 1999.

The claimant had surgery on March 8, 2000. The claimant testified that he rode a bus and walked a block to get to the CCH.

The reports of Dr. P indicate that the claimant's condition became worse. The last paragraph of the October 26, 1999, letter of Dr. P, set forth earlier in this decision, is key to the resolution of the disputed issue. Dr. P said that the claimant has been unable to work even in a seated position "because all those type of positions require moderate walking." In Texas Workers' Compensation Commission Appeal No. 970890, decided June 27, 1997, the Appeals Panel reversed a decision that a claimant was entitled to SIBs and rendered a decision that he was not. The Appeals Panel stated that the medical evidence and the claimant's testimony demonstrated that he had some ability to perform light sedentary, nonlifting activities. The Appeals Panel noted that it may be futile for the claimant to seek light sedentary work on an intermittent basis, but the evidence did not establish a total inability to work. Rule 130.102(d)(3) uses the phrases "unable to perform any type of work in any capacity" and "causes a total inability to work." We do not interpret Appeal No. 970890 to be inconsistent with the provisions of Rule 130.102(d)(3). Applying the provisions of Rule 130.102(d)(3), the October 26, 1999, letter of Dr. P does not establish that the claimant has been unable to perform any type of work in any capacity and is not a narrative report which specifically explains how the injury causes a total inability to work. The finding of fact that during the qualifying period

Claimant has been unable to perform any type of work in any capacity, and has provided a narrative report from [Dr. P] which specifically explains how the injury causes a total inability to work, and no other records show that claimant is able to return to work

is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust and is reversed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The Application for [SIBs] (TWCC-52) indicates that the claimant sought employment four days in November 1999. He did not seek employment during each week of the qualifying period as required by Rule 130.102(e).

We reverse the decision of the hearing officer that the claimant is entitled to SIBs for the third quarter and render a decision that he is not entitled to SIBs for the third quarter.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I dissent. The majority relies upon Texas Workers' Compensation Commission Appeal No. 970890, decided June 27, 1997. The only thing I find instructive in this decision is Judge K's dissenting opinion, which I think is as applicable in the present case as it was in Appeal No. 970890. Judge K stated in part as follows in her dissent in Appeal No. 970890:

I am not, however, the fact finder, nor are my personal beliefs the standard of appellate review. The decision of the hearing officer in this case is sufficiently and soundly based on the evidence, and the hearing officer determined that, in this case, "no" search was commensurate with the claimant's ability to work, which he found was nil. The decision should be affirmed.

I believe the majority in the present case, just as the majority did in Appeal No. 970890, departs from our standard of appellate review to substitute their personal beliefs for the factual findings of the hearing officer. Under the 1989 Act the hearing officer is the finder of fact. The hearing officer's decision in the present case includes the following Finding of Fact No 2:

2. During the qualifying period for the third SIBS [supplemental income benefits] quarter:
 - A. Claimant had no ability to work;
 - B. Claimant's requirement to attempt in good faith to obtain employment commensurate with Claimant's ability to work was satisfied because Claimant had no ability to work;
 - C. Claimant has been unable to perform any type of work in any capacity, and has provided a narrative report from [Dr. P], which specifically explains how the injury causes a total inability to work, and no other records show that Claimant is able to return to work[.]

The majority, in their rush to render a contrary decision, fails to even go through the motions of explaining what constitutes the great weight and preponderance of the evidence contrary to this finding. I believe this finding is supported by the reports of Dr. P which are replete with statements that the claimant cannot work. In his October 22, 1999, narrative (three days before the beginning of the qualifying period) Dr. P stated, "The patient at this time is absolutely unable to return to his work." Dr. P, in other narratives, makes abundantly clear that a major impediment to the claimant's return to work was the need for further surgery which was actually performed on March 8, 2000, only a few weeks after the end of the qualifying period. I also interpret many of Dr. P's statements concerning sedentary work as part of a sincere plan to try to get the claimant back into the workforce once the claimant had undergone appropriate medical treatment and retraining such as Dr. P mentions in his May 4, 1999, report. Apparently, the majority would have us interpret efforts by the doctor to aid the claimant to return to the workforce in the future as evidence of a present ability to work barring the claimant from benefits. This is rather amazing to me in light of the repeated advice from the Appeals Panel that a claimant should seek his or her doctor's advice in trying to find means to return to work. This is exactly the type of interpretation of medical evidence that would discourage a claimant from seeking such advice or a doctor from giving it.

In any case, it is not my interpretation of Dr. P's reports, or the majority's reading of those reports, that is relevant to the proper resolution of this case. The real question is whether they could be reasonably read to support the findings of the hearing officer. I submit that they can be. I also point to the following language which appears in countless Appeals Panel decisions:

It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

In the present case, I believe the majority has arrogated this fact-finding process to themselves to reach a desired result. I think this is a clear invasion of the fact-finding function of the hearing officer, whose decision I would affirm.

Gary L. Kilgore
Appeals Judge