APPEAL NO. 002160

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 July 20, 2000. The issues at the CCH concerned the entitlement of the appellant, _____, who is the claimant, to his 7th through 13th quarters of supplemental income benefits (SIBs). It was stipulated that the claimant had not sought employment during the quarters under review and he argued that he had the complete inability to work.

The hearing officer held that the claimant had the ability to work during the periods under review and had not sought employment commensurate with his ability to work, and consequently was not entitled to SIBs for any of the quarters in question. However, the hearing officer held that the claimant's "inability to work" was the direct result of the claimant's impairment. The hearing officer further held that the claimant permanently lost entitlement to SIBs due to not being entitled for 12 consecutive months. She further found that the Texas Workers' Compensation Commission (Commission) had not abused its discretion in approving a change in treating doctor. We note that it was stipulated that the claimant did not timely file his SIBs applications for the seventh and eighth quarters.

The claimant had appealed this decision, arguing facts in support of his contention that he has a severe mental incapacity preventing him from working. The claimant argues that there should be a "good cause" exception for mentally disabled persons in filing a late Application for [SIBs] (TWCC-52). The respondent (carrier) responds that the decision should be affirmed and recites evidence in its favor. The carrier also makes an argument based upon new SIBs rules that were in effect during some of the quarters in issue. The carrier argues that a psychologist is not a "doctor" within the scope of these new rules calling for the opinion of a doctor on inability to work.

DECISION

Affirmed.

The claimant sustained an injury to his head on _____. He had emergency surgery that day from a fractured skull and resulting hematoma. He was conscious and able to consent to surgery beforehand. Extruding amounts of the claimant's brain were removed in the course of surgery. A fractured sinus area was also repaired. Although medical evidence is considerable, our summary will focus on records pertinent to the periods of time under consideration, which ran from May 27, 1998, through February 11, 2000, mentioning others to contribute background.

The claimant testified that he is able to drive his car and can also take care of horses on his acreage in a rural area. The claimant contended that he had a five-pound lifting limit, and that he paid afterwards for instances when he lifted more than this. The claimant denied that he had been diagnosed with alcoholism.

The claimant began treatment with psychiatrist Dr. C in 1995. Dr. C's reports prior to the period under consideration indicate that the claimant refused referral to the Texas Rehabilitation Commission (TRC) and that he was advised by Dr. C to reduce his alcohol consumption. Dr. C also indicated concern with noncompliance with taking medications. On August 18, 1997, Dr. C noted that a considerable amount of time was spent discussing vocational reentry and that the claimant was once again urged to contact TRC. He noted that the claimant had applied for Social Security disability. On June 29, 1998, a counselor with Dr. C's office noted that the claimant was having decreased problems with tremors and headaches, no seizures were reported, and the claimant's primary daily activity was taking care of farm animals. The claimant reported to the therapist that TRC found no suitable alternative for him vocationally. On June 17, 1999, the counselor discussed the possibility of going back to work for a salary that would not jeopardize his Social Security income. The claimant sought to change treating doctors in August 1999.

The claimant was examined by Dr. W on February 2, 1998, primarily for his back. Dr. W noted that the claimant had degenerative symptoms at L4-5 and L5-S1. Dr. W noted that these injuries were related to the claimant's previous injury. There is no comment in the report about the claimant's ability or inability to work. Dr. W wrote on July 8, 1998, that the claimant had a sedentary level due to restrictions although he noted that the claimant's brain injury would limit his abilities to concentrate in a desk-type job. He limited the claimant to a five-pound lifting limit, and advised alternating standing and sitting. Other restrictions on physical postural functioning were limited from "never" to "occasionally."

Restrictions given by Dr. C on August 6, 1998, gave a heavier lifting limit and more ability to perform certain physical functions, and noted emotional difficulties and a seizure disorder. Selected excerpts presented by the claimant from a deposition of Dr. C note that there were "some" deficits in executive-functioning functions of the brain, and that as a broad generalization, there were some jobs the claimant would not be able to do. Dr. C also stated that there was nothing specific in neuropsychological tests that would have made it impossible for the claimant to return to work. The entire deposition is also in evidence as a carrier's exhibit and puts these statements in context. Dr. C made it clear that his work restrictions for the claimant were completed with the deficits in executive functioning in mind and that he basically felt that the claimant could perform job functions that would involve one and two step operations. He felt that the claimant could respond appropriately to supervision and working with coworkers but would need careful handling, and could function in a low-stress job.

The claimant was also evaluated by Dr. F, but not at the request of the carrier or Commission, on May 26, 1998. (Notes of Dr. C at the time refer to the claimant consulting a psychiatrist in order to obtain Social Security disability benefits.) Dr. F noted that the claimant reported irritability and frustration which were hard for him to control, and angry outbursts. Dr. F noted decreased reasoning and memory impairments. He said that the claimant functioned on the low average range of intelligence. He recommended further evaluation. On June 8, 1998, Dr. F reported emotional difficulties that affected the claimant's ability to "sustain optimal levels of attention and concentration." Dr. F noted that

there were "no" jobs in the world of work that the claimant could perform without extensive rehabilitation. We note that the records of Dr. C's office at or around this time do not document these problems. Dr. F furnished a December 1998 affidavit contending that the claimant was totally disabled vocationally, and that it was his opinion that the claimant "had not been mentally competent since his traumatic brain injury" to advocate for himself with respect to workers' compensation.

By agreement between the parties, the claimant was evaluated by Dr. P, on October 14, 1999. The claimant reported to Dr. P that he did not see himself ever going back to work. Dr. P stated that the claimant's medical records reflected a good recovery from his head injury and that he was noncompliant with medication. Dr. P found that testing indicated a profile consistent with symptom magnification. Also, the profile was consistent with relationship and social difficulties. Dr. P found no evidence for memory or intellectual difficulties or any impairment psychologically that would prevent a return to work.

Dr. M, a neurologist, wrote on February 8, 2000, that the claimant was depressed and had difficulty remembering things. She also noted that he had back pain. Dr. M concluded by generally stating that the claimant was "completely and totally disabled vocationally."

At the outset, we would note that the hearing officer's finding of fact on "direct result" contains a clerical error. The hearing officer found that the claimant did not have an inability to work although she found in Finding of Fact No. 7 that his inability to work was a direct result of his impairment. It appears that this finding should track the statutory language regarding direct result, and reform this finding of fact to read that the claimant's "unemployment" (rather than inability to work) was the direct result of his impairment.

Second, whether there is or should be a good cause exception for the mentally disabled on timely filing a SIBs application was dealt with somewhat in the stipulation that the claimant did not timely file applications for the seventh and eighth quarters, and the unambiguous language of Section 408.143(c), which provides no exceptions. We are without authority to create such an exception. *See* Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999).

Finally, although not indicated in the decision or the appeal, new SIBs rules were in effect beginning with the 10th quarter. As applied to this case, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) [which became Rule 130.102(d)(4) effective November 28, 1999] states that a claimant will be considered to have made a good faith effort to find employment commensurate with the ability to work if he or she:

> 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[.]

Prior to that date, the decisions of the Appeals Panel had made clear that inability to work that would satisfy the legislatively imposed requirement to search for employment as a precondition for SIBs was a rare situation, and that the burden of proof was firmly on the SIBs claimant. We would also note that a narrative should be from a "doctor" (as opposed to a health care provider), which is defined in Section 401.011(17) with reference to certain enumerated licenses which do not include psychology.

In reviewing the evidence, we note that there is essentially no narrative that would encompass all disputed quarters from a doctor which explains how the injury in question caused a total inability to work. The hearing officer evidently was of the opinion that the February 2000 assertion of Dr. M that the claimant was "completely and totally disabled vocationally" was not backed up with the required narrative. The fact that the claimant's initial injury was severe does not in and of itself satisfy the burden of proof that there is a total inability to work.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of 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.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We simply cannot agree with the claimant's argument that the evidence compels a finding of inability to work, or that the hearing officer's decision is against the great weight and preponderance of the evidence. We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur in the decision affirming the hearing officer's determinations that the claimant is not entitled to supplemental income benefits (SIBs) for the 7th through the 13th quarters. I write separately to address the question of whether a report from a psychologist can be considered in making a determination of whether there is a narrative that specifically explains how the claimant's injury causes a total inability to work. As the majority notes, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) states that the narrative should be from a "doctor" and Section 401.011(17) does not include a psychologist in the definition of that term. However, in my opinion, that does not mean that the report of a psychologist cannot be considered as part of the narrative. If the doctor providing the narrative explaining the claimant's inability to work references or incorporates the psychologist's findings in his or her narrative, then I believe that the psychologist's findings become a part thereof and can serve to explain the effects of the psychological component of the claimant's compensable injury in relation to the question of his ability to work.

Elaine M. Chaney
Appeals Judge