APPEAL NO. 002558

Following a contested case hearing (CCH) held on October 11, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the respondent (claimant herein) was entitled to supplemental income benefits (SIBs) for the fifth quarter. The appellant (carrier herein) files a request for review arguing that the hearing officer erred in finding that the claimant had a total inability to work during the qualifying period for the fifth compensable quarter when there was evidence that the claimant had an ability to work and that the claimant failed to present evidence which showed she an inability to work. The carrier also contended that the evidence the claimant relied upon to show a total inability to work should not have been admitted into evidence as the claimant failed to timely disclose the identity of these witnesses. The claimant responds that the carrier listed the witnesses about whom it complains as people having knowledge concerning the case in its discovery exchange. The claimant also argues that the hearing officer did not err in finding she had no ability to work based upon the evidence of these witnesses and not relying upon the evidence concerning the claimant's ability to work.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarizes the evidence in his decision and we adopt his rendition of the evidence. The parties stipulated that the claimant sustained a compensable injury which resulted in a 20% impairment rating and that the qualifying period for the fifth quarter of SIBs was from April 1, 2000, through June 30, 2000. The claimant testified that she was unable to work during the filing period due to intractable pain and the effects of the medications she was taking. Dr. M, an orthopedic surgeon and the claimant's treating doctor, testified at the CCH that the claimant was unable to work due the effects of pain medication and the fact that any activity aggravated the claimant's arachnoiditis (inflamation of the middle membrane surrounding the spinal cord. Dr. E, a psychiatrist who is also treating the claimant, testified at the hearing that the claimant was unable to work and would need a minimum of six months of physical therapy before any type of employment could be considered. Dr. E also explained the debilitating effects of the claimant's medication. Narrative reports from Dr. M and Dr. E which were admitted into evidence also stated that the claimant had an inability to work. Medical evidence showed that the claimant had undergone four spinal surgeries and suffers from intractable pain and depression.

The carrier presented into evidence a narrative dated November 17, 1999, from Dr. O, its medical examination order doctor. Dr. O stated in this narrative that the claimant "could do an extremely restricted job with no more than three or four hours a day, allowing her ample opportunity to rest, including possibly the opportunity to lie down if her pain became too intense." Dr. M in a narrative report of January 6, 2000, strongly disagreed

with Dr. O's opinion. The carrier also put into evidence the report of a functional capacity evaluation (FCE) dated April 6, 2000, which indicated that the claimant was able to work four hours per day at the sedentary work level. The FCE report cautioned that while the claimant demonstrated an ability to perform at this work level on the date of the FCE, "there is a limit of certainty in predicting [the claimant's] ability to safely maintain this level of performance over time." The claimant testified that for two to three days after the FCE she was bedridden, unable to get out of bed from the effects on her body from the FCE testing.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. 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 (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 (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 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBs is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101(4), "qualifying period" is defined as the 13-week period ending on the 14th day before the beginning of a compensable quarter. Rule 130.102(d)(4) 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[.]"

In regard to these requirements the hearing officer made the following findings of fact:

> 7. The Claimant provided narrative reports from two doctors which specifically explained how the Claimant's injury and the impairment therefrom caused a total inability to work during the qualifying period.

8. The report of the [FCE], performed on April 3, 2000, concluded that the Claimant was able to work at a sedentary level for approximately four hours on that one day, but failed to show that she could return to work on any regular basis. The Claimant was bedridden for two days after the physical effort at the [FCE], showing that she would not be able to work even on a part-time basis.

9. [Dr. O] in November 1999, five months before the qualifying period, reported that he thought the Claimant could perform minimum work about three hours per day, with numerous provisional qualifiers that made her performing any work highly unlikely. [Dr. O] failed to give any specific explanation for his conclusion. Overall, [Dr. O's] report did not show that the Claimant was able to return to work during the qualifying period.

10. During the qualifying period, the Claimant did not seek any employment. Pursuant to [Rule 130.102(d)(4)], the Claimant thus made a good faith effort during the qualifying period to obtain employment commensurate with her ability to work because she had no ability to work.

The carrier contends that Dr. M and Dr. E did not specifically explain how the claimant's injury of May 21, 1996, caused a total inability to work in any capacity during the qualifying period for the fifth quarter. The carrier further contends that the report of Dr. O and the FCE report clearly constitute other records showing an ability to return to work.

In Texas Workers' Compensation Commission Appeal No. 000323, decided March 29, 2000, the Appeals Panel stated that 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, citing Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. *See also* Texas Workers' Compensation Commission Appeal No. 002091, decided October 23, 2000. Further, in Texas Workers' Compensation Commission Appeal No. 002102, decided October 11, 2000, we found that a report detailing significant restrictions could be interpreted to constitute a narrative specifically explaining how the injury caused a total inability to work. In light of this, the hearing officer in the present case could rely on Dr. M's and Dr. E's detailing the claimant's restrictions and the debilitating effects of her medication in determining that the claimant was unable to work. In addition, the hearing officer could reasonably determine that no other records show an ability to work.

Nor do we find that the hearing officer's allowing Dr. M and Dr. E to testify constituted reversible error. The carrier listed Dr. M and Dr. E as persons with knowledge of relevant facts in its exchange. We have previously held that a party need not exchange information previously provided by the other party as part of its exchange. Texas Workers'

Compensation Commission Appeal No. 91088, decided January 15, 1992. Also, in light of the fact that Dr. M's and Dr. E's narrative reports were admitted without objection, we find any error in the admission of their testimony could be considered at most to be harmless error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge