

APPEAL NO. 010473

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 6, 2001. With regard to the issues before her the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the fifth and sixth quarters. The appellant (carrier) files a request for review, contending that the hearing officer's findings that the claimant was unable to work during the qualifying periods for these quarters as well as her findings that this was shown by medical records and that no other medical records showed that the claimant could work during these periods were contrary to the evidence. The carrier also argues that the decision of the hearing officer is contrary to that of another hearing officer regarding the fourth and fifth compensable quarters. The claimant responds that the findings and decision of the hearing officer were sufficiently supported by the evidence.

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 parties stipulated that the claimant sustained a compensable injury to her back, neck, head, and left shoulder on _____; that the claimant has a 39% impairment rating; that the claimant did not commute any portion of her impairment income benefits; that the fifth quarter ran from July 7 through October 6, 2000; and that the sixth quarter ran from October 7, 2000, through January 5, 2001. Medical evidence showed that the claimant's injury resulted in a three-level cervical fusion in June 1996 and a shoulder surgery in May 1999. There were medical reports in evidence from Dr. S and Dr. M stating that the claimant was unable to work during the qualifying period for the fifth compensable quarter, and medical reports from Dr. S stating that the claimant was unable to work during the qualifying period for the sixth compensable quarter. Also in evidence was a report from Dr. P, dated October 29, 1999, in which he stated that the claimant could work in a sedentary setting. The carrier also put in evidence a copy of Texas Workers' Compensation Commission Appeal No. 002358, decided November 21, 2000, in which the Appeals Panel affirmed a hearing officer denying the claimant SIBs for the fourth and fifth quarters. We note that in Texas Workers' Compensation Commission Appeal No. 000546, decided May 1, 2000, the Appeals Panel remanded for further findings a decision of a hearing officer granting the claimant SIBs for the first and second quarters and in Texas Workers' Compensation Commission Appeal No. 001466, decided August 8, 2000, we affirmed the decision of the hearing officer on remand, which found entitlement to SIBs for the first and second quarters.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. The qualifying periods for the 5th and 6th quarters herein ran from March 25, 2000 through September 22, 2000, collectively.
3. Between March 25, 2000 and September 22, 2000, the Claimant was unable to work in any capacity pursuant to narrative reports provided by her treating doctors, [Dr. M] and [Dr. S].
4. The reports of [Dr. M] and [Dr. S], collectively and in their totality, specifically explain how the Claimant's _____ injury caused her complete inability to work between March 25, 2000 and September 22, 2000.
5. No other records, including [Dr. P's] October 28, 1999 report, credibly show that the Claimant could have returned to work between March 25, 2000 and September 22, 2000, given her condition due to the _____ injury and the medications she was taking for the condition.
6. Between March 25, 2000 and September 22, 2000, the Claimant acted in good faith in not seeking to obtain employment since she was unable to work and had not been released to return to work by her treating doctors.

CONCLUSION OF LAW

5. The Claimant is entitled to [SIBs] for the 5th and 6th quarters.

Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.102(d)(4)Rule 130.102(d)(4) provides as follows in relevant 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[.]

Section 410.165(a) provides that the 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, 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). 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 great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying our standard of review, as well as the requirements of the 1989 Act and the rule cited above, we find no error in the hearing officer's determination that the claimant was entitled to SIBs for the fifth and sixth quarters. The carrier argues that the claimant failed to provide a narrative report from a doctor which specifically explained how her injury caused a total inability to work. The hearing officer weighed all of the medical evidence and determined that it established an inability to work during the qualifying periods for the fifth and sixth compensable quarters. We do find that this factual determination was sufficiently supported by the evidence. The carrier points to contrary medical evidence which it argues showed the claimant was able to return to work. The hearing officer explained why she did not find that this evidence showed an ability to work. The hearing officer found that Dr. P's report was not credible in that it predated the qualifying period, and that it was issued when Dr. P lacked pertinent records, including those regarding the claimant's May 1999 shoulder surgery. The mere existence of a medical report stating the claimant had an ability to work does not mandate that a hearing officer find that other records showed an ability to work. Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. We do find the great weight and preponderance of the evidence contrary to the finding of the hearing officer that no other record showed the claimant had an ability to work during the qualifying periods for the fifth and sixth compensable quarters.

As far as the carrier's contention that since the Appeals Panel affirmed the decision of a hearing officer to deny the claimant SIBs for the third and fourth quarter we are somehow required to reverse the decision in the present case, we note that in Appeal No. 001466, *supra*, and in Appeal No. 002358, *supra*, we affirmed decisions of hearing officers regarding the claimant's entitlement to SIBs when the factual findings on which those decisions were based were supported by sufficient evidence based upon our standard of review. We again apply the same standard and reach the same result in the present case.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

CONCURRING OPINION:

I write separately as having been the author judge on Texas Workers' Compensation Commission appeal No. 001466, decided August 8, 2000. The quarters at issue in that case, which included a period during which claimant had surgery, differ substantially from the period at issue here.

Further, I do not believe the hearing officer used the correct standard in her Finding of Fact No. 4, quoted above, where she referred to the reports of Dr. M and Dr. S as "collectively and their totality, specifically explains. . . ." Rule 130.102(d)(4) requires "a narrative report from a doctor" (emphasis added), not reports "collectively and in their totality." However, my review of the record indicates that there is a report dated April 5, 2000 (actually two reports of the same date), from Dr. H, which the hearing officer could find to be the narrative required by Rule 130.102(d)(4).

Finally, I would note that the hearing officer did not err in not considering the report of Dr. P made some months prior to the qualifying periods at issue. It is up to the parties to obtain probative medical evidence.

Thomas A. Knapp
Appeals Judge