APPEAL NO. 012099
FILED OCTOBER 18, 2001

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 August 8, 2001. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the third and fourth quarters. The appellant (carrier) appeals the determination on sufficiency grounds, and asserts that the hearing officer erred in admitting the medical records of the claimant's treating doctors. The claimant urges affirmance.

DECISION

Affirmed.

EVIDENTIARY OBJECTION

The carrier asserts that the hearing officer erred in considering the medical opinions of the claimant's treating doctors, because they do not satisfy the requirements for admissibility of expert evidence in Daubert v. Merrell Dow Pharmaceauticals, Inc., 509 U.S. 579 (1993) and E. I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995). We disagree.

Section 410.165(b) provides that a hearing officer "shall admit" a signed report from a health care provider. In view of §410.165(b), we have held that Daubert and Robinson do not provide a basis for excluding opinions in an administrative workers' compensation proceeding. Texas Workers' Compensation Commission Appeal No. 991964, decided October 25, 1999. Rather, the factors advanced by Daubert and Robinson can be considered by the fact finder in making credibility determinations.

SIBS--NO ABILITY TO WORK

The hearing officer did not err in determining that the claimant was entitled to third and fourth quarter SIBs. The claimant asserts that he had no ability to work during qualifying periods for the third and fourth quarters. The claimant, therefore, did not make a job search during these periods. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an injured employee has made a good faith effort to obtain employment commensurate with her 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. Whether the claimant had an ability to work during the qualifying period was a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the

conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)).

The claimant provided a narrative report from Dr. M, which outlined the claimant's condition and provided, in relevant part, "As a consequence of his chronic intractable pain, he suffers from somatic malfunctioning to the exclusion of any factors or difficulties in his life. He is stuck in this psychological position of pain-depression-suffering-pain that reflects extremely poor coping skills for his pain, as well as everyday life. Under these circumstances, he is incapable of performing any gainful employment." We note that this statement was made in a letter dated June 25, 2001, in response to a letter from the Texas Workers' Compensation Commission specifically asking Dr. M whether the claimant was able to work during the relevant filing period, and if not, to explain how the injury prevented the claimant from doing so. Also in evidence was a report from the carrier's required medical examination (RME) doctor, which also described the claimant's condition and provided that the claimant "is not capable of returning to any full-duty type of job. However, I do believe that he is capable of returning to modified duty type work." We observe that the claimant was examined by the RME doctor more than two months after the close of the qualifying period for the fourth quarter. We also note that the RME doctor did not express any opinion as to the claimant's ability to work for any period prior to the examination by the RME doctor.

In view of the evidence presented, the hearing officer could find, as she did, that the claimant had no ability to work during the qualifying periods for the third and fourth quarters. The hearing officer's determination that the claimant is entitled to SIBs for the third and fourth quarters is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **RELIANCE NATIONAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

C/O TIMOTHY J. MCGUIRE
633 N. STATE HWY. 161, SUITE 200
IRVING, TEXAS 75038.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I dissent.

This case involves supplemental income benefits (SIBs) for the third and fourth quarters. The parties stipulated that the qualifying period for the third quarter was from October 27, 2000, to January 25, 2001, and that the qualifying period for the fourth quarter was from January 26 to April 26, 2001.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). At issue in this case is whether the claimant met the requirement of a good faith effort to obtain employment commensurate with his ability to work. The claimant asserts that he has a total inability to work in any capacity. 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. The hearing officer does not reference Rule 130.102(d)(4) in her decision.

The hearing officer found that both Dr. P and Dr. M "provided a narrative specifically explaining how Claimant's compensable injury caused a total inability for Claimant to work."

Rule 130.102(d)(4) requires "a narrative report from a doctor" (emphasis added), not reports collectively and in their totality. Texas Workers' Compensation Commission Appeal No. 010473, decided April 11, 2001. The hearing officer references, and the majority quotes from, a report from Dr. M dated June 25, 2001, which I note is two months after the fourth quarter qualifying period. That report is one paragraph which states that the claimant "is incapable of performing any gainful employment." (Emphasis added.) I note that nothing in the 1989 Act or the SIBs rules refers to "gainful employment" rather Rule 130.102(d)(4) states "work in any capacity" which we have interpreted to mean sedentary and/or part time work, not gainful employment.

If one arguably accepts Dr. M's report as explaining how the injury causes "a total inability to work," the remaining requirement is that "no other records show that the injured employee is able to return to work." The hearing officer makes this finding without further elaboration. In evidence is a report dated July 2, 2001 (exactly one week after Dr. M's report that the majority relies on), from Dr. B. Dr. B's report is a five-page report which concludes:

> As for this gentleman's work status, he clearly is not capable of returning to any full-duty type of job. However, I do believe that he is capable of returning to modified duty type work. Please see the attached TWCC-73 form, the work restrictions which apply to his right upper extremity which include motion restrictions and lifting restrictions. This would be considered at this point in time an indefinite work restriction.

Attached to the five-page report is a TWCC-73 which releases the claimant to work with a number of restrictions. The hearing officer does not indicate why this is not a record which shows that the claimant is able to return to work. The hearing officer only comments:

> Carrier introduced medical evidence that Claimant could return to a modified type of work as of July 2, 2001. That evidence was from [Dr. B] who saw and evaluated Claimant for a required medical examination on July 2, 2001.

If the hearing officer is saying that she did not consider Dr. B's report because it is outside the qualifying period, then I note that Dr. M's report on which the majority relies, was also outside the qualifying period and was only one week earlier. The hearing officer is not at liberty to simply reject Dr. B's report without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000; Texas Workers' Compensation Commission Appeal No. 002129, decided October 27, 2000; and Texas Workers' Compensation Commission Appeal No. 002498, decided November 30, 2000.

The majority appears to emphasize that the Texas Workers' Compensation Commission (Commission) (presumably the ombudsman) wrote Dr. M specifically asking about the claimant's status during the qualifying period. I think that it is a reasonable

inference that the carrier asked Dr. B for the same information and that Dr. B would have given the same answer. I do not think the case should turn on such a fine distinction. In any event, it is not a distinction the hearing officer made but, rather, it is a distinction that the majority has made after combing through the record. I would have relied on the cases cited in the previous paragraph.

I would reverse the hearing officer's decision as not being supported by the evidence and render a decision that the claimant is not entitled to SIBs for the third and fourth quarters because the claimant has not complied with the requirements of Rule 130.102(d)(4) namely that either there is no narrative from a doctor during the qualifying periods which specifically explains how the injury causes a total inability to work or that Dr. B's July 2, 2001, is an "other" record which shows that the claimant is able to return to work.

Thomas A. Knapp
Appeals Judge