APPEAL NO. 012224
FILED NOVEMBER 7, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on August 15, 2001, the hearing officer determined that the respondent (claimant) had no ability to work during the qualifying period for the sixth quarter and that he is entitled to supplemental income benefits (SIBs) for that quarter. The appellant (carrier) has appealed, asserting that not only did the claimant fail to prove he had no ability to work during the qualifying period but that there is evidence that he had the ability to return to some type of work and, therefore, that he is not entitled to SIBs for the sixth quarter. The carrier also asserts error in the hearing officer's exclusion of certain documentary evidence. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that while working as a motor man on a drilling rig on _____, he ruptured a disc in his low back; that on March 18, 1999, he underwent a fusion operation at the L5-S1 levels with placement of cages; that the fusion was not successful and he thereafter had massive pain in his low back and down his legs; that he was prescribed pain killing drugs and could not progress from aquatic physical therapy to gym therapy; and that when additional lumbar spine surgery was eventually approved, he underwent further surgery on August 2, 2001, to repair the failed fusion. The claimant further testified that he received SIBs for the first through fourth quarters but not for the fifth and that his severe pain prevented him from performing any type of work during the sixth quarter qualifying period, February 21 through May 22, 2001.

The statutory requirements for entitlement to SIBs are provided for in Sections 408.142 and 408.143 of the 1989 Act and in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102)). 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.

To satisfy the requirement of Rule 130.102(d)(4)) for a narrative report that explains how he could not perform any type of work during the qualifying period, the claimant relies on the April 16, 2001, report of his treating doctor, Dr. N. Dr. N stated that the claimant cannot work in any type of job until after he has had the additional surgery for his failed fusion and that once he has had that surgery, followed by rehabilitation, he can return to some type of work. Dr. G, who in July 2000 issued a second opinion recommending additional physiotherapy before further surgery, reported on February 22, 2001, that the

claimant likely has a psuedoarthrosis, that he still has problems after additional physiotherapy, and that he, Dr. G, now feels that the surgery proposed by Dr. N is appropriate. The carrier relies on the January 16, 2001, report of Dr. P who ordered the functional capacity evaluation (FCE) report attached to his report to the effect that the claimant's physical demand level falls in to the light classification. The report does make clear that the claimant's pain behavior is appropriate and that he is not magnifying symptoms. Dr. P wrote on January 16, 2001, that the claimant is not ready to return to full-duty work but could return to light duty up to four hours per day. However, Dr. P also states that he recommends a work conditioning program and that if such program is not successful, then the claimant is left with the options of pain control medications or further surgery.

The carrier asserts error in the hearing officer's sustaining the claimant's relevancy objection to the admission of the Decision and Order of another hearing officer denying the claimant SIBs for the fifth quarter and the Appeals Panel decision in Texas Workers' Compensation Commission Appeal No. 011286, decided July 18, 2001, affirming that hearing officer's decision. In Texas Workers' Compensation Commission Appeal No. 010865, decided May 30, 2001, the carrier in that case urged error by the hearing officer in admitting hearing officer decisions and Appeals Panel decisions relating to four prior SIBs quarters. The Appeals Panel determined that the hearing officer had not committed reversible error, citing Texas Workers' Compensation Commission Appeal No. 941053, decided September 20, 1994, for the proposition that "eligibility for each quarter of SIBs is dependent upon the facts pertinent to that quarter[.]" and see, Texas Workers' Compensation Commission Appeal No. 961424, decided September 5, 1996. The carrier here argues that the hearing officer in the fifth SIBs quarter case relied on Dr. P's January 16, 2001, report in denying the claimant SIBs for that quarter, finding that it constituted an "other record" which showed an ability to return to work and that the hearing officer in this case cannot now find to the contrary concerning Dr. P's report. However, the hearing officer in the case we consider goes to some length to explain why he does not regard Dr. P's report with the attached FCE report as constituting an "other record" for the quarter at issue. Further, we note that the evidence for the sixth quarter reflects that during the sixth quarter qualifying period the Texas Workers' Compensation Commission approved Dr. N's request for the additional surgery which, apparently, had not been approved in July 2000, and also includes the report of Dr. G. Even if the hearing officer did abuse his discretion in excluding these documents from evidence, we are satisfied that the hearing officer did not commit reversible error. Hernandez. V. Hernandez, 611 S. W. 2d 732 (Tex. Civ,. App.-San Antonio 1981, no writ).

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)). We are satisfied that the challenged factual findings of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150

Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge