APPEAL NO. 020189
FILED MARCH 5, 2002

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 December 19, 2001. The appellant (claimant) appealed, arguing that the decision of the hearing officer was contrary to the great weight and preponderance of the evidence. The claimant offers new evidence for the first time on appeal. In its response, the respondent (carrier) contends that the decision is supported by sufficient evidence. The claimant submitted a supplemental request for review well after the deadline for filing an appeal; therefore, it will not be considered.

DECISION

Affirmed.

The claimant was employed as a customer service representative for the employer. The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement with an impairment rating of 15% or greater; and that she did not commute any portion of her impairment income benefits. The claimant argued that she had no ability to work during the qualifying periods for the 2nd through the 7th quarters of supplemental income benefits (SIBs).

The hearing officer was persuaded that the functional capacity evaluation (FCE) dated July 3, 2001, showed an ability to work. In addition, she was not persuaded that the claimant presented a narrative report that specifically explains how the injury causes a total inability to work. The claimant testified that her physical condition has not changed. The claimant argues on appeal that the FCE cannot be applied retroactively and "at worst, it only supports denying the last two weeks of the 7th quarter." The Appeals Panel has held that the fact that evidence falls outside the qualifying period may affect the weight the hearing officer decides to assign to a given piece of evidence but it does not preclude the hearing officer from considering that evidence in resolving the issue before her. Texas Workers' Compensation Commission Appeal No. 000096, decided February 29, 2000; Texas Workers' Compensation Commission Appeal No. 960901, decided June 20, 1996.

The issue of whether the claimant satisfied the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) and, therefore, established her entitlement to SIBs for the quarters at issue was a question of fact for the hearing officer. The hearing officer is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence and to decide what facts the evidence has established. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will reverse the factual

determinations of a hearing officer only if those determinations are so against 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 this standard of review to the record of this case, we cannot agree that the hearing officer's determination that the claimant did not satisfy the requirements of Rule 130.102(d)(4) is so against the great weight of the evidence as to compel its reversal on appeal.

Regarding whether we may consider the evidence attached to the claimant's appeal, we note that we do not normally consider new evidence for the first time on appeal. We may, however, in very limited circumstances, remand a case when new evidence is presented if that evidence came to the party's knowledge after the hearing, if it is not cumulative of the evidence presented, if it was not through a lack of diligence that the evidence was not presented at the hearing for the hearing officer to consider, and if the evidence is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. In this case, there is nothing to show that the claimant could not have obtained the benefit dispute agreement at an earlier time. Accordingly, we decline to consider the evidence submitted for the first time on appeal.

The affirmance of the hearing officer's determinations regarding ability to work are dispositive of the SIBs entitlement issue. Therefore, the issue of timely filing of the SIBs applications will not be addressed.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

TIM KELLY
AIG
675 BERING, 3RD FLOOR
HOUSTON, TEXAS 77057.

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Edward Vilano
Appeals Judge