APPEAL NO. 950275

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 20, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues were whether (claimant), the claimant herein, was entitled to supplemental income benefits (SIBS) for his first and second quarters of eligibility, and his correct impairment rating (IR).

The hearing officer held that claimant was not eligible for SIBS for the first compensable quarter, because he did not make a good faith search for employment commensurate with his abilities, but was due to receive SIBS for the second compensable quarter because the carrier had not raised a dispute as to entitlement within ten days after receiving the claimant's application for SIBS for the second quarter. The hearing officer also found that the claimant's correct IR, in accordance with the report of the designated doctor, was 16%. There were no findings as to when the claimant reached maximum medical improvement (MMI).

Although the decision does not set out the dates of the compensable quarters in issue, the benefit review conference (BRC) report states that the first compensable quarter was from July 1, 1994 through September 29, 1994, and the second quarter began September 30, 1994 and ran through December 29, 1994.

Both the claimant and the carrier appeal the decision. The claimant appeals the determination that he did not make a good faith search for employment in the qualifying period prior to the first compensable quarter. He argues that he has looked and listened in every area of his town for a job, and that he is seeking employment by starting a training class. The response to the appeal by the carrier is that this decision should be affirmed. The carrier's appeal is that the IR of the designated doctor was not entitled to presumptive weight because he did not have all of claimant's medical records, because he did not respond to the inquiries of the Texas Workers' Compensation Commission (Commission) for clarification, and that the significant disparity between the zero percent rating given by another doctor and the designated doctor's 16% IR was never explained. The carrier argues that a second designated doctor should have been appointed. The carrier also argues that the claimant failed to furnish a statement that his unemployment was a direct result of his impairment. Third, the carrier argues that it did not waive its right to contest compensability of the second quarter of SIBS because the statement filed by the claimant was incomplete. In the alternative on this point, the carrier argues that the exposure to SIBS for the second quarter cannot begin prior to the date that the claimant filed his statement.

DECISION

The decision and order are affirmed.

The testimony in the CCH was brief. Claimant testified he was injured when he fell from a bulldozer on (date of injury), striking his ribs, shoulder, and mid back as he fell. He was employed by (employer). Claimant testified that while he had returned to two months of light duty employment during May and June of 1992, he had for the most part not worked since the date of his injury. Claimant indicated that his primary treatments had been courses of physical therapy and medication.

Early medical records admitted into evidence were few. On August 9, 1991, (Dr. F), a neurosurgeon, wrote that he had evaluated claimant and noted that neck movement was quite good, and that there was generalized weakness in the left arm. He found no problem with claimant's neck. A consultation by a (Dr. BR) yielded a letter on September 24, 1992, that stated an opinion that claimant had a "conversion hysteria". Dr. BR noted that claimant had at times a breakaway weakness in his left extremity. A letter dated October 6, 1992, by (Dr. M), a neurologist treating claimant at that time, indicated that claimant had no established diagnosis but a persistent weakness in left arm. Dr. M stated it was difficult to tell if there was an organic weakness. Dr. M noted that claimant appeared to be in excellent health and had no atrophy of the muscles. Claimant was seen by (Dr. B), in the department of neurosurgery at the (College), who noted that claimant had several objective tests and on April 20, 1993, Dr. B stated that no underlying anatomical abnormality could be identified. However, Dr. B also noted that the cervical MRI was suboptimal due to claimant's movement but the "brachial plexus" area could be interpreted as normal.

There was no testimony or stipulation, as there should have been, concerning claimant's date of MMI that applies to this case. We infer from the documentary evidence (the carrier's TWCC-21 and the appointment of a designated doctor to resolve IR only) that claimant reached MMI at the point 104 weeks following the date income benefits accrued (which, in accordance with previous decisions of the Appeals Panel, would be 104 weeks from August 9, 1991, although it appeared that the carrier counted 104 weeks from the date after the injury).

A doctor for the carrier, (Dr. T), determined that claimant had reached MMI on July 28, 1993, with a zero percent IR. Dr. T described claimant's testing records in detail, and noted that claimant had several normal EMGs and that the brachial plexus area showed no definite abnormalities, with the soft tissue planes well maintained and no lesions identified. A CT scan of the same area noted no evidence of mass or lesion enhancement. Dr. T found full range of motion (ROM) in claimant's left shoulder, elbow, wrist and fingers. Dr. T essentially failed to find evidence of objective impairment.

The claimant apparently disputed this and a designated doctor, (Dr. K), was appointed. Dr. K examined claimant on September 9, 1993. He too recited various normal testing results. On the "brachial plexus" area, Dr. K specifically noted that an MRI of the area yielded "no definitive abnormalities in the area of the left brachial plexus, again the soft tissue fat planes are well maintained and no enhancing lesions are identified. . . ." Claimant's current subjective complaints of tingling and burning in the left

extremity area were noted. He found decreased muscle strength in the left arm and grip, but no atrophy or sensory deficits.

Dr. K stated that his impression was "left brachial plexopathy with residuals." He went on to assess his IR based upon ROM limitations in the left extremity. Dorland's Illustrated Medical Dictionary defines plexus as "the general term for a network of lymphatic vessels, nerves, or vines." The brachial plexus is defined as "a plexus originating from the ventral branches of the last four cervical spinal nerves and most of the ventral branch of the first thoracic spinal nerves." Plexopathy is defined as "any disorder of a plexus, especially of nerves."

The correspondence in the record between the carrier's adjuster and the Texas Workers' Compensation Commission indicates that while the carrier began payment of impairment income benefits, it continued to raise concerns about Dr. K's rating. One line of dispute, carried forth into the hearing, was that Dr. K did not have all of claimant's medical records. However, the record contains a letter from the adjuster to Dr. K, dated September 27, 1993, purporting to forward all of the medical records the carrier had in its file. After advising the carrier not to make unilateral contact with Dr. K, the Commission wrote to Dr. K on January 12, 1994, with a second request on March 30, 1994, asking him if he had all pertinent medical records, and if it was still his opinion that claimant still had a 16% IR. There is no response to these letters contained in the record, even after the adjuster wrote the Commission on April 28, 1994, to follow up. What the record contains is a November 17, 1994, letter from Dr. K to the adjuster, concerning his examination of claimant two days earlier, stating that claimant's IR had increased as to ROM. As of November 15, 1994, Dr. K was claimant's treating doctor in accordance with a Commission-approved change. Claimant testified that he did not see a doctor between September 9, 1993, and November 15, 1994.

During the first qualifying period for SIBS, claimant agreed he had been released with some restrictions. The medical evidence did not indicate a complete inability to work. He indicated on his employment status only that he contacted Jasper Equipment about work. He testified that this employer offered him a job, but it was not one within his restrictions, most of his testimony involved job search efforts made in the qualifying period for the second quarter of SIBS.

While it might have been desirable to press the designated doctor in this case for a response, we cannot agree that Dr. K's failure to respond to the Commission's questions disqualified him. The evidence includes a letter from the carrier purporting to forward to Dr. K all of claimant's medical records. Prior to this time, Dr. K's report indicated an awareness of claimant's previous tests, whether or not he had each and every record. Dr. K's opinion is based upon his own examination, and his assessment that claimant had an objective condition causing impaired ROM. It was the hearing officer's responsibility to determine if the countervailing medical evidence amounted to a "great weight." We find her decision on impairment has sufficient support in the record, and affirm.

The record indicated that a statement of employment status was filed by claimant for the first quarter of eligibility and signed August 12, 1994. For reasons not developed in the record, it was not until September 26, 1994, that the Commission gave notice of entitlement for SIBS for a quarter to run from July 1 through September 29, 1994. On October 10, 1994, the adjuster disputed this and filed a request for a BRC on a Commission form Request for Setting Benefit Review Conference (TWCC-45). (There was no evidence as to when the claimant received the employment status form.)

The letter from the Commission on September 26, 1994, indicates that the carrier must thereafter supply claimant with the Statement of Employment Status. On October 31, 1994, the carrier's adjuster received a statement of employment status from claimant that, while it does not identify the dates of the quarter involved, contains new information about positions sought. The adjuster on November 9, 1994, completed the bottom of the statement by indicating that the employee was not entitled to benefits. A BRC was not requested on this form, nor was there evidence that carrier requested a BRC for the second quarter.

Section 408.142 describes the entitlement to, and eligibility requirements for, SIBS as follows:

> (a)An employee is entitled to [SIBS] if on the expiration of the impairment income benefit period computed under Section 408.121(a)(1) the employee:
>
> (1)has an impairment rating of 15 percent or more. . . ;
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> (2)has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
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> (3)has not elected to commute a portion of the impairment income benefit. . . ; and
>
> (4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c)) states that a carrier waives the right to contest continuing eligibility to SIBS for "that compensable quarter" if the carrier fails to request a BRC within 10 days after receipt of the Statement of Employment Status. This rule carries forth the similar provision in Section 408.147(b). The need to request a BRC is, we believe, in addition to the requirement set forth in Rule 130.104(d) for the carrier to determine whether the claimant has continued eligibility for SIBS after the first quarter that the Commission determined SIBS eligibility, and to list any grounds for refusal.

Section 408.147(b) and Rule 130.108(c) provide no exception for substantive defects that are arguably inherent in the Statement of Employment Status. The carrier is required to react to the receipt of the document; we believe that the fact that the document is arguably incomplete does not preclude a waiver if the 10-day requirement for requesting a BRC is not met, because such matters of substance are exactly among the matters that should be raised in the requested BRC. It is clear that such a request must be filed for each disputed quarter (even if such quarters are ultimately combined into the same BRC). Therefore, the hearing officer's determination that claimant waived its right to contest eligibility correctly implements this provision. The record in this case does not establish that carrier's liability should be offset by the first month of that quarter. We agree that Section 408.143(c) plainly states that "[f]ailure to file a statement under this section relieves the insurance carrier of liability for supplemental income benefits for the period during which a statement is not filed." Rule 130.104(c) requires the employee to file the statement not later than 15 days after receiving its statement of employment status from the carrier. However, because of the lack of evidence that claimant did not file the statement within this time, we cannot find the hearing officer in error for holding carrier liable for the entire 2nd quarter.

Concerning whether claimant made a good faith search for employment, we note that the hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The determinations underlying the order in favor of claimant are fact determinations, considering the totality of facts, that were the responsibility of the hearing officer to make. Sufficient evidence supporting one finding, we cannot reverse the hearing officer's determination that claimant did not make the requisite job search for his first quarter of SIBS eligibility.

The hearing officer's decision and order are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge