

APPEAL NO. 960407

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 24, 1996. The issues at the CCH were: 1. whether the respondent/cross-appellant (carrier herein) waived its right to contest the compensability of the reflex sympathetic dystrophy (RSD) and psychological condition of the appellant/cross-respondent (claimant herein) by not contesting compensability within 60 days of being notified of these conditions; 2. whether the claimant's RSD and psychological conditions resulted from the compensable injury sustained on or about (prior date of injury); 3. whether the claimant was entitled to supplemental income benefits (SIBS) for the seventh compensable quarter; and 4. what was the claimant's average weekly wage (AWW). The hearing officer found that the carrier had waived its right to contest the compensability of the of the claimant's psychological condition, but not her RSD because the carrier had never been clearly notified that the claimant suffered RSD or that such condition resulted from the compensable injury. The hearing officer also ruled that the claimant's psychological condition, including her major depression, was the result of her compensable injury, but, to the extent that she may suffer from it, RSD was not. The hearing officer concluded that the claimant was entitled to SIBS for the seventh compensable quarter and that her AWW was \$374.01. The claimant appeals the determinations of the hearing officer concerning RSD, arguing that the evidence did not support the hearing officer's determinations that the claimant did not establish that she suffered from RSD and that the carrier did not waive its right to contest the compensability of RSD because it had not received notice that the claimant suffered from RSD, or that any such condition was the result of the compensable injury. The carrier responds that the evidence supports the determinations of the hearing officer regarding RSD. The carrier appeals the hearing officer's findings that the claimant's psychological condition was related to her compensable injury and that it had waived the right to contest the compensability of the psychological injury. The carrier also challenged several findings of fact concerning the claimant's eligibility for SIBS as well as the conclusion of the hearing officer that the claimant was entitled to SIBS for the seventh compensable quarter. The claimant responded that we should affirm all issues other than those dealing with RSD. There was no appeal regarding the AWW issue.

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 claimant testified that she injured her back on (prior date of injury), when she fell at work. The claimant testified that she underwent conservative treatment with several doctors before having a two-level lumbar hemilaminectomy in April 1993. This surgery was performed by Dr. C, a neurosurgeon who was still the claimant's treating doctor at the time of the CCH. The claimant testified after her surgery she developed pain and numbness in the lower right extremity. Several treatment modalities, including a spinal cord stimulator,

have been tried in an attempt to relieve this lower extremity discomfort, but none has proven successful. In October 1994 Dr. C diagnosed her with depression and referred her for chronic pain counseling to Dr. G, Ph.D., a psychologist.

By October 1994 Dr. C noted that the claimant was unable to work, pending some resolution of her pain. Dr. C referred the claimant to Dr. P, a pain management specialist, who noted her severe depression and, in turn, referred her to Dr. N, a psychiatrist. In a September 27, 1995, report Dr. N stated that the claimant suffers from major depression resulting from the chronic pain from her injury. In a December 27, 1995, report Dr. N indicated that the claimant is being treated for depression, chronic pain and RSD.

The claimant testified that she did not believe she was able to work at all during the qualifying period for the seventh compensable quarter for SIBS. She testified that she did mail out a number of applications for work because the adjuster had told her she must apply for work to qualify for SIBS.

The first issue is whether the carrier waived its right to contest the claimant's psychological and RSD conditions by failing to contest compensability of these conditions within 60 days of being notified of them. It is undisputed that the carrier never filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) disputing either of these conditions. The carrier contends that it had no obligation to dispute them because it was never notified that they were related to the claimant's compensable injury. The hearing officer found that this was true in regard to RSD. The claimant testified that her symptoms of RSD arose after her surgery and she believed that they were related to her compensable condition. While Dr. C and Dr. N mentioned RSD after her surgery, neither ever states that she developed RSD as a result of either the compensable injury or her surgery.¹ The hearing officer found that the carrier did not have an obligation to contest the compensability of RSD. On the other hand, medical reports from several doctors, particularly Dr. N, relate the claimant's depression to the effects of pain from her compensable injury. The hearing officer found that, since the carrier did not dispute the compensability of the psychological condition within 60 days of its receipt of these reports, it waived its right to do so.

Whether or not there was sufficient evidence of causality to put the carrier on notice, as to whether either the psychological or RSD condition was related to the claimant's compensable injury, is a factual determination. Section 410.165(a) provides that the contested case 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

¹In fact, there is some question from the medical reports as to whether the claimant's doctors actually diagnosed her with RSD or whether they merely suspect she might have RSD.

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 overwhelming weight 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, there is sufficient evidence to support the findings of the hearing officer regarding waiver. The carrier received medical reports clearly linking the claimant's psychological condition to her injury. On the other hand, while RSD is certainly mentioned in the claimant's medical reports there is no evidence relating it back to the claimant's original injury or treatment thereof.

This also has bearing on the second issue which is whether the claimant's psychological condition or RSD was related to her compensable injury. The hearing officer found that the claimant's psychological condition was, but her RSD was not. We have previously held that the question of extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Again, just as in the first issue, there is sufficient evidence to support the findings of the hearing officer in that there is medical evidence clearly linking the claimant's psychological condition, but not her RSD, to her compensable injury.

The final appealed issue deals with the claimant's eligibility for SIBS. Section 408.142(a) outlines the requirements for SIBS eligibility as follows:

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 as determined by this subtitle from the compensable injury;
- (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;

(3)has not elected to commute a portion of the impairment income benefit under Section 408.128; and

(4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

The fact that the claimant met the first and third of these requirements was established by stipulation. This case revolved around whether the claimant met the second and fourth of these requirements. We have previously held that both the question of whether the claimant made a good faith job search and whether the claimant's unemployment was a direct result of his impairment are questions of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994.

In regard to good faith job search, the hearing officer found the claimant was unable to work at all, due to her compensable injury, during the filing period for the seventh compensable quarter. We have said previously that if a claimant is unable to work at all, a job search commensurate with the claimant's ability to work can be no search at all. Texas Workers' Compensation Commission Appeal No. 94398, decided May 19, 1994; Texas Workers' Compensation Commission Appeal No. 94512, decided June 9, 1994. The carrier argues that Dr. C released the claimant to return to work as earlier as April 1994. While this is true, by October 1994 Dr. C noted that the claimant could not work and was totally disabled, pending some resolution of her pain. In a March 1995 report, Dr. C noted that the claimant could only walk from her bedroom to her kitchen. Also, Dr. N's report of September 1995 shows that by the time of the filing period the claimant is suffering from severe depression that is related to her compensable injury and prevents her from working. Thus the hearing officer's factual finding that the claimant is unable to work at all is supported by the medical evidence, as well as the testimony of the claimant. Further, there is sufficient evidence to support the hearing officer's finding that the claimant has not returned to employment as a direct result of her injury in the medical evidence and her testimony that she is unable to work due to her compensable injury, including her psychological condition.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge