APPEAL NO. 992759

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 November 15, 1999, with the record closing on November 21, 1999. The issues at the CCH were whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the sixth quarter, and whether the appellant (carrier) waived its right to contest the claimant's entitlement to SIBS for the sixth quarter by failing to timely request a benefit review conference (BRC). The hearing officer determined that the claimant is entitled to SIBS for the sixth quarter and that the carrier waived its right to contest the claimant's entitlement to SIBS for the sixth quarter by failing to timely request a BRC. The carrier appeals, urging that the claimant's evidence of her inability to work during the qualifying period for the sixth quarter was inadequate as a matter of law because she failed to provide a narrative report which specifically explains how her injury causes a total inability to work, and that the hearing officer's determination that the claimant had a total inability to work and is entitled to SIBS for the sixth quarter should be reversed. The carrier also argues that the hearing officer erred in determining that the carrier waived its right to contest the claimant's entitlement to sixth quarter SIBS because the issue was improperly added by the hearing officer. The claimant replies that she agrees with the hearing officer's decision and it should be affirmed.

DECISION

Affirmed.

We first address the carrier's argument that the hearing officer erred in determining that the carrier waived its right to contest the claimant's entitlement to sixth quarter SIBS because the issue was improperly added by the hearing officer. The carrier argues that the issue was not raised or discussed at the BRC, and that the claimant had no good cause for her failure to raise the issue. According to the carrier, it received notice of the claimant's request for the additional issue on October 12, 1999, and, upon contacting the Texas Workers' Compensation Commission (Commission) on October 13, 1999, to oppose the request, it was informed that the issue had already been added. The carrier asserts that its rights have been prejudiced because it has not had time to conduct a full investigation of its alleged waiver and was not afforded the opportunity to effectively defend its position on the issue.

A BRC was held on September 21, 1999, and a BRC report was distributed to the parties on September 24, 1999, indicating a CCH would be held on November 15, 1999. On October 5, 1999, the claimant's representative, in writing, requested the waiver issue be added as a dispute, explaining that at the BRC she had incorrectly relied upon a facsimile copy of the Statement of Employment Status (TWCC-52) that was filed with the carrier on July 12, 1999, instead of a green card indicating that the TWCC-52 was received by the carrier on June 22, 1999. The claimant's request was received by the Commission on

October 6, 1999, and contained a certificate of service indicating that the request had been mailed to the carrier on October 5, 1999. The hearing officer's notes indicate that as of October 12, 1999, the Commission had not received a response from the carrier to the claimant's request. On October 14, 1999, the hearing officer issued an order, upon a finding of good cause, adding the waiver issue and a copy of the order was sent to both parties. On October 28, 1999, the carrier filed a motion opposing the claimant's motion to add the additional issue. At the CCH the carrier renewed its objection to the additional issue. The hearing officer reaffirmed her ruling, stating that good cause had been shown, and that the carrier had received adequate notice of the additional issue and been provided adequate time to prepare.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) addresses the disputes which are to be considered by a hearing officer. Absent the unanimous consent of the parties, an additional dispute may be raised by a represented party in writing, provided that he or she identifies and describes the dispute, states the reason for the request, sends the request to the Commission no later than 15 days before the CCH, and delivers the request to the other parties. If these conditions are met, a hearing officer may consider the additional issue "only on a determination of good cause." Rule 142.7(e). We review a hearing officer's finding of good cause to add an issue on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 971626, decided September 29, 1997. In this case, the claimant complied with the provisions of Rule 142.7(e) and the hearing officer found good cause to add the issue. We do not find that the hearing officer abused her discretion in adding the additional issue. The carrier was notified of the additional issue four weeks prior to the date of the CCH and the hearing officer felt that this was sufficient time for the carrier to prepare to litigate the issue. We do not find any prejudice under the circumstances.

The parties and the hearing officer agreed that this case is "a new SIBS case" (Rules 130.101 through 130.108 and 130.110 were repealed and new Rules 130.100 through 130.108, with no change in Rule 130.109, were adopted effective January 31, 1999). The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant has not elected to commute any portion of her impairment income benefits; that the claimant reached maximum medical improvement with an impairment rating of 15% or greater; that the sixth quarter was from June 30 through September 28, 1999; and that the qualifying period for the sixth quarter was from March 18 through June 16, 1999. On _____, the claimant fell off a step stool, sustaining an injury to her low back and right hip. The claimant testified that she has herniated lumbar discs and a right hip fracture, that she is in constant pain, and that she had no ability to work during the sixth quarter qualifying period.

The claimant relied on the medical records and testimony of Dr. D, her treating doctor, to support her position that she had no ability to work. Dr. D's records reflect that on August 23, 1996, a functional capacity evaluation was completed which indicated that the claimant had "no safe work capacity." During the qualifying period Dr. D issued an off-work slip dated April 19, 1999, which states that the claimant has no lifting, pushing or

pulling capacity; the claimant has no prolonged standing or sitting capacity; the claimant is on medications which cause dizziness and/or drowsiness which interfere with the claimant's driving and working safely; the claimant is in intense, constant pain, and is therefore unable to pursue any type of gainful employment; and the claimant's range of motion is limited due to pain which interferes with the claimant's ability to work safely and increases the possibility of reinjury.

After the qualifying period, on August 10, 1999, Dr. D wrote a "Letter of Total Disability" indicating that the claimant has herniated discs at L4-S1, spine instability, and severe arthritis in her right hip as a result of the injury; that the claimant needs future surgery to her right hip and a spinal fusion; and that the claimant is "totally disabled and unable to work because of severe pain to the back with spine instability and severe pain to her right hip with marked limitation in motion." On October 4, 1999, Dr. D issued a report indicating a final diagnosis: fracture right hip, transcervical; lumbar spinal stenosis L4-5; lumbar spinal stenosis L5-S1; trochanteric bursitis, right hip; avascular necrosis, right hip; and herniated nucleus pulposis L4-S1. Dr. D also commented on the claimant's ability to work stating:

> I advised the patient on 08/09/99 that she is totally disabled. She is not capable of sitting for greater than two hours in an eight-hour day, which eliminates any sedentary type work. Patient is not capable of doing any computer work or telephone work because of the two-hour limitation of sitting in an eight-hour day. In addition, patient is not capable of standing for greater than two hours in an eight-hour day, which also eliminates sedentary work.

Dr. D testified at the hearing that during the sixth quarter qualifying period the claimant had no ability to work because of right hip avascular necrosis, ruptured lumbar discs, and because of spinal instability at L3-S1. Dr. D testified that the claimant has undergone conservative treatment but now needs a three-level lumbar fusion and a total right hip arthroplasty. According to Dr. D, the claimant is totally unable to perform any work because of her medical condition.

Rule 130.102(d) provides in pertinent part that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) 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 carrier argues that the claimant failed to provide a narrative report which specifically explains how the claimant's injury causes a total inability to work. The carrier did not present any contrary medical opinions or any record "showing" that the claimant had an ability to work.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In order to determine whether the evidence

presented was sufficient to meet the criteria of Rule 130.102(d)(3), the hearing officer had to judge the credibility of the evidence before her. The hearing officer applied Rule 130.102(d)(3) and found that the totality of the medical evidence from Dr. D indicated that the claimant had a total inability to work during the qualifying period. The hearing officer could consider Dr. D's reports of August 10, 1999, and October 4, 1999, as constituting narrative reports. Both of these reports, although outside the qualifying period, explained the claimant's injury and why she was unable to work. The hearing officer found that Dr. D's medical records and testimony adequately justified why the claimant was unable to work during the sixth quarter qualifying period. No records indicate that the claimant was capable of working prior to March 18, 1999.

As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant had a total inability to work during the sixth quarter qualifying period, made a good faith job search commensurate with her ability to work during the sixth quarter qualifying period, and is entitled to SIBS for the sixth quarter.

Rule 130.108 codifies previous Appeals Panel decisions, which found a distinction in the rules (in effect prior to January 31, 1999), between those situations involving continuing entitlement to SIBS and those quarters where there had been no previous payment of SIBS for the preceding quarter. In summary, waiver does not apply against a carrier where there has been no SIBS payment in the preceding quarter. Rule 130.108(e). In this case, there was no evidence presented indicating whether the carrier paid SIBS during the preceding fifth quarter and the hearing officer made no such finding. Without this information, it cannot be determined whether the carrier waived its right to contest the claimant's entitlement to SIBS for the sixth quarter by failing to request a BRC. However, even if the hearing officer erred in determining that the carrier waived its right to contest the claimant's entitlement to SIBS for the sixth quarter, it would not effect the outcome in this case, given the hearing officer's determination of the SIBS issue in the claimant's favor and our affirmance of that determination.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge