APPEAL NO. 950023
FILED FEBRUARY 16, 1995

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 16, 1995. She determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the second compensable quarter. The claimant appeals urging that he did make a good faith effort to seek employment commensurate with his ability to work and the fact that he is a full-time student under the (name) who is paying for his college. The respondent (carrier) urges that the "evidence clearly shows that the hearing officer's findings are not against the great weight and preponderance of the evidence" and asks that the decision be affirmed.

DECISION

We reverse and remand.

The claimant sustained a back injury on _____, and subsequently underwent surgery on two occasion, a discectomy in July 1991 and an anterior lumbar fusion in August 1993. A statement from his doctor, (Dr. G), dated November 2, 1994, indicates that the surgeries have been relatively unsuccessful in alleviating the claimant's chronic back problems. Dr. G also stated that "[t]his patient is completely unable to work and has been since March of 1994" and that he did not foresee the claimant "returning to any type of gainful employment any time in the near future." The claimant was ultimately assessed as having an impairment rating of 15%. The filing period under consideration for the second quarter SIBS was from June 22, 1994 through September 19, 1994.

The claimant testified that he has not worked during the period in issue although he sought several jobs. He stated he was still in pain, that he had significant work restrictions involving no prolonged standing, sitting, no bending or twisting, and lifting restrictions. He testified that he has a ninth grade education but has a GED and that he is under a program with the (name) and since August 22, 1994, has been a full-time student (14 hours of courses) studying to be an environmental safety technician. He testified that during the period, he occasionally looked in newspapers for positions commensurate with his injury and for which he was qualified and that he had specifically sought employment at a couple of companies and put in applications at a couple of others. He also asked about part-time employment with a service station compatible with his schooling program. He was told that no positions were available at the places he sought employment and he testified that "most jobs don't fit my restrictions and qualifications." The carrier, through cross-examination, pointed out that the claimant did not constantly seek employment but only during short, intermittent periods. The carrier also offered into evidence job advertisements from a December 15, 1994, newspaper although outside the period in issue.

The hearing officer was not convinced that the claimant proved that he made a good faith effort to find employment and pointed out that just because a claimant is a full-time student does not automatically remove him from the requirement to seek employment. The hearing officer indicated the claimant also did not establish that his not returning to work was a direct result of the impairment. We do not fault the hearing officer's reasoning, as far as it goes, and we certainly do not intend to intrude on a hearing officer's responsibility to assess weight and credibility. Clearly, Section 410.165(a) states that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. And, regarding the job search requirements of an injured worker who is in a full-time study program, we have stated that such does not automatically exclude the claimant from job search requirements although it is a consideration in determining good faith. Texas Workers' Compensation Commission Appeal No. 931188, decided February 9, 1994; Texas Workers' Compensation Commission Appeal No. 93936, decided November 29, 1993; Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993. What concerns us and causes our remand is the clear and unambiguous statement by the claimant's doctor covering the time period involved that the claimant "is completely unable to work" and no indication in the decision that it was considered in the good faith determination. That is, whether and how Dr. G's evaluation of claimant's inability to work affected the overall evaluation of his good faith efforts to find work. In this regard, and we cannot determine if Dr. G's assessment was appropriately evaluated, if the claimant was functionally not able to work at all, then the work search requirement may be met even if no employment was sought. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, we observed that where it is demonstrated that a claimant's ability to work is no ability at all, job search requirements can be met even if there is no search at all. However, as we stated in Texas Workers' Compensation Commission Appeal No. 941439, decided December 9 1994, a claimant's inability to do any work must be supported by medical evidence or must be so obvious as to be irrefutable. *See also* Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. We recognize that it is a question of fact for the hearing officer to determine whether a claimant has made a good faith effort, as required by the 1989 Act, after considering all the circumstances and evidence relating to the issue. Texas Workers' Compensation Commission Appeal No. 941590, decided January 11, 1995. *See* Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993, for a discussion of the concept of good faith.

Our concern that a significant evidentiary matter may not have been appropriately considered or that its possible effects were incorrectly applied in accordance with the standards enunciated in previous Appeals Panel decisions causes us to reverse and remand this case for further consideration and development of evidence as deemed appropriate by the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge