APPEAL NO. 962167
FILED DECEMBER 12, 1996

On October 4, 1996, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the CCH was whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 11th compensable quarter. The appellant (carrier) requests review of the hearing officer's decision that the claimant is entitled to SIBS for the 11th quarter. The claimant requests affirmance.

DECISION

Affirmed.

The claimant had the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. Section 408.142 sets forth the criteria for SIBS. The claimant, who is 70 years of age, testified that she sustained a back injury at work on _____. She had back surgery at the L2-3 level in October 1992. In May 1994, Dr. B, the designated doctor, certified that the claimant reached maximum medical improvement and assigned the claimant a 23% impairment rating (IR) for impairment of the lumbar spine. Dr. B's rating for a specific disorder of the lumbar spine is for a surgically treated disc lesion with residual symptoms. The parties stipulated that the claimant has an IR of 15% or more and that she did not commute impairment income benefits. The 11th quarter was from June 18, 1996, to September 16, 1996, and the filing period for that quarter was from March 19, 1996, to June 17, 1996 (hereafter referred to as the filing period). The claimant testified that she has been unable to work since her injury, that her inability to work is due to her back injury, and that her treating doctors have not released her to return to work.

Dr. H performed the back surgery and the claimant said she treated with him until he left the state in February 1996. Dr. H wrote in January 1995 that the claimant had not done particularly well from her surgery and that "[g]iven her age, given her problems, I don't think she is really employable at this point." In July 1995 Dr. H wrote that the claimant "once again continues to do poorly. At this point I don't think this patient is employable." Dr. H noted that the claimant had had surgery at the L2-3 level and he stated that he believed that the claimant may be developing instability at that level.

At the carrier's request, the claimant underwent a functional capacity evaluation (FCE) at the direction of Dr. O on January 3, 1996, and Dr. O concluded that the claimant can do sedentary, light, and up to borderline medium work. The claimant indicated that she hurt her knee during the FCE and said that she had knee surgery on August 27th; however, no issue relating to compensability of the knee condition was before the hearing officer. For purposes of this appeal, we consider the claimant's impairment from her compensable injury to be limited to impairment of her back. After Dr. H left the state, the claimant began treating with Dr. D, and Dr. D wrote on August 5, 1996, that "[claimant] is

currently under my care for her back and right knee. She is unable to look for work at the present time." When the claimant was asked what health problems prevented her from working during the filing period, she said "my back and my knee," but she also testified that, more than anything else, her back prevents her from getting a job.

The carrier appeals the hearing officer's finding that, during the filing period, the claimant was unable to do any work as a direct result of her impairment from the compensable injury, and her conclusion that the claimant is entitled to SIBS for the 11th quarter. The carrier contends that the hearing officer's finding is not supported by sufficient evidence and that it is against the great weight of the evidence. The carrier asserts that the treating doctors' opinions are conclusory and that the inability to work is not based on the rated impairment. It is undisputed that the claimant did not look for work during the filing period. The matters in issue at the CCH were whether the claimant's unemployment or underemployment was a direct result of the impairment from the compensable injury and whether the claimant had made good faith efforts to obtain employment commensurate with her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104. The claimant asserted that she had no ability to work during the filing period because of her impairment.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she had no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we held that the burden is on the claimant to prove that he or she had no ability to work due directly to the impairment that resulted from the injury. In Texas Workers' Compensation Commission Appeal No. 962006, decided November 20, 1996, we held that Subsection 408.142(a)(2) requires that the injured employee's underemployment or unemployment must be a direct result of the employee's impairment, that that subsection does not state that the unemployment or underemployment must be a direct result of the IR, and that the term "impairment" must be interpreted in accordance with its definition in Section 401.011(23). In Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996, we stated that "[t]he claimant's unemployment or underemployment must be a direct result of the impairment, but the impairment need not be the sole cause of the unemployment or underemployment." In Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, a SIBS case, we stressed the need for medical evidence to affirmatively show an inability to work if that was being relied on by the claimant.

While we recognize that in Appeal No. 960123, *supra*, we observed that we had previously held that the medical evidence should encompass more than conclusory statements and should be buttressed by more detailed information concerning the claimant's physical limitations and restrictions, we point out that in Western Casualty and Surety Company v. Gonzales, 518 S.W.2d 524 (Tex. 1975), a case wherein the Texas Supreme Court affirmed an award for workers' compensation benefits for total and

permanent disability under the prior workers' compensation statutes, the court stated that a medical expert's opinion on causation "may or may not be buttressed by an explanation of the process which occurred within the body; this goes to the matter of the credibility of the witness and his opinion, but it is not a prerequisite to his expression of that opinion."

In the instant case there are conflicting medical opinions on the claimant's ability to work. Dr. O states that the claimant can perform some types of work, while Dr. H states that he thinks that the claimant is unemployable. Dr. D's opinion of August 5, 1996, is closest in time to the filing period, and he opined that the claimant is unable to look for work. It is undisputed that the claimant has permanent impairment as a result of her compensable back injury and that she has impairment of her back. In opining that he doesn't think that the claimant is employable, Dr. H mentioned that the claimant had not done particularly well from her back surgery and he also pointed out that he believed that the claimant may be developing instability at the disc level where the surgery was performed. While Dr. D mentioned current medical care for the claimant's back and knee in giving his opinion that the claimant is unable to look for work, the fact that the claimant has a knee condition, which may be partially responsible for her inability to work, does not necessarily defeat her entitlement to SIBS so long as the unemployment is a direct result of the impairment from the compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996. As previously noted, we have held that the impairment need not be the sole cause of the unemployment or underemployment. Appeal No. 960721, *supra*. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence, including the medical evidence, and may believe all, part, or none of the testimony of any witness. We conclude that the appealed finding and conclusion are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

Joe Sebesta
Appeals Judge