APPEAL NO. 980014

Following a contested case hearing held on November 12, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first four compensable quarters and that the respondent (carrier) is not relieved of liability for SIBS because of claimant's failure to timely file the Statement of Employment Status (TWCC-52) forms. Claimant has appealed the adverse SIBS determinations on the grounds of evidentiary insufficiency, asserting that her testimony, the reports from her treating doctor, and the fact that she was approved for and underwent a second spinal surgery establish that she had no ability to work during the filing periods for the four compensable quarters at issue. She also asserts that the hearing officer's statement of the evidence is incomplete. The carrier's response details the evidence it contends sufficiently supports the challenged findings.

DECISION

Affirmed.

It was not disputed that claimant was injured in the course and scope of her employment on _____. Inexplicably, the hearing officer's decision and order fails to reflect the parties' stipulations that claimant reached maximum medical improvement (MMI) on November 30, 1995, with a whole body impairment rating (IR) of 15%, that she did not commute impairment income benefits, that her average weekly wage is $183.03 and her monthly SIBS rate is $509.35, and that the dates of the filing periods for the four compensable quarters in issue were, respectively, July 12 through October 10, 1996; October 11, 1996, through January 9, 1997; January 10 through April 10, 1997; and April 11 through July 10, 1997. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. The filing period is a period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and the amount of, SIBS. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § § 130.102(b) and 130.101 (Rules 130.102(b) and 130.101).

Not appealed are findings that claimant had no treatment for her back condition between November 1995 and February 1997, that during the filing periods for the four quarters at issue, claimant did not look for employment, and that she had bilateral knee surgery between November 1995 and February 1997 for reasons not related to her compensable injury.

Claimant testified that she injured her low back when she turned and twisted while working on an assembly line and felt immediate pain; that she was treated by (Dr. H), who,

on February 6, 1995, performed a 360° fusion of her lumbar spine at L4-5 and L5-S1; that she thereafter had continued back pain, became depressed from the back pain, and was treated for depression by (Dr. F); that she could not disagree if the carriers's medical records reflect that she last saw Dr. H on November 30, 1995; and that Dr. H moved from the area at about that time and sent his patients to (Dr. D). Claimant further stated that she first saw Dr. D in March 1996 but could not disagree if the carrier's records reflect that her first visit to Dr. D was in February 1997. She said that Dr. D informed her that she needed additional surgery but that she did not undergo the second fusion operation (by Dr. D) until July 15, 1997. Claimant also stated that on May 20, 1996, she underwent bilateral total knee replacement surgery and for sometime thereafter used crutches, a walker, and a cane and had six weeks of physical therapy. She said the knee problems were not related to her compensable injury. She further testified that she did not look for employment during any of the filing periods because of her back pain and depression and alluded to the futility of having to advise a prospective employer of her back problem and the limitations it imposed. She also stated that, apparently referring to the filing periods, she had "a really bad attitude . . . bit everybody's heads off . . . didn't even like [herself] . . . and hated [her] life, period." She conceded that she also discussed the abusive conduct of her son with Dr. F but maintained that her primary problem was depression from her back pain. Claimant further testified that Dr. D has her off work and seeing a doctor for pain control.

Claimant also testified that she helped one of her sons start a business by answering the phone and doing the financial planning and that at one time she attempted to market the arts and crafts she apparently made in her house but did not follow through with this venture. She did not state the dates of these efforts. Claimant explained that due to her depression she could not finish anything she started. She said she has experience answering telephones and doing business financial planning and indicated that she creates arts and crafts at her house. Although claimant testified that she would like to retrain for work in the computer or travel agent fields, the only evidence (in Dr. F's records) of her contact with the Texas Rehabilitation Commission (TRC) related to the TRC having paid for her knee surgery.

(Ms. S), the carrier's adjuster, testified that the carrier's medical records reflected that claimant's last visit to Dr. H was on November 30, 1995, and that her first visit to Dr. D was on February 11, 1997. She further stated that from the date of MMI through the conclusion of Dr. H's treatment, the carrier received no medical documentation indicating that claimant had no ability to work and it denied claimant's applications for SIBS for the first two quarters for that reason. Ms. S further stated that claimant's attorney called asking what it would take for claimant to receive SIBS, that she discussed the requirement for medical evidence of the inability to work, and that she thereafter received Dr. D's May 16, 1997, letter.

Dr. H's November 30, 1995, report of claimant's follow-up visit stated that she feels like her back is doing quite well, that she needs to continue following up with Dr. F for depression, that he will see her for a recheck in one year, and that he has given her an IR

and will see her sooner if she has problems. Dr. H wrote the carrier on January 8, 1996, stating that claimant had reached statutory MMI, that she has a solid arthrodesis and good pain relief, and that with respect to her return to work, that is something she needs to discuss with her employer as he does not determine return to work.

Dr. F's records indicate that he first saw claimant on July 21, 1995, upon referral from Dr. H and that his diagnostic impression was major depressive disorder, pain disorder due to lumbar disc disease, mood disorder due to chronic pain syndrome, and dysthymic disorder. His November 8, 1996, letter to Dr. D indicated that while claimant had responded well to his treatment, she had missed three appointments without prior notice and he will discontinue seeing her because of her repeated disregard for his time. Dr. F's records mention claimant's having taken "appropriate steps" with the TRC. Dr. F's reports in August and November 1995 mention claimant's efforts to establish a business with a son and helping out by answering the telephone, doing some financial planning, and some other sedentary activities. Reports in February and April 1996 mention claimant's involvement in producing arts and crafts. Dr. F's August 30, 1996, letter to the carrier stated that claimant's depression was precipitated by her work-related injury and its sequelae.

Dr. D's record of February 11, 1997, reflects that x-rays showed a probable nonunion at L4-5 and some loose pedicle screws. On March 25, 1997, Dr. D wrote that he quoted claimant a 50% chance of union and pain reduction with further surgery and would submit her to the Texas Workers' Compensation Commission (Commission) for spinal surgery. Dr. D wrote the Commission on May 16, 1997, stating that claimant had been under his care for a spine condition "since May 1996" and that "she has been unable to work since that time." His letter then stated the dates of the four filing periods. Aside from this letter, no record of Dr. D in evidence reflected that he saw claimant before February 1997. Dr. D's records introduced by claimant showed visits on February 11 and March 25, 1997. Dr. D wrote on June 30, 1997, that claimant has a known nonunion of L4-5 and L5-S1; that after attempted fusions she has had progressive disability with her back pain that has left her unable to be employed; that he believes "she has been unable to be employed in any job as the level of her pain is to the extent that this occupies her thoughts virtually all of the time so that even some sedentary occupations would be inordinately difficult for even the shortest periods of time," and that even part-time work would be difficult. Dr. D further stated that claimant has poor sitting tolerance and significant pain, and it is his belief that from May 1996 until now, claimant was unable to work in any capacity. Claimant submitted the latter two letters with each of her four TWCC-52 forms.

(Dr. C), who provided a second opinion for claimant's second spinal surgery, reported on May 9, 1997, that claimant complained of a moderate amount of low back pain and did not complain of radicular symptoms.

In addition to the dispositive legal conclusions, claimant has challenged factual findings that during the filing periods at issue she had some ability to work, that she did not

make a good faith effort to find employment commensurate with her ability to work, and that her inability to work was "not a direct result of her compensable impairment."

Since the other statutory SIBS elements were stipulated, claimant had the burden to prove by a preponderance of the evidence that her unemployment was a direct result of her impairment and that she attempted in good faith to obtain employment commensurate with her ability to work. *See* Sections 408.142 and 408.143. The Appeals Panel held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, we will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not find them so in this case.

With respect to both the "good faith attempt" and "direct result" criteria, the hearing officer could consider evidence that claimant last saw Dr. H on November 30, 1995, at which time Dr. H had not indicated claimant had no ability to work; that despite Dr. D's May 16, 1997, letter indicating claimant had been under his care since May 1996, the medical records in evidence reflected claimant's visits to have been on February 11 and March 25, 1997; that claimant manifested the ability to perform at least sedentary work with her efforts, albeit documented by Dr. F prior to the first filing period, to establish a business with her son and to market her arts and crafts; the completely conclusory nature of Dr. D's May 16, 1997, letter stating merely that claimant has been unable to work since May 1996; Dr. C's statement that when he examined claimant in May 1997 for a second opinion on spinal

surgery, she was complaining of moderate pain and not radicular pain; claimant's bilateral knee replacements and period of recovery; the absence of evidence of a functional capacity evaluation and efforts to obtain retraining under the auspices of the TRC; and claimant's experience with answering telephones and doing financial planning, both sedentary occupations. While Dr. D's June 30, 1997, letter did contain more detail about claimant's inability to work, including statements that even simple sedentary occupations would be "inordinately difficult" due to claimant's preoccupation with her pain and that even part-time work would be "difficult," the hearing officer was not bound by this evidence but rather could give it the weight he considered appropriate in the context of the remainder of the evidence. The hearing officer could conclude from the evidence that claimant did have some ability to work during the four filing periods and thus did not make a good faith attempt to obtain employment commensurate with her ability to work. He could also conclude that claimant's unemployment was not a direct result of her impairment, but was due to her lack of interest in employment outside her home.

Claimant complains that the hearing officer's statement of the evidence is incomplete and failed to recite claimant's testimony that she was unable to work and that her treating doctor informed her that she could not work. The Appeals Panel has stated that while the 1989 Act does require findings of fact and conclusions of law, it does not require a statement of the evidence and that when a hearing officer chooses to provide additional information in a decision, the hearing officer is not required to mention all the evidence but should "generally provide a reasonably fair summary of the material." Texas Workers' Compensation Commission Appeal No. 93955, decided December 8, 1993. In our view, the hearing officer did provide a reasonably fair summary.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

I concur in the result in the case and agree that the evidence is sufficient for the hearing officer to find under these facts that claimant did not establish her entitlement to SIBS. Although it does not affect the result in this case, I write separately to state that, in my view, the May 16, 1997, letter of Dr. D does not provide any evidence supporting the hearing officer's denial of SIBS. The majority states that the hearing officer could have refused to credit Dr. D's letter because it is allegedly "conclusory." The hearing officer was free to believe or disbelieve any evidence. However, there was evidence that this claimant had a failed fusion and, indeed, shortly after Dr. D's letter she underwent a second fusion surgery. Under these facts, I do not believe that Dr. D was required to go into detail explaining why he did not think claimant could work during the prior filing periods. I believe the doctor's reasoning can be explained by the record. We should not encourage the automatic second-guessing of doctors just because they do not explain their opinions to our liking.

Judy L. Stephens
Appeals Judge