

APPEAL NO. 980026

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 10, 1997. She (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the third, fourth, and fifth compensable quarters. The appellant (carrier) appeals several findings of fact going to the determinations that the claimant was not able to work during the three quarters in issue, that the claimant made a good faith effort to look for work during the filing period for the third quarter, and that the claimant was undergoing medical treatment during the filing periods. The claimant responds that the evidence sufficiently supports the findings, conclusions, and decision of the hearing officer and asks that the decision be affirmed.

DECISION

The decision is affirmed; however, one finding of fact is set aside

The Decision and Order of the hearing officer sets forth adequately and fairly the evidence in this case and it will only be briefly covered here. The claimant sustained a back injury on _____, subsequently requiring surgery, reached maximum medical improvement and was assessed a 15% impairment rating. The claimant was previously denied SIBS for the first and second quarters. The three SIBS quarters in issue ran from February 20, 1997, through November 19, 1997, the filing period for the third quarter ran from November 21, 1996, through February 19, 1997, and the filing periods for the fourth and fifth quarters ran from February 20, 1997, through August 20, 1997. Although the claimant testified, somewhat inconsistently, and introduced evidence that he applied for eight jobs starting after January 15, 1997, and during the first week of February 1997, he stated that he did not believe he was able to work at all, that his pain was worse, that no doctor released him or told him he could work, and that he applied for jobs because he was desperate. Four of the applications are with the same company, (company 1) (DS). On one of his applications, he indicated that he could not do all the requirements of the job.

Regarding the primary basis asserted for qualification and entitlement to SIBS, that is, no ability to work, the record consisted of the testimony of the claimant and various medical reports from different doctors. As indicated, the claimant testified he was not able to work and described his worsening pain in his back and leg during the filing periods. He also stated that he had gone through several months of therapy in 1997, and that he changed his treating doctor. He stated, and the medical records show, that he has a recurrent disc herniation, that he has gone through the spinal surgery second-opinion process and obtained approval and that the surgery had not been done because of high blood pressure and other personal problems involving his care after surgery. He stated that he planned on having the surgery when his doctor indicated he was ready. There are

medical records and notes in evidence that indicate, going back to November 4, 1996, that the claimant is "100% totally disabled from any gainful employment," setting forth his rigorous restrictions of activity. Subsequent notes indicate that the claimant is to remain off work and is "totally incapacitated." The current treating doctor and surgeon states in a letter of May 12, 1997, that the claimant has been "unable to return to work," that he continues to suffer severe pain, that x-rays "show marked collapse of his spine," and that further studies are needed. An MRI was performed and, as previously mentioned, the second opinion spinal surgery process was initiated and resulted in a concurrence for surgery. His current treating doctor reiterated that claimant is not able to work.

The hearing officer found that the claimant made a good faith effort to look for work during the filing period for the third quarter. This finding is not sufficiently supported by the evidence and we set it aside. We have stated that a search generally must cover the entire filing period absent some justifiable circumstance. Texas Workers' Compensation Commission Appeal No. 971184, decided August 1, 1997. There is nothing in the evidence to excuse, or even explain why, the claimant did not look for any work from November 21, 1996, until after January 15, 1997. According to the claimant, he did not think he could work during the whole period, and when he applied for employment in January he was desperate and he had to make some showing of good faith. There is not sufficient evidence to show a good faith job search during the third quarter filing period; to the contrary, the great weight and preponderance of the evidence is contrary to the finding of the hearing officer. Texas Workers' Compensation Commission Appeal No. 970046, decided February 20, 1997. We accordingly set aside this finding.

The hearing officer also found from the evidence of record that the the claimant did not have an ability to work during the filing periods for the three quarters in issue and consequently did not have to look for employment. We have stated that where it is indeed shown that there is no ability to work, then the provisions of Section 408.142(a) and 408.143 setting forth the requirement that a good faith effort to obtain employment commensurate with the ability to work is satisfied although no search for work has been made. Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994; Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden to show no ability to work is on the claimant and generally requires medical evidence. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994; Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. Whether a claimant has no ability to work is essentially a question of fact for the hearing officer. We have reviewed the evidence and do not conclude the determinations of the hearing officer on this issue are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, our standard of review on sufficiency of evidence issues. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Accordingly, we affirm the decision and order of the hearing officer.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge