

APPEAL NO. 980128

Following a contested case hearing (CCH) held on December 8, 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 respondent (claimant) is entitled to supplemental income benefits (SIBS) for the sixth compensable quarter. The appellant (carrier) has appealed contending that since the Appeals Panel has previously determined that claimant's psychological condition did not result in permanent impairment, the hearing officer erred in utilizing claimant's mental condition in determining whether claimant's underemployment during a part of the filing period was a direct result of the compensable injury. The carrier further asserts that claimant failed to provide sufficient evidence of her wages to support the hearing officer's underemployment determination. The carrier also asserts that the hearing officer erred in determining that claimant made a good faith effort to seek employment commensurate with her ability to work. Claimant has responded urging the sufficiency of the evidence to support the challenged findings of fact and conclusions of law.

DECISION

Reversed and a new decision rendered that claimant is not entitled to SIBS for the sixth compensable quarter.

Not appealed are findings, based on the parties' stipulations, that on _____, claimant sustained a compensable injury to her right knee which later resulted in the 19% impairment rating; that as a result of the compensable injury, claimant has received medical and income benefits including SIBS; that the sixth compensable SIBS quarter began on August 22 and ended on November 20, 1997; that the qualifying period for the sixth compensable quarter began on May 23 and ended on August 21, 1997; that claimant was employed during the qualifying period but her earnings were less than 80% of her average weekly wage; and that claimant had some ability to work during the qualifying period and did work during part of the qualifying period. Incidentally, we regard the finding concerning claimant's underemployment as rendering meritless the carrier's point on appeal that claimant failed to adduce sufficient evidence of her wages to support the underemployment determination.

It is appropriate to mention at this point two prior Appeals Panel decisions involving these parties and SIBS for the fourth and fifth compensable quarters. The hearing officers' decisions and orders in these cases were in evidence. In Texas Workers' Compensation Commission Appeal No. 971725, decided October 17, 1997, the Appeals Panel affirmed the hearing officer's determinations that claimant's psychological condition is the result of the compensable injury and that claimant is entitled to partial SIBS for the fourth compensable quarter. The Appeals Panel decision, however, noted the absence of medical evidence to show that the depression was permanent and stated that a

determination on the permanence of the depression was not required at that time. The decision reversed so much of a finding of fact as found that claimant's depression and psychological problems, though treatable, were also permanent as not being supported by the evidence and as being "superfluous" to the issues before the hearing officer at that time. The Appeals Panel decision is in evidence.

Texas Workers' Compensation Commission Appeal No. 972228, another case involving these parties, was decided by the Appeals Panel on December 10, 1997, a date which followed the hearing we consider but which preceded the December 22, 1997, date on which the hearing officer signed the decision and order. In Appeal No. 972228, the Appeals Panel affirmed the hearing officer's decision that claimant was not entitled to SIBS for the fifth compensable quarter and notwithstanding the outcome the carrier appealed from two findings of fact. The Appeals Panel set aside as unsupported by the evidence and contrary to law findings that claimant's mental depression in 1996 became a part of the impairment from the compensable injury and that her unemployment during the fifth quarter filing period was a direct result of her physical and mental impairment. At the hearing we here consider, both parties mentioned that this case was then pending before the Appeals Panel.

The carrier has challenged for evidentiary insufficiency the following findings and conclusions:

FINDINGS OF FACT

9. During the qualifying period for the sixth compensable quarter the Claimant continued to suffer from untreated depression which was part of her compensable injury.
10. During the filing period for the sixth compensable quarter the Claimant was underemployed for the first eight weeks of the quarter and that was a direct result of her physical and mental condition.
11. During the remaining five weeks of the filing period for the sixth compensable quarter, the Claimant was totally unable to work due to her severe untreated depression.
12. During the filing period for the sixth compensable quarter, the Claimant made a genuine effort to obtain employment commensurate with her ability to work during the first eight weeks of the period.

13. During the remaining five weeks of the period the Claimant was excused from attempting to find work because she was totally unable to perform work because of her depression.

CONCLUSIONS OF LAW

2. The Claimant was excused from attempting to find work during the last five weeks of the filing period for the sixth compensable quarter because of an inability to perform any work.
3. The Claimant is entitled to supplemental income benefits for the sixth compensable quarter.

Claimant testified that during the filing period for the sixth quarter, she baby-sat a three-year-old child in her home for eight weeks from 7:00 a.m. to 6:00 p.m., earning \$40.00 per week (and her Statement of Employment Status (TWCC-52) so reflected); that the child was "active," wanted to run around the house, and began to "get on [her] nerves," and that she stopped that baby-sitting but now baby-sits for a granddaughter for \$50.00 per week. She said she did not look during the remainder of the sixth quarter filing period because, as she put it, "I couldn't even keep a child." She also indicated that she had been treated by ' (Dr. N) for depression but that the carrier stopped her treatment, including medication.

(Dr. GO) reported on May 15 and August 14, 1996, that claimant's diagnosis is traumatic degenerative arthritis of the right knee, and that light duty would be acceptable with the following restrictions: no climbing, no stairs, no crawling, no squatting, no kneeling, no walking or standing for more than five minutes per hour, no sitting for more than one hour, no lifting of more than 10 pounds, and no repetitive movements with her leg. Dr. G reported on May 19, 1997, that claimant had seen (Dr. A), who suggested she use a cane in her left hand and possibly a brace on her right knee, and that a total knee replacement was considered but that claimant is not inclined toward that procedure. Dr G further reported that claimant "is unable to work at this time because of depression," that claimant's treatment for depression was apparently stopped in February and that Dr. A agrees that "her main problem right now is depression." Dr. G said that claimant needs to resume treatment of her depression with Dr. N and that "[u]nless she corrects that, she cannot work." He also restated her restrictions from August 14, 1996, once her depression treatment is finished. Dr. G reported on November 21, 1997, that claimant "has been unable to work because of depression," that she had some problems with Dr. N, and that she is to see (Dr. M) on November 25, 1997. Dr. G's work certificate of November 21st stated no duty for three months.

(Dr. GU) reported on June 11, 1996, that he evaluated claimant at the request of the Texas Rehabilitation Commission, that he could not examine claimant's knee because of

her voluntary resistance "which is out of proportion," and that he doubts that claimant "will ever be employable because of her mental attitude already that she cannot work."

(Dr. K), a psychiatrist, reported on October 23, 1996, that he performed an independent psychiatric evaluation, that claimant knew the purpose of the evaluation and dated the onset of her difficulties to May 1996 when the insurance carrier told her it was necessary that she try to find work and she tried to do so but was not successful due to her physical difficulties and limited education, that her workers' compensation benefits were stopped because she made only eight or nine applications, and that she began some telecommunications work seven weeks ago. Dr. K diagnosed minor depression and stated that if she could find a satisfactory job, working would be therapeutic and enhance her self-esteem.

Dr. A reported on February 28, 1997, that he examined claimant at the request of the carrier and had previously evaluated her on multiple occasions; that claimant is 51 years of age and was injured on ____, when she hit her right knee against a laundry cart; that Dr. G performed arthroscopic surgery on the knee on January 20, 1994, and again on September 16, 1994; that claimant did not thereafter do well and has continued to be symptomatic; that she has been seeing Dr. N for depression and taking Xanax and Effexor; that she mostly sits around the house; and that she feels she is not able to go to work because of her limited education. Dr. A diagnosed severe post-traumatic right knee arthritis and clinical depression. Dr. A stated that "[a]t the present time, her ability to be gainfully employed is hampered more by her depression than by her knee"; that claimant "could very well be doing a sitting job"; that she has enough education to be gainfully employed if properly placed but "at the present time, her depression just doesn't even let her do that"; and that a functional capacity evaluation would be a waste of time until her depression is under control, perhaps in six months or so.

Dr. M, a psychiatrist, reported on November 25, 1997, that he had evaluated claimant, that claimant is suffering from severe major depressive illness, and "is totally disabled for employment due to her severe depression."

We do not find that Findings of Fact Nos. 9 and 11 through 13 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 however find the evidence insufficient to support Finding of Fact No. 10, which is essentially the same factual finding we set aside in Appeal No. 972228, *supra*. As in Appeal No. 972228, there is virtually no medical evidence to establish that claimant's depression is permanent so as to constitute impairment as defined in Section 401.011(23). Since Finding of Fact No. 10 is against the great weight and preponderance of the evidence, claimant has failed to prove the statutory requirement for SIBS that her underemployment during the filing period for the sixth compensable quarter is a direct result of her impairment. See Sections 408.142 and 408.143.

The decision and order of the hearing officer is reversed and a new decision is rendered that claimant is not entitled to SIBS for the sixth compensable quarter.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Christopher L. Rhodes
Appeals Judge