

APPEAL NO. 980162
FILED MARCH 10, 1998

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 29, 1997, a contested case hearing (CCH) was held with hearing officer. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the sixth and seventh quarters and whether respondent self-insured (carrier) timely filed a sufficient dispute of SIBS eligibility for the sixth quarter within the 10-day period. The hearing officer determined that claimant is not entitled to SIBS for either quarter and that carrier filed a sufficient dispute in this case. Claimant appeals the determinations that he had an ability to work during the filing periods in question, that he did not meet the good faith requirements for SIBS, and that he is not entitled to SIBS. The parties did not appeal the determinations regarding direct result or the sufficiency of carrier's dispute. Carrier responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he did not make a good faith effort to obtain employment commensurate with his ability to work and that he had the ability to do some work during the filing periods in question. Claimant also complains that the contrary medical evidence from (Dr. CO) was not as credible as the evidence from claimant's treating doctors.

The parties stipulated that: (1) claimant sustained a compensable injury on _____, while working for the (employer); (2) claimant had an impairment rating (IR) of 20%; and (3) he did not commute any of his impairment income benefits (IIBS).

Claimant testified that he was injured on _____, when he lifted a trailer, heard his back pop, and was rendered barely able to move. At the CCH, claimant testified that he feels he cannot work for psychological reasons because of the stress and demands of working but said that, concerning his physical abilities, he can do some work. Claimant indicated that his psychological condition is due to the fact that employer put him in dangerous situations in the past, his employer had threatened to "run [him] off," his supervisor was killed during an accident at work, and because claimant has physical problems from his compensable injury. He said he has problems driving and that he has "flashbacks" of situations that happened to him at work. He said he has been diagnosed with post traumatic stress disorder (PTSD) and depression and that he takes several medications, including Prozac. He said he has been off work since _____, and that he spends most of the day in bed. Claimant explained a videotape that shows him loading and unloading a truck and said that he was helping his brother move because his brother's

house was foreclosed upon. He testified that his brother could not help because he had undergone hernia surgery.

In a March 13, 1996, letter, (Dr. DE) stated that claimant enjoyed his ranch and family before his series of on-the-job accidents, that the accidents left him in constant pain with 70 to 80% restriction of his range of motion (ROM) in his back and neck, that the death of his supervisor left him with PTSD, that he filed for bankruptcy, and lost his ranch, sexual identity and family, and that claimant "is permanently and totally disabled for any employment due to constant pain and the inability to handle stress even of everyday life." In a November 26, 1997, letter, Dr. CO stated that he believes claimant does have work capabilities, that it would help claimant's long term functioning to return to work, that claimant's percentage of impairment for his psychological disorder "would most likely place the examinee in the mild range of mental impairment," and that claimant is irritable but does not have severe mental confusion.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. 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*.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the claimant contended and had the burden to prove he had no ability to work. Appeal No. 950582, *supra*. The hearing officer was the sole judge of the credibility of the medical evidence. Although Dr. DE said claimant was “disabled for any employment,” the record reflects that Dr. CO said claimant would benefit from a return to work. The evidence conflicted regarding whether claimant had any ability to work and the hearing officer resolved this conflict after judging the credibility of the medical evidence. He made his good faith and ability-to-work determinations based on the evidence before him. Because the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for his. Cain, *supra*.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge