

APPEAL NO. 980163
FILED MARCH 12, 1998

On December 30, 1997, a contested case hearing (CCH) was held, with the hearing officer. 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 hearing was whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the 13th quarter. The claimant requests review and reversal of the hearing officer's decision that she is not entitled to SIBS for the 13th quarter. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the claimant during the prior filing period. Rule 130.104(a) provides that an employee initially determined by the Texas Workers' Compensation Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period: (1) has been unemployed, or underemployed as defined by Rule 130.101, as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. The claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

This case concerns an assertion of no ability to work. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, we stated that if an employee established that 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 she had no ability to work, if that was being relied on by the claimant, due directly to the impairment from the injury. In Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, we stressed the need for medical evidence to affirmatively show an inability to work, and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must

be "judged against employment generally, not just the previous job where the injury occurred."

The claimant, who is 70 years of age, testified that on _____, she was working as a housing project manager for the employer when she fell and injured her right knee, right wrist, and low back. The parties stipulated that the claimant sustained a compensable injury on _____. The claimant said that in May 1992 her right knee locked up, causing her to fall and break her right ankle. In May 1992 she underwent surgery on her right ankle and in April 1993 she had the hardware removed from her right ankle and had surgery on her right knee for a torn medial meniscus and a torn lateral meniscus. The parties stipulated that the claimant has a 27% IR; that she did not commute IIBS; that the 13th quarter was from October 9, 1997, to January 7, 1998; that the filing period for the 13th quarter was from July 10 to October 8, 1997 (the filing period); and that during the filing period the claimant was unemployed and earned no wages. There is no appeal of the hearing officer's finding that the claimant's unemployment is a direct result of her impairment. Thus, the SIBS criteria at issue is whether the claimant attempted in good faith to obtain employment commensurate with her ability to work during the filing period.

The claimant testified that she has extreme pain in her right knee, right ankle, and low back; that her treating doctor, (Dr. A), who has treated her since 1992, has prescribed exercises, which she does every day; that every day she takes pain medication prescribed by Dr. A; that her condition is deteriorating; that she can type, but only at her own pace and not as a secretary; that she can walk with an ankle brace; that she can drive her automobile for the 10-minute trip to hearings and to the grocery store; and that back pain prevents her from sitting for long periods of time. The claimant further testified that she did not look for work during the filing period because to do so would have been against Dr. A's recommendations and because her pain and prescribed exercises prevent her from being able to do any type of productive work.

Dr. A wrote on July 11, 1997, that as a result of her ankle fracture, the claimant developed necrosis and compression of the talus, degenerative changes of the tibial/talar articulation, and subtalar degenerative arthritis. He also noted that the claimant needed a new ankle brace and orthopedic shoes. An MRI of the claimant's right knee done on July 11, 1997, showed a small posterior horn of the medial meniscus, a tear through the anterior horn of the medial meniscus, osteoarthritic changes, chondromalacia, degenerative changes, a small joint effusion, and a small popliteal cyst. An MRI of the claimant's right ankle done the same day showed healed fractures and mild tenosynovitis. On August 4, 1997, Dr. A wrote with regard to the claimant's work status, "no work."

The claimant underwent a functional capacity evaluation on August 5, 1997, and a physical therapist wrote that his assessment was that the claimant is performing "at the sedentary level." On August 18, 1997, Dr. A wrote that the claimant is suffering from advanced chondromalacia of her right knee, which causes her significant pain, and limits her ability to do day-to-day activities, and that the claimant should undergo physical therapy for her knee. On September 12, 1997, Dr. A wrote that the claimant "is unable to return to

work and that because of her physical limitations she is not able to seek employment and should undergo permanent retirement." The claimant said that, although she is unable to work, she is not retired and that, if not for her compensable injury, she would still be working for the employer. At the carrier's request the claimant was examined by (Dr. B) on September 15, 1997, and Dr. B wrote on September 28, 1997, that the claimant "is able to return to some type of work which will likely be fairly light duty work or sedentary work. Secretarial work would probably be acceptable." An MRI of the claimant's lumbar spine done on October 6, 1997, showed a small disc herniation at L5-S1 with an annular tear causing right S1 stenosis.

The claimant appeals the hearing officer's findings that during the filing period she had an ability to work and that she did not make a good faith attempt to find employment commensurate with her ability to work, and the hearing officer's conclusion that she is not entitled to SIBS for the 13th quarter. The claimant contends that Dr. A's reports show that she has no ability to work, that Dr. A has not released her to return to work, and that Dr. B's report was conclusory and misleading. The claimant also refers us to decisions on previous SIBS quarters. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact the hearing officer resolves conflicts in the evidence and determines what facts have been established from the evidence presented. We have previously observed that the absence of a release to return to work may be subject to varying inferences and is not necessarily dispositive on the question of whether a claimant has some ability to work. See Appeal No. 941382, *supra*.

Regarding previous Appeals Panel decisions on the claimant's entitlement to SIBS, in Texas Workers' Compensation Commission Appeal No. 962259, decided December 23, 1996 (Unpublished), we affirmed a hearing officer's decision that the claimant was entitled to SIBS for the eighth quarter; in Texas Workers' Compensation Commission Appeal No. 970226, decided March 25, 1997 (Unpublished), we affirmed a hearing officer's decision that the claimant was not entitled to SIBS for the ninth and 10th quarters; in Texas Workers' Compensation Commission Appeal No. 971356, decided August 28, 1997 (Unpublished), we affirmed a hearing officer's decision that the claimant was not entitled to SIBS for the 11th quarter; and in Texas Workers' Compensation Commission Appeal No. 972225, decided December 12, 1997 (Unpublished), we affirmed a hearing officer's decision that the claimant was entitled to SIBS for the 12th quarter. All of the cited Appeals Panel decisions on the claimant's entitlement to SIBS involved an assertion of no ability to work during the relevant filing periods.

Entitlement to SIBS for a particular quarter is determined based on whether the claimant met the SIBS criteria in the filing period for that particular quarter. Rule 130.102(b). We cannot say that the facts in the filing period for the 12th quarter were the same as the facts in the filing period for the 13th quarter because there is no mention in Appeal No. 972225, of Dr. B's report of September 28, 1997, which was within the filing period for the 13th quarter. That decision notes Dr. B's report of November 1996. We conclude that the hearing officer's findings that the claimant had an ability to work during the filing period and that she did not make a good faith attempt to find employment

commensurate with her ability to work during the filing period are supported by sufficient evidence and 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 findings on the good faith criterion for SIBS supports his conclusion that the claimant is not entitled to SIBS for the 13th quarter.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge