

APPEAL NO. 980173  
FILED MARCH 13, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 8, 1997. With regard to the issues at the CCH, the (hearing officer) determined that the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the fourth, fifth and sixth quarters, that he is not entitled to SIBS for the seventh and eighth quarters, and that he had not permanently lost entitlement to SIBS. The claimant appeals the determinations regarding the seventh and eighth quarters of SIBS, seeks a reversal of the decision and argues that during the filing periods for the seventh and eighth quarters of SIBS he attempted in good faith to obtain employment commensurate with his ability to work. The carrier responds and seeks an affirmance of the decision.

The determinations that the claimant is entitled to SIBS for the fourth, fifth and sixth quarters and that he has not permanently lost entitlement to SIBS are not appealed. The findings of fact that during the filing periods for the seventh and eighth quarters of SIBS the claimant's unemployment was a direct result of his impairment are not appealed either. Therefore, those determinations and findings of fact became final by operation of law. Section 410.169.

DECISION

We affirm.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, that his impairment rating is 15% or more, that the filing period for the seventh quarter of SIBS was March 28 to June 26, 1997, and that the filing period for the eighth quarter of SIBS was from June 27 to September 25, 1997. There is no dispute that the claimant was neither employed nor did he search for employment during the filing periods for the seventh and eighth quarters of SIBS. The disputed SIBS criterion is whether the employee, the claimant, during the filing period, "attempted in good faith to obtain employment commensurate with the employee's ability to work." Section 408.142(a)(4); *see also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(a)(2) (Rule 130.104(a)(2)). The hearing officer made findings of fact that the claimant had an ability to work during the filing periods for the seventh and eighth quarters of SIBS.

The claimant testified that he injured his back when part of a marshmallow machine he was repairing fell on him. He said he developed depression and pain as a result of the compensable injury. He participated in occupational therapy from June 16 to August 14, 1997, under the direction of his psychiatrist, (Dr. C). On June 17, 1997, the occupational therapist directed him to contact the (T R C). The therapy progress notes reflected he had no complaints of pain during the sessions. On October 21, 1997, his orthopedist, (Dr. P), stated the claimant had internal disc disruption that "indeed can be a painful condition, but it

is not a disabling condition." Dr. P also wrote that persons with such injuries "are often times capable of carrying on some sort of occupational activity, although it may be far more sedentary than they are accustomed to or trained to do." Dr. C testified at the CCH that the claimant was unable to work during the filing periods for the seventh and eighth quarters of SIBS. He opined that the claimant had pain and was depressed as a result of the compensable injury.

Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. If an employee establishes that he 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." Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994. 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. 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. "Medical evidence which affirmatively shows an inability to work is required if an employee is relying on such inability to work to replace the requirement for establishing a good faith attempt to find employment." Texas Workers' Compensation Commission Appeal No. 951798, decided December 13, 1995. "The total inability to do any work at all will arise in only rare and unusual cases, as opposed to the fairly common situation where a seriously injured employee cannot return to her previous employment." Texas Workers' Compensation Commission Appeal No. 960714, decided May 20, 1996. An employee who is able to perform sedentary work must search for sedentary work. Texas Workers' Compensation Commission Appeal No. 971638, decided October 6, 1997; Texas Workers' Compensation Commission Appeal No. 970373, decided April 9, 1997; Texas Workers' Compensation Commission Appeal No. 970290, decided April 2, 1997; Texas Workers' Compensation Commission Appeal No. 962341, decided December 23, 1996; and Texas Workers' Compensation Commission Appeal No. 951829, decided December 15, 1995.

The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). Although there was conflicting evidence presented regarding the claimant's ability to work during the filing periods for the seventh and eighth quarters of SIBS, it was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co.

v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We will reverse a hearing officer's determinations if we find that they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The determinations regarding the claimant's entitlement to SIBS for the seventh and eighth quarters of SIBS are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, we affirm the decision.

Christopher L. Rhodes  
Appeals Judge

CONCUR:

Philip F. O'Neill  
Appeals Judge

Elaine M. Chaney  
Appeals Judge