APPEAL NO. 980220
FILED MARCH 13, 1998

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 2, 1998, a contested case hearing was held with hearing officer. With respect to the only issue before him, the hearing officer determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the third compensable quarter, which the issue from the benefit review conference lists as being from August 21 through November 19, 1997.

Appellant (carrier) appeals, contending that there is insufficient medical evidence to support a determination of a total inability to work, that carrier's medical evidence does show claimant's ability to work and that claimant's testimony shows her capable of performing activities of daily living and is supported by a videotape (Carrier's Exhibit No. 11), which is contrary to claimant's testimony regarding her limitations. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant's response on appeal lists evidence in support of claimant's position and concludes that the "treating doctors believe there is no ability to work." Claimant does not mention or reference carrier's videotape, and urges affirmance of the hearing officer's decision.

DECISION

We reverse and remand.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant had at least a 15% impairment rating (IR) (medical evidence established a 45% IR) and that claimant had not elected to commute her impairment income benefits. There are no stipulations or determinations which establish the filing period and the parties merely refer to it as being from mid-May to mid-August (of 1997). We will accept the filing period as being the 90 days preceding August 21, 1997. We will note that Texas Workers' Compensation Commission Appeal No. 971811, decided

October 20, 1997 (Unpublished), where we affirmed this claimant's entitlement to the first and second compensable quarters of SIBS, established the other jurisdictional elements for SIBS and the background facts for this case.

Claimant testified that she is __ years old and was a "collections coordinator" (who tracked illegal cable taps using computers and a telephone) when she sustained a neck, back and left shoulder injury moving some office furniture on _____. Claimant had cervical spine surgery (a fusion) at C4/5 in April 1994 and was eventually assessed a 45% IR by (Dr. T), the designated doctor, in November 1994. Dr. T, at that time, states: "Employability . . . would be impossible should she have to use her left upper extremity at all." (Dr. G), claimant's current treating doctor, in a chart note dated March 12, 1997, states claimant "is unable to work" and, in an off work slip dated "4-10-97," states "[d]isabled and unable to work for eight weeks." Dr. G, in letters and reports dated April 28 and July 10, 1997, recommended additional surgery (which was subsequently disapproved in a second opinion process). A note dated July 21, 1997, states there has been no change in claimant's condition (presumably since March 12, 1997, when he began treating claimant). Another "Return to Work/School" slip dated July 21, 1997, also states "disabled & unable to work." (Dr. S), a prior treating doctor, in a "To whom it may concern" note dated May 13, 1997, states that claimant "was disabled and unable to work during the period from November 21, 1996 to March 12, 1997, due to her chronic pain symptoms and left arm weakness." In a similar note dated June 9, 1997, Dr. S writes "I consider [claimant] unable to perform any type of work that requires the use of her arms or hands."

A psychotherapy note of November 22, 1996, indicates claimant "is not planning to go back to work in a regular type job" and that she is comfortable that she "has been able to spend more time with her family since being hurt." (Dr. M), carrier's independent medical evaluation doctor, in a report dated March 12, 1997, found that claimant's "lack of focal muscular atrophy is clearly inconsistent with her contention that she has diffuse and gross left upper extremity weakness for the past two years." Dr. M concludes:

> I see no reason why the patient should be unable to return to light active work similar to that which she was doing prior to the injury in question.

Claimant testified in some detail that she is unable to work, that after she gets up in the morning she alternates sitting and lying down to alleviate her pain, that she has severe headaches and about the various medications that she takes. The hearing officer, in his Statement of the Evidence, comments:

> Based on Claimant's testimony describing loss of grip strength, inability to fully use her upper extremity, inability to sit long without lying down, headaches, and effects of medication as well as the treating doctor's opinions, Claimant was not required to seek employment during the qualifying period for the 3rd SIB's [sic] quarter.

We have frequently noted, and recited elements in Appeal No. 971811, *supra*, that the Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she 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." 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, and 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. 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*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

We are mindful that the hearing officer is the sole judge of the weight and credibility to be given to the evidence and accordingly give great deference to the hearing officer's factual determinations. We also concede that the medical evidence in this case is in conflict and several doctors have opined that claimant has a real and verifiable weakness and pain in her left upper extremity. That being said, what gives us great pause is that neither the hearing officer nor the claimant address Carrier's Exhibit No. 11, a videotape apparently taken January 25 and 30, 1997, about four months prior to the filing period at issue. That video shows claimant engaged in normal activities of daily living, including driving a car, shopping at a yard sale, visiting with a friend, exiting a mail center carrying an empty cardboard box under her left arm, and opening a door with her left arm. This video is completely inconsistent with claimant's testimony that she is unable to perform the very activities the video shows her performing. While perhaps there is an explanation, neither the hearing officer nor the claimant offer any comment or explanation how claimant can be performing the depicted activities in January 1997 and yet be virtually bedridden, according to claimant's testimony of her typical daily activities, during the filing period.

In a somewhat similar case, Texas Workers' Compensation Commission Appeal No. 970321, decided April 2, 1997, where the injured employee had a 33% IR, cervical and upper extremity injuries, testified about a total inability to work and was supported by some medical evidence and the carrier introduced a videotaped surveillance tape which was "dramatically at odds with claimant's testimony." The Appeals Panel reversed and remanded that case. In the instant case, the hearing officer does not reference or comment on the videotape, while in Appeal No. 970321, the hearing officer "was troubled by the seeming contradictions between what the claimant demonstrated on the videotape

and her claimed inability to work at all." The Appeals Panel, in Appeal No. 970321, reversed the hearing officer's determination awarding SIBS for the fourth compensable quarter and remanded, stating:

> Because such evidence, we believe, is incomplete without reference to or acknowledgment of the videotape, we reverse the finding of the hearing officer that the claimant has no ability to work in any capacity and is entitled to SIBS and remand this issue for further consideration. The hearing officer should obtain further medical evidence which expressly includes consideration of the videotape by any doctor who provides a medical opinion as to the claimant's ability to work. Such an opinion, although not entitled to presumptive weight, may be requested of a designated doctor to resolve this dispute "as to the medical condition of an injured employee." Section 401.011(15).

A concurring opinion in that case commented further on the use of a designated doctor to resolve disputes concerning a claimant's ability to work. Such an opinion, of course, would not be entitled to presumptive weight, but would help resolve the dispute over the injured employee's ability to work.

We reverse the findings of the hearing officer that the claimant has no ability to work and is entitled to SIBS and remand the case for further consideration. As in Appeal No. 970321, *supra*, the hearing officer should obtain further medical evidence which expressly includes consideration of the videotape, including the time frame in which it was made, *vis-a-vis* the filing period, by any doctor who provides a medical opinion as to the claimant's ability to work. We would again note to the hearing officer that a determination of entitlement to SIBS based on a total inability to work must be based on medical evidence rather than claimant's testimony, although the hearing officer, in this case, is certainly free to comment on why he apparently discounted the videotape. Conversely, medical evidence of a claimant's ability to work is <u>not</u> required and such ability may be found based on other non-medical evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Christopher L. Rhodes
Appeals Judge