

APPEAL NO. 980229
FILED MARCH 13, 1998

On December 4, 1997, a contested case hearing (CCH) was held in (City), Texas, with (hearing officer) presiding as 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 CCH was whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the third quarter. The claimant requests review and reversal of the hearing officer's decision that she is not entitled to SIBS for the third quarter. The respondent (carrier) questions whether the request for appeal was timely filed and responds that the hearing officer's decision is supported by the evidence.

DECISION

Affirmed.

On December 10, 1997, the Texas Workers' Compensation Commission (Commission) mailed the hearing officer's decision to the claimant at an address other than the address she gave at the CCH. Commission computer records reflect that on January 26, 1998, the claimant notified the Commission that she had not received the hearing officer's decision and that on that date the Commission mailed the hearing officer's decision to the claimant at her correct address. The claimant states in her request for appeal that she received the hearing officer's decision on January 29, 1998. The claimant's request for appeal was received by the Commission on February 6, 1998. We conclude that the claimant's request for appeal was filed within the 15-day time period provided for in Section 410.202(a). See Texas Workers' Compensation Commission Appeal No. 94517, decided June 14, 1994.

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 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 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 compensable 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 testified that on _____, she was working as a stocker at the employer's store when she fell off of a ladder and was injured. She said that she had cervical surgery in 1994. The surgery was a four-level fusion. The parties stipulated that on _____, the claimant sustained a compensable injury, that she has a 34% IR; and that she was entitled to SIBS for the first two quarters. The third quarter was from May 25 to August 23, 1997, and the filing period for the third quarter was from February 23 to May 24, 1997 (filing period). There is no appeal of the hearing officer's finding that during the filing period the claimant was unemployed as a direct result of her impairment from her compensable injury. Thus, the issue in this case 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 did not look for work during the filing period; that she could not look for work during the filing period because her condition got worse and she could not walk, bathe without help, or drive; that she could not do anything; that she stayed mostly in bed; that her treating doctor, Dr. M, told her that she needs spinal surgery; that she has pain in her spine and left leg; that she cannot turn her neck; that her hands go numb; that she takes medication every day; that she did not know that she was released to work until she received Dr. M's letter of June 9, 1997; and that Dr. M sent her copies of his office notes.

Dr. M noted on a "Physical Capacities Form" dated February 27, 1997, that the claimant was released to return to part-time work for four hours a day on February 27, 1997, with restrictions. Dr. M noted on the form that in an eight-hour workday the claimant could: (1) stand/walk for zero to two hours at one time for a total of two to four hours a day; (2) sit zero to two hours at one time for a total of two to four hours a day; (3) drive 30-60 minutes at one time; and (4) lift/carry 10 pounds occasionally and frequently. Dr. M also noted that the claimant could use her hands for simple grasping

and fine manipulation, but not for pushing and pulling; that she had no restrictions on using her feet for repetitive movements; that she was not able to balance; that she can occasionally bend, squat, reach, twist, and rotate, but that she cannot kneel, climb, or crawl; that she takes medications that might affect her ability to work; and that she would be required to use a cervical collar intermittently. On May 22, 1997, the claimant underwent a functional capacity evaluation (FCE) at Dr. M's request and the FCE report states that the claimant's functional capabilities are in the sedentary level.

On June 9, 1997, Dr. M noted that the claimant complained of pain in her neck, left hip, and left leg; that the FCE showed that the claimant is incapable of anything beyond sedentary activities; that he would release the claimant for a "sedentary position only, part time only"; that the claimant cannot withstand more than four hours a day to start; and that he did not think that the claimant would be able to find employment. On July 23, 1997, Dr. M wrote that the claimant has clinical findings to support her complaints of back and leg pain; that a scan done in 1993 showed herniations at L4-5 and L5-S1; and that he recommended an MRI. The claimant stated that the MRI was done on August 5, 1997. On October 22, 1997, Dr. M wrote that the claimant's May 1997 FCE demonstrated that she had virtually no functional capabilities beyond extremely sedentary level; that the claimant's back had flared up since that time; that the claimant's cervical fusion was solid; that the MRI scan showed disc herniations at L4-5 and L5-S1; that the claimant is "barely able to function in activities of daily life, much less in a work environment"; that the claimant could not pass a preemployment physical nor work even part time; that his opinion was based on the claimant's structural abnormalities and physical findings; and that he felt that the claimant "remains totally and permanently disabled, and this is not going to change." Dr. M added that the claimant's back and leg pain had gotten much more severe over the last six to eight months and that she is probably going to require lumbar surgery.

The hearing officer found that the claimant had an ability to do sedentary work on a part-time basis during the filing period and that the claimant did not attempt during the filing period to obtain any employment commensurate with her ability to work. It is undisputed that the claimant did not attempt to obtain employment during the filing period. The hearing officer concluded that the claimant was not excused from attempting to find work during the filing period and that the claimant is not entitled to SIBS for the third quarter. There is evidence that during the filing period the claimant was able to perform part-time sedentary work. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact the hearing officer resolves conflicts in the evidence and determines what facts have been established from the evidence presented. We conclude that the hearing officer's finding that the claimant had an ability to do part-time sedentary work during the filing period is supported by sufficient evidence and that it is 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 third quarter.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge