APPEAL NO. 980238
FILED MARCH 13, 1998

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (City), Texas, on January 5, 1998, with (hearing officer) presiding as hearing officer. The issues were is the respondent/cross-appellant's (claimant) psychological condition a result of the compensable injury sustained on _____, and is the claimant entitled to supplemental income benefits (SIBS) for the fifth quarter. The appellant/cross-respondent (carrier) and the claimant stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement on February 2, 1995, with a 27% impairment rating; and that the filing period for SIBS for the fifth quarter began on May 23 and ended on August 21, 1997.

The hearing officer determined that the claimant's psychological condition is a result of her compensable injury. The carrier appealed that determination, urging that it is so against the great weight and preponderance of the evidence as to be manifestly unjust and is wrong as a matter of law. The carrier also stated that it filed a motion to reopen the record for the introduction of newly discovered evidence, that the Texas Workers' Compensation Commission (Commission) did not provide the motion to the hearing officer, and that it was error for the hearing officer not to act upon its motion. The carrier requested that the record be reopened so that the hearing officer may address its request to offer newly discovered evidence. The claimant responded, urging that the evidence is sufficient to support the determination that her psychological condition is a result of the compensable injury and that the hearing should not be reopened because the carrier did not exercise due diligence in obtaining a report from its peer review physician. The claimant requested that the hearing officer's determination that her psychological condition is a result of her compensable injury be affirmed.

The hearing officer determined that during the filing period for SIBS for the fifth quarter, the claimant's unemployment was a direct result of her impairment from the compensable injury. She made the following findings of fact concerning the good faith criterion:

FINDINGS OF FACT

3. Claimant was released back to work by [Dr. M] on October 30, 1996, with restrictions.

4. A functional capacity evaluation adopted by [Dr. F], Claimant's treating physician, established that Claimant had, on July 22, 1997, the ability to work at a light duty performance level.

5. Claimant worked from March 17, 1997, through April 29, 1997, as a cashier until terminated for not following procedures.

6. During the 5th quarter [SIBS] filing period from May 23, 1997, through August 8, 1997, Claimant had some ability to work.

7. During the fifth quarter [SIBS] filing period from August 9, 1997, through August 21, 1997, Claimant had some ability to work.

8. Between August 8, 1997, and August 21, 1997, Claimant made approximately 13 job contacts, 4 of which were originated by Claimant's efforts.

9. Claimant's minimum efforts to find work during the last two weeks of the fifth quarter [SIBS] filing period do not constitute a good faith search for employment.

10. Claimant did not make a good faith effort to obtain employment commensurate with her ability to work.

The hearing officer concluded that the claimant is not entitled to SIBS for the fifth quarter. The claimant appealed the decision that she is not entitled to SIBS for the fifth quarter, urging that it is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; contending that she was unable to work from May 23 through August 7, 1997, and that she made a good faith effort to obtain employment from August 8 to 21, 1997; and requesting that the Appeals Panel reverse the decision of the hearing officer that she is not entitled to SIBS for the fifth quarter and render a decision that she is entitled to SIBS for that quarter. The carrier responded, urging that the evidence is sufficient to support the determinations of the hearing officer concerning the good faith criterion and requesting that the decision that the claimant is not entitled to SIBS for the fifth quarter be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a two-page Statement of the Evidence. A lengthy summary of the evidence will not be repeated in this decision. Concerning the determination that the claimant's psychological condition is a result of her compensable injury, the claimant testified that she had depression soon after the injury, but that she did not receive treatment for it until she was referred by the Texas Rehabilitation Commission (TRC) to Dr. H, a psychologist, in June 1997. A letter from a TRC counselor and the limited medical records in evidence are consistent with her testimony. In a letter dated June 26, 1997, Dr. H stated that the claimant's depressive

symptoms are in response to her compensable injury, loss of the use of her left arm, and the lengthy rehabilitation process. In a report dated July 24, 1997, Dr. F said that the claimant was suffering from some degree of post-traumatic stress disorder related to her lack of employment and other functional loss due to the compensable injury. On August 21, 1997, Dr. F reported that he was referring the claimant to Dr. B, a board-certified psychiatrist, and that the referral was the result of the compensable injury. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). She correctly required medical evidence to establish that the claimant's psychological condition is a result of the compensable injury. Her determination on that issue is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer that the claimant's psychological condition is a result of her compensable injury, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

In Texas Workers' Compensation Commission Appeal No. 961473, decided September 11, 1996, the Appeals Panel rejected the argument made by the carrier in the case before us that a claimant contending that a psychological condition is a result of the compensable injury must meet the criteria for a mental trauma injury and stated that the correct issue is whether the compensable injury is a producing cause of the psychological condition.

We next address the determination that the claimant is not entitled to SIBS for the fifth quarter. The evidence is sufficient to support the findings of fact that prior to the filing period in question, the claimant was released to work by Dr. M and that she worked as a cashier for about six weeks. In a letter to the Commission field office handling the claim, dated July 10, 1997, Dr. F stated that the claimant remained with rather remarkable functional deficits, that she was currently enrolled in a work hardening program in which she was making excellent progress, that she was still unable to work, and that upon successful completion of the work hardening program her work status would be reevaluated. On August 7, 1997, Dr. F stated that the claimant had completed all aspects of the work hardening program and was released to a light-lifting category. In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is firmly on the claimant 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. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated, "claimant's inability to do any work must be supported by medical evidence or must be so obvious as to be irrefutable (the employee is completely bedridden)." In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant

and that the doctor considered the specific impairment and its impact on employment generally. The hearing officer determined that the claimant had some ability to work during the entire filing period for SIBS for the fifth quarter. That determination is not so agaisnt the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, *supra;* Pool, *supra*.

The claimant sought employment with 13 prospective employers during the last two weeks of the filing period. Whether good faith in seeking employment was shown is usually a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. Consideration can be given to the manner in which a job search is made and timing, forethought, and diligence may be considered in determining whether a good faith job search was made. Texas Workers Compensation Commission Appeal No. 961195, decided August 5, 1996. In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel rejected the contention that a certain number of job applications showed good faith and stated the following about good faith:

> In common usage this term is ordinarily used to described that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.

The requirement for a good faith job search generally spans the entire filing period. Texas Workers' Compensation Commission Appeal No. 960964, decided June 26, 1996. The determination that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work during the filing period is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, *supra*; Pool, *supra.*

Two days after the hearing closed, the carrier submitted a motion to reopen the record to consider a report from Dr. P, a Ph.D. and a diplomate in clinical neuropsychology, who reviewed the records of the claimant. In the motion, the carrier stated that it first learned in November that the claimant was contending that she had psychological problems that were part of the compensable injury; that the inability of the carrier to obtain the review by Dr. P was not due to lack of diligence, but was due to the unfair surprise associated with the first notification of the issue in November 1997; that at no time prior to January 7, 1998, did the carrier's adjuster or attorney have any indication that a peer review report was being prepared; that if such information had been known, the carrier would have attempted to obtain the report prior to the hearing or requested a continuance. The motion was not presented to the hearing officer before she rendered her decision. The carrier now requests that the case be reversed and remanded to the hearing officer for her to consider the report of Dr. P. In Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992, the Appeals Panel wrote:

> Where there is a claim of newly discovered evidence, as there is here, we evaluate the evidence to determine if there is a sound basis to cause a remand for further consideration and development of evidence. In doing so, we look to the guidelines provided in Texas case authority. It is incumbent on a party who seeks a new trial on grounds of newly discovered evidence to establish: (1) the evidence has come to the knowledge of the party since the hearing; (2) it was not owing to want of due diligence that it did not come sooner; (3) the evidence is not just cumulative; and (4) the evidence is so material it would probably produce a different result if a new hearing were granted.

In a letter to Ms. GB, a nurse working for (employer), dated December 29, 1997, Dr. P stated that at her request he had reviewed the records she had provided him; summarized the records, and said that he did not see any necessity for psychological treatment as it relates to the work injury of _____. Ms. GB made a summary of the letter of Dr. P on January 5, 1998. At the hearing, Ms. KB testified that she worked for (employer) as a vocational specialist and that the carrier paid for her services. It is apparent that (employer) was under contract to provide services concerning the claimant's claim. (Employer) was an agent of the carrier and the carrier was charged with knowledge of (employer). The request to Dr. P had been made sometime prior to December 29, 1997. That neither the adjuster nor the attorney handling the claim were aware of the request does not excuse inaction by the carrier. The peer review had been requested sometime prior to December 29, 1997, and efforts could have been made to obtain the report prior to the date of the hearing, to request a continuance, or to hold the record open for a reasonable time to offer the report after it was obtained. It is not clear that the evidence is so material that it would probably produce a different result. The carrier has not met the requirements for a remand to consider newly discovered evidence.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge