

APPEAL NO. 980252  
FILED MARCH 26, 1998

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 7, 1998, a contested case hearing (CCH) was held in (City), Texas, with (hearing officer) presiding as hearing officer. The issue concerned whether the appellant, MG, who is the claimant, was entitled to his 12th quarter of supplemental income benefits (SIBS).

The hearing officer held that the claimant had not made a good faith search for employment commensurate with his ability to work, although his unemployment was the direct result of his impairment.

The claimant has appealed, arguing that his treating doctor took him entirely off work. He says on appeal that he would have continued to work, and not have retired at age 62, if he was not in constant pain. There is no response from the carrier.

DECISION

Affirmed.

The claimant injured his back on \_\_\_\_\_, and had two surgeries on his back, the last one in 1993. His treating doctor was Dr. S. The filing period for the 12th quarter ran from July 25 through October 22, 1997.

Claimant contended he was completely unable to work. Asked to specify why, he said he did not feel well and was in pain. However, he took pain medication. He said his right leg would feel numb. Claimant testified that he considered himself retired and had no intention of going back to work. He said he was 66 years of age. When asked by the ombudsman on redirect if he had retired earlier than he wanted to, he said no, that he had retired at age 62. Claimant agreed that he had gone to Mexico during the filing period but said it was only for a "short time" starting Labor Day weekend.

Claimant agreed he had not sought employment. He said that Dr. S had told him for the last five years that he could not work. Dr. L examined the claimant on April 29, 1997, and stated that claimant's abilities were characteristic of medium-duty level work. This appears to be his interpretation of a functional capacity evaluation performed by a technician which showed that claimant could safely work light duty and could occasionally perform tasks consistent with heavy duty. The evaluator noted that less than maximal effort was indicated by a decrease in the claimant's heart rate during lifting.

A report from Dr. R dated November 1996 recorded being told by claimant that he worked on his father's farm, was practically pain free, and had a job that kept him

busy every day. Claimant said that he was misunderstood and denied working on the farm. Dr. R wrote a letter in January 1998 saying that he had been contacted by claimant's daughter and that there might have been a misunderstanding due to language interpretation of what claimant told him.

It is fair to characterize claimant's medical records during the filing period as indicative of moderate level pain (five or six on a 10 scale) and mild to moderate spasticity in the lumbar region. On November 12, 1997, Dr. S wrote that in his opinion claimant qualified for SIBS because he was not a candidate for gainful employment. Dr. S charged that Dr. L was biased.

In Texas Workers' Compensation Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated 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 Appeal No. 950581, decided May 30, 1995. We have held that the burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Appeal No. 941382, decided November 28, 1994, and that a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Appeal No. 950173, decided March 17, 1995. See also Texas Workers' Compensation 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 injury occurred." Texas Workers' Compensation Appeal No. 941334, decided November 18, 1994. 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 Appeal No. 941154, decided October 10, 1994.

In this case, the claimant forthrightly admitted that he had no intention of returning to the workforce because he was retired. Although on appeal he asserted that he retired at age 62 due to his injury, he was given the opportunity at the CCH to give such an explanation and did not. In fact, he testified that he had NOT retired earlier than intended at age 62. The hearing officer, as trier of fact, was not bound by Dr. S's assertions that the claimant could perform no gainful employment. With the evidence in the posture of claimant admitting an intent not to go back to work, the hearing officer would be hard pressed to reconcile this with the requisite frame of mind to find "good faith" in the lack of a search for employment. We will stress that injured workers are not prohibited from retiring by the Workers' Compensation Act, but may risk losing entitlement to benefits that are specifically put in place to subsidize the return to employment.

We cannot agree that the hearing officer's determination is against the great weight and preponderance of the evidence, and we affirm the decision and order.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Christopher L. Rhodes  
Appeals Judge

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Judy L. Stephens  
Appeals Judge