APPEAL NO. 980263
FILED MARCH 23, 1998

On January 8, 1998, 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 issues at the contested case hearing (CCH) were the appellant's (claimant) entitlement to supplemental income benefits (SIBS) for the second, third and fourth quarters. The hearing officer found that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work during the filing periods for the quarters in issue and he decided that the claimant is not entitled to SIBS for those quarters. In a timely request for review, the claimant requests review of the hearing officer's decision. The respondent (carrier) filed a document identified as a response to the claimant's request for review in which it responds that the hearing officer's finding that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work is supported by the evidence, but requests that we reverse the hearing officer's finding that the claimant's unemployment during the filing periods for the quarters in issue was a direct result of his impairment.

The carrier's response was filed with the Texas Workers' Compensation Commission (Commission) within the 15-day period for filing a response to the request for appeal, but it was not filed within the 15-day time period for filing a request for appeal. Section 410.202. The carrier's Austin representative received the hearing officer's decision on January 22, 1998, and thus the carrier had until February 6, 1998, to mail a request for appeal to the Commission. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)). The carrier's response is postmarked February 20, 1998, and thus was not timely filed as an appeal. Consequently, the hearing officer's finding that the claimant's unemployment during the filing periods for the quarters in issue was a direct result of his impairment is final under Section 410.169 and will not be addressed on appeal.

DECISION

Affirmed.

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 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 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 his 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 he 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 he had no ability to work, if that was being relied on by the claimant, due directly to the impairment from the 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's testimony was translated by a Spanish-speaking interpreter. The parties stipulated that the claimant, who is 52 years of age, sustained a compensable injury to his low back on _____. The claimant said that the injury occurred when he twisted his back while painting. Dr. M is the claimant's treating doctor. Dr. M referred the claimant to Dr. T, who diagnosed the claimant as having a herniated disc at L4-5 and performed a lumbar laminectomy and discectomy on the claimant at that level on January 22, 1995. The parties stipulated that the claimant has a 22% IR; that the claimant did not commute IIBS; that the second quarter was from March 25 to June 23, 1997, with a filing period of December 24, 1996, to March 24, 1997; that the third quarter was from June 24 to September 22, 1997, with a filing period of March 25 to June 23, 1997; that the fourth quarter was from September 23 to December 22, 1997, with a filing period of June 24 to September 22, 1997; and that the claimant did not work during the filing periods for the second, third, and fourth quarters.

The claimant testified that he is in pain and cannot work, that Dr. M told him that he cannot do any work, that Dr. M did not release him to return to any type of work during the filing periods for the quarters in issue, that if he sits for too long his legs go numb, that if he stands for too long he feels like he will fall, that he wears a back brace, that he sometime uses a cane to walk, that he walks for about five miles every morning and then walks in the afternoon, that he has trouble turning his head when he drives a car, that his pain is worse with weather changes, that he is unable to put on his socks by himself, that he did not look for work during the filing periods for the second and

fourth quarters, that he looked for work at about 25 employers during the filing period for the third quarter in order to meet the statutory requirements for entitlement to SIBS, that he did not know whether the places he looked for work at were hiring, that no one offered him a job, that he would have taken a light-duty job had it been offered to him, and that he went to the Texas Workforce Commission during the filing period for the third quarter. The claimant's log of employment contacts for the filing period for the third quarter shows that he looked for work on only five days during that filing period and it lists 25 job contacts.

The claimant underwent a functional capacity evaluation (FCE) in September 1995 and a therapist reported in the FCE report that the claimant gave inconsistent efforts on testing and that he may be a symptom magnifier. The therapist recommended that the claimant undergo work conditioning. Dr. S reported in September 1995 that the claimant has a 22% IR and diagnosed the claimant as having chronic post-surgical back pain with left L5-S1 radiculopathy. Dr. S wrote that apparently a post-operative MRI showed epidural fibrosis with encroachment of the L4-5 nerve root.

Dr. M wrote in October 1996 that the claimant has failed back syndrome with persistent complaints of back pain and that it was his opinion that the claimant is "completely disabled." In monthly reports from September 1996 to July 1997 Dr. M wrote that the claimant complained of back pain. In some of those reports Dr. M mentions the claimant's complaints of leg pain and that the claimant has limitation of range of motion (ROM) of his lower back. At Dr. M's request the claimant underwent an FCE in October 1996 and a therapist wrote in the FCE report that the claimant is extremely debilitated, that the claimant seemed to have symptom magnification, and that limitation of motion in the claimant's cervical spine, shoulders, and low back are real. The therapist also wrote that the claimant was unable to complete many tests due to reports of pain. In November 1996 and January 1997 Dr. M wrote that the claimant is unable to do any kind of work. In December 1996 and July 1997 Dr. M wrote that the claimant is unable to return to work. In March 1997 Dr. M wrote that the claimant has significant limitation of lumbar ROM and weakness of the right foot, that the FCE found that the claimant was extremely debilitated, and that in his opinion the claimant is unable to do any kind of work and is totally disabled. In several reports Dr. M mentions that sitting and standing for a prolonged period of time make the claimant's symptoms worse. In August 1997 Dr. M wrote that the claimant was unable to work in any kind of work from June 24 to September 22, 1997, due to limited ROM of the lumbar spine, muscle spasms, and weakness of the lower extremities. In December 1997 Dr. M wrote that a post-surgical MRI done in April 1995 showed epidural fibrosis at L4-5, which encases the left nerve root, and degenerative changes at L3-4; that the October 1996 FCE found that the claimant was extremely debilitated; and that in his opinion the claimant is unable to perform any kind of work as a result of his work injury of July 1993 because of severe limitation of ROM of the lumbar spine, significant muscle spasm of the lumbar spine, weakness and decrease of sensation of the lower

extremities, inability to stand or sit for longer than 15 minutes at a time, inability to lift objects over 10 pounds, and inability to do repetitive twisting and bending for longer than two minutes.

On May 5, 1997, Dr. T reported that he examined the claimant that day and that the claimant would only be able to do light-duty work with restrictions of no lifting over 20 pounds, no bending from the waist, and no reaching. Dr. T added that the claimant should be able to change positions every 20-30 minutes or walk around. Dr. N examined the claimant at the carrier's request in January 1996, December 1996, and August 1997. In January 1996 Dr. N wrote that the post-surgery MRI done in April 1995 showed no recurrent disc herniation or evidence of a new disc herniation, that the claimant exhibited significant evidence of voluntary restriction on ROM testing and symptom magnification, and that the claimant could return to work without restrictions. In January 1997 Dr. N wrote that in the December 1996 examination the claimant had voluntary restriction on ROM testing. He added that the claimant could probably return to regular duty, but that if it were totally fruitless in attempting to return the claimant to regular duty, then the claimant could be retrained for light-duty work. Dr. N diagnosed the claimant as having "probable secondary gain syndrome." In August 1997 Dr. N reported that in the examination done that month the claimant showed voluntary restriction on lumbar ROM testing and exhibited symptom magnification. He added that the claimant does not require any further medical treatment and can be returned to work or retrained for another type of work.

The hearing officer found that the claimant had some ability to work during the filing periods for the second, third, and fourth quarters and that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work during those filing periods. The hearing officer concluded that the claimant is not entitled to SIBS for the second, third, and fourth quarters. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact the hearing officer may believe all, part, or none of the testimony of any witness. The hearing officer wrote in his decision that Dr. M's reports during the filing periods in issue were conclusory, but that Dr. M did provide an additional report in December 1997. We agree with the claimant's assertion that a doctor's failure to explain his opinion goes to the credibility of the opinion and that an explanation is not a prerequisite to the expression of a doctor's opinion. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997. However, we disagree with the claimant's contention that the hearing officer's decision was based solely on his characterization of Dr. M's reports during the filing periods in issue as conclusory, because the hearing officer clearly considered the report of Dr. T and the reports of Dr. N in arriving at his finding that the claimant had some ability to work during the filing periods in issue.

The claimant states that the hearing officer did not comment on the credibility of the claimant's testimony or the credibility of Dr. M's reports; however, there is no

statutory or rule requirement that the hearing officer must comment on the credibility of a witness's testimony or a doctor's reports. It is clear from the hearing officer's decision that he did not find the evidence sufficient to establish a total inability to work during filing periods for the second, third, and fourth quarters and that he did not believe that the claimant made a genuine effort to obtain employment during the filing period for the third quarter. We conclude that the hearing officer's findings that the claimant had some ability to work during the filing periods for the second, third, and fourth quarters and that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work during those filing periods are supported by sufficient evidence and are 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 second, third, and fourth quarters.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge