APPEAL NO. 980300
FILED MARCH 25, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 7, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. With respect to the issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fourth quarter. In his appeal, the claimant essentially argues that that determination is against the great weight and preponderance of the evidence. In its response, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on March 30, 1995, with an impairment rating of 32%; that he did not commute his impairment income benefits; that the fourth quarter of SIBS ran from November 1, 1997, to January 30, 1998, with a filing period of August 2 to October 31, 1997; and that the claimant made no effort to look for work in the filing period.

Dr. B, the claimant's treating doctor, testified at the hearing that the claimant was not capable of performing any work. He stated that the claimant has significant problems in his low back, with bulging discs at L4-5 and L5-S1 and degenerative disc disease. Dr. B stated that the claimant has a cervical strain and a "minor amount of anxiety and depression." Dr. B further testified that in his medical opinion the claimant could not work because he had "major depression" secondary to pain and his inability to get well. He explained that the claimant had significant low back pain which did not "remit with usual treatments" and that made standing, sitting and walking "not tenable in a work situation," because he could not do any of these activities for a long enough period of time to accomplish a work function. In response to questioning from the hearing officer, Dr. B opined that the claimant was not capable of performing any type of work because of he is incapable of sitting, standing and walking and that if the claimant were to work, his problems would "cascade" and cause a "total breakdown."

On September 3, 1997, the claimant underwent a functional capacity evaluation (FCE), which was reported as showing that the claimant could work in a light physical demand category for five to six hours per day. The FCE report lists the claimant's lumbar range of motion (ROM) as lumbar flexion of 110°, lumbar extension of 0°, right lateral flexion of 80° and left lateral flexion of 80°. The claimant steadfastly denied that any ROM testing had been performed as part of the FCE. Dr. B testified that the ROM measurements reported in the FCE were "pretty hilarious." He noted that under Tables

56 and 57 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, 60° of lumbar flexion is considered normal. Thus, Dr. B noted that the claimant would "be able to kiss his butt. . ." if his lumbar flexion ROM was 110° as the report stated. In addition, Dr. B stated that 25° is considered normal left and right lateral flexion ROM and the 80° reported for the claimant was "beyond probability." Dr. B concluded that the FCE was invalid based upon what he considered the absurdity of the ROM findings.

Dr. M, a chiropractor, also testified at the hearing concerning what he considered the "thoroughly wrong" ROM testing listed in the September 3, 1997, FCE report. Dr. M noted that 60° is normal lumbar flexion ROM. He stated that "nobody can do 110°" and that such ROM is impossible. He stated that a person would have to be able to put his head between his legs in order to have 110° flexion. Dr. M further testified that 25° is normal ROM for right and left lateral flexion and that it was not physically possible for a person to have 80° of lateral flexion as was reported, noting that if a person were to measure that type of lateral flexion ROM he would be touching the floor.

In Texas Workers' Compensation Commission 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 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 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." We have likewise noted that medical evidence affirmatively showing an inability to work is required, if a claimant is relying on such inability to work to satisfy the good faith requirement. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer made the following findings of fact concerning the claimant's ability to work:

FINDINGS OF FACT

4. Claimant did not prove by a preponderance of the evidence that he is physically unable to perform some type of employment.

10. Claimant had some ability to work during the filing period for the fourth compensable quarter.

The claimant was steadfast in his testimony that he could not work. As noted above, Dr. B testified that the claimant had no ability to work in the filing period, noting that the claimant could not sit, stand or walk for a sufficient period of time to permit him to "accomplish a work function." Based upon our review of those findings, it appears that the hearing officer simply was not persuaded that the claimant's evidence was sufficient to satisfy the burden of proving that the claimant had no ability to work. The hearing officer as the sole judge of the weight and credibility of the evidence under Section 410.165(a) was free to disbelieve the evidence from Dr. B, even in the absence of evidence specifically controverting that evidence. In his discussion section, the hearing officer acknowledged the apparent inaccuracies in the ROM figures listed in the FCE and did not make any further reference to it. Therefore, it seems that he did not rely on the FCE in determining that the claimant had some ability to work. Rather, he decided, as was his province as the fact finder, that the claimant's evidence did not establish a total inability to work. In that regard, we note that a surveillance videotape of the claimant taken during the filing period can be interpreted as being somewhat at odds with Dr. B's testimony of the claimant's inability to perform any work functions. Our review of the record does not demonstrate that the hearing officer's decision is so contrary to the great weight and preponderance of the evidence as to compel reversal on appeal. Pool, *supra*; Cain, *supra*. The fact that another fact finder could have drawn different inferences from the evidence, which might have supported a different result, does not provide a basis for our reversing the hearing officer's decision on appeal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

While I concur with the rationale of and disposition by the author judge, I write separately because the context of the decision juxtaposed with the evidence in this case, is somewhat disturbing. While I agree that the hearing officer assesses credibility and weight of the evidence and that the claimant has the burden of proof, where the primary evidence (the FCE) to counter the testimony of the claimant and his treating doctor is so flawed and erroneous to warrant, in my opinion, NO weight at all, I am left with some doubt as to the reason for the unexplained findings of the hearing officer. That the carrier even offered the unacceptable FCE is somewhat a mystery to me. Nonetheless, I am unwilling to hold error as a matter of law and, therefore, concur with the majority opinion.

Stark O. Sanders, Jr.
Chief Appeals Judge