APPEAL NO. 980304
FILED APRIL 1, 1998

On January 15, 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 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 he is not entitled to SIBS for the third quarter. The respondent (carrier) requests affirmance.

DECISION

Reversed and rendered.

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 that 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 compensable 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 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."

It is undisputed that the claimant, who is 48 years of age, sustained a compensable back injury on _____; that he has an IR of 15% or greater (the parties state in documents that the designated doctor assigned the claimant an IR of 21%); that he did not commute IIBS; that the third quarter was from October 21, 1997, to January 19, 1998; that the filing period for the third quarter was from July 22 to October 20, 1997 (the filing period); that the claimant earned no wages and did not look for work during the filing period; that Dr. G, an orthopedic surgeon, is the claimant's treating doctor; and that as a result of his compensable back injury, the claimant underwent what Dr. G referred to as a global spinal fusion at L4-5 and L5-S1 in April 1995. There is no appeal of the hearing officer's finding that, during the filing period, the claimant's unemployment was a direct result of his impairment from his compensable injury of _____.

Dr. G wrote in February 1997 that the claimant has chronic back and leg pain and that from a functional capacity point of view the claimant would be capable of a sedentary level of employment on at least a part-time basis. Dr. G wrote in April 1997 that the claimant's back pain had improved significantly but that his left leg still hurt and he had numbness in the foot, that treatment options did not provide relief, that the lumbar fusion was solid, that the claimant has chronic radiculopathy on the left, and that the claimant would undergo a dorsal column stimulator trial for his leg pain. Dr. G also wrote in April 1997 that the claimant's return to work status would be determined once the claimant reached maximum medical improvement. Dr. G wrote in May 1997 that the claimant was doing well regarding his back pain but had ongoing leg pain and that the claimant was scheduled for a consultation with Dr. R regarding implantation of a dorsal column stimulator. Dr. G noted that the claimant had painful lumbar range of motion (ROM) and chronic radiculopathy. In June 1997 Dr. R agreed that the claimant was a good candidate for a spinal cord stimulator, that the claimant would have a trial stimulator for seven days, and that if that gave some relief to the claimant a permanent stimulator would be implanted. On July 9, 1997, Dr. G wrote that the claimant had been rated as fit for sedentary duty by a functional capacity evaluation (FCE), but due to chronic pain and radiculopathy, inability to sit for prolonged periods, and potential confusion due to medications the claimant was taking, the claimant "is not a safe candidate for any type of vocational integration."

The claimant provided a prescription profile from Dr. G for 1997 which listed medications he said Dr. G prescribed and that he took throughout 1997, and these medications were Amitriptyline, Ultram, Soma, Cephalexin, Keflex, Vicodin, Ketorlac, Elavil, and Flexeril. Attached to the claimant's prescription profile is prescription information for Soma, a muscle relaxant, which states that its side effects may include drowsiness, dizziness, nausea, or headache; prescription information for Vicodin, a pain reliever, which states that its possible side effects include dizziness, drowsiness, lightheadedness, constipation, nausea, and or vomiting; and prescription information for

Ultram, a pain reliever, which states that its possible side effects include dizziness, nausea, drowsiness, dry mouth, constipation, headache, or sweating. The prescription profile reflects prescriptions for Amitriptyline in April and July 1997, prescriptions for Ultram in July and October 1997, prescriptions for Soma in July and October 1997, a prescription for Cephalexin in August 1997, a prescription for Keflex in September 1997, prescriptions for Vicodin in September and November 1997, a prescription for Ketorlac in September 1997, a prescription for Elavil in October 1997, and a prescription for Flexeril in November 1997.

On July 11, 1997, Dr. G wrote that the claimant's primary complaint was leg pain and that he would be "resubmitting" a request for a dorsal column stimulator. The filing period began on July 22, 1997. On July 24, 1997, Dr. G wrote that since he could not guarantee 100% improvement with the dorsal column stimulator, he recommended that the claimant consider job retraining with the Texas Rehabilitation Commission (TRC) and that, for the claimant's psychological benefit, he believed that "a return to his previous employment even in a modified way as a trucker would be good for him." On July 25, 1997, Dr. G wrote that the claimant was still complaining of leg pain, that the claimant continued to have painful restricted ROM of the lumbar spine, that lumbar muscle spasms were present, that the claimant had decreased sensation in the left leg, that he would be requesting a dorsal column stimulator, and that the claimant would continue on his medications. Dr. G wrote on August 14, 1997, that the claimant was doing well with regard to back pain, although the claimant has significant back pain with weather changes; that the claimant's leg pain was persistent; that the claimant is unable to walk for very long distances without his leg giving way; that the claimant continued to have pain with ROM; that the claimant was scheduled for a dorsal column stimulator implantation on August 22, 1997; that the claimant is unable to work; that he had recommended in the past that the claimant go to the TRC for retraining; and that due to the fact that the claimant would be undergoing the stimulator implantation, the claimant would not be able to work for a "period of time."

In an operative report dated August 22, 1997, Dr. R gave preoperative and postoperative diagnoses of low back pain, failed back surgery syndrome, and lumbar radiculopathy left leg, and noted that the procedure he performed on the claimant that day was a "temporary lead placement of spinal cord stimulation using C-arm fluoroscopy as a guide." On August 27, 1997, Dr. G wrote that the claimant had significantly decreased leg pain, but an increase of upper back pain; that the claimant continued to have pain with ROM; that spasms were present; and that the claimant had decreased sensation in the left lower extremity. Dr. G continued to diagnose the claimant as having chronic radiculopathy.

On August 27, 1997, Dr. R wrote that he saw the claimant that day for removal of the temporary lead from the stimulator and that the claimant stated that his pain improved 80 to 90%, that the burning pain down his leg was gone, that he still had some pain, and that he had numbness in the left foot. Dr. R also wrote that the claimant was able to tell where his foot is, where before he could not; that the claimant was walking

better; and that he, Dr. R, considered the stimulator trial to be successful and that he would schedule the claimant for placement of a permanent stimulator. In an operative report dated September 2, 1997, Dr. R gave preoperative and postoperative diagnoses of low back pain, failed back surgery syndrome, and lumbar radiculopathy left leg, and he noted that the procedure performed was the "permanent placement of a spinal cord stimulator lead within the epidural space using C-arm fluoroscopy as a guide" and placement of wire and a generator. The claimant said that the only thing that changed after his spinal cord stimulator was installed was that he was able to feel his left foot when it hit the ground. He also said that his back pain decreased 25%, that he has no feeling in his left leg, that the stimulator sends electricity to his foot so that he can feel it when it hits the ground, that he does not fall as much as he did before the stimulator was inserted, but that he still falls.

Dr. R noted on September 15, 1997, that the claimant's sutures were still in place, that the sutures were to be removed on September 18, 1997, and that the claimant stated that the stimulator seemed to be taking care of his pain. Dr. R further noted that he explained to the claimant that the tissues were still scarring and that he reprogrammed the stimulator to where the claimant said he was much better. Dr. R also wrote that the claimant told him that he had quit taking his pain medication five days before the visit of September 15th, that the claimant received excellent pain relief from the stimulator, and that the claimant seemed comfortable with just the spinal cord stimulator, which Dr. R considered a success. Dr. R wrote that the claimant was to return to him in one month, that he was to continue care with Dr. G, and that he was to get his stitches removed. On September 23, 1997, Dr. G wrote that the claimant was having postoperative pain and that the claimant told him that "the stimulator has helped decrease the pain in his leg when it is functioning." On October 2, 1997, Dr. G wrote that the stimulator had given the claimant a great deal of relief, that the claimant has restricted ROM, that the claimant's decreased sensation is chronic in the lower extremity, that the claimant has chronic radiculopathy, that the claimant is to maintain his medications, and that "it seems that due to the combination of medications that he requires, his chronic radiculopathy, and ongoing medical problems, that he is really a very poor candidate for any type of vocational reintegration."

Dr. G wrote on October 6, 1997, that the claimant has chronic pain and that "he takes medications, which affect and cloud his consciousness, which make him a poor candidate for any type of vocational integration, due to this combination of factors, and I believe that for all essential purposes, that he is unlikely to be reintegrated into the workforce." Dr. R wrote that he reprogrammed the claimant's spinal cord stimulator on October 20, 1997, that the claimant seemed to be doing well, and that the claimant said that the stimulator took care of about 60% of his pain. The filing period ended on October 20, 1997. In letters dated October 30, 1997, Dr. G wrote that the claimant has significant pain and he continues to have chronic radiculopathy with a dorsal column stimulator; that the claimant had some relief with the stimulator; that the claimant's back pain improved with back surgery; that he had recommended that the claimant not return to work; that the claimant is not capable of returning to work; that from July to October

the claimant underwent surgical procedures; that the claimant has been off work due to those surgical procedures and "our medical recommendations"; that the claimant is still recovering from the surgical procedures; that the claimant is not fit for any type of gainful employment due to a combination of being postoperative and taking medications, which, Dr. G wrote, cloud the claimant's consciousness and make him a potential danger to himself and others; and that the claimant would be considered for an FCE once the claimant recovers from the surgery of the dorsal column stimulator insertion.

On November 14, 1997, Dr. G wrote that the claimant told him that whenever the dorsal column stimulator is on it reduces his pain about 50%, that the claimant is able to walk without his leg giving way, that the claimant continued to have some pain around the incision site, that the claimant is still recuperating from surgery, and that "due to the fact that he is recuperating from his surgery, and his medications, he is not capable for gainful employment at this time." On December 5, 1997, Dr. G wrote that the medications the claimant takes cause dizziness and drowsiness "and therefore, even in a sedentary position, he can indeed find himself at risk to himself and to others." The claimant underwent an FCE on December 30, 1997, and Dr. G wrote in the FCE report that "for the purposes of returning [claimant] to work at this time, we recommend sedentary work duty." Dr. G also wrote that the claimant's ability to perform sedentary work would be extremely limited due to the claimant's "inability to sit."

In an affidavit dated January 14, 1998, Dr. R stated that he had reviewed a letter from Dr. G and a list of medications taken by the claimant as well as his own medical records, and that based on his personal observations and the opinion of Dr. G, it is his opinion that the claimant was not capable of engaging in employment for the period from July 22 to October 22, 1997. The claimant said that Dr. G told him during the filing period that his taking of medications made it unsafe for him to work and that Dr. G has never told him since the stimulator was inserted that he could go back to work. The claimant also said that Dr. R told him that after the insertion of the stimulator he could not go back to work for at least six months.

The hearing officer found that the claimant had some ability to work during the filing period and that he did not make a good faith effort to obtain employment commensurate with his ability to work during the filing period. The hearing officer concluded that the claimant is not entitled to SIBS for the third quarter. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). We should set aside a decision of a hearing officer only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995.

In February 1997 Dr. G wrote that the claimant could perform sedentary work part-time. However, Dr. G's subsequent reports reflect that the claimant's left leg pain failed to respond to treatment and that the chronic radiculopathy the claimant experiences worsened to the point where by April 1997 Dr. G was recommending a spinal cord stimulator in hopes of providing the claimant some relief from his constant

pain. Dr. R agreed with Dr. G that the claimant might benefit from the insertion of a spinal cord stimulator, and two invasive surgical procedures were performed on the claimant's back during the filing period, one for the stimulator trial period and the other for the permanent implantation of a stimulator. Dr. G wrote during the filing period that the claimant was unable to work and set forth findings supporting his opinion. While Dr. R noted improvement in the claimant's condition following the insertion of the stimulator, Dr. G noted that the claimant continued to have pain and chronic radiculopathy following the stimulator surgeries and that the claimant was to keep taking his medications. Dr. G wrote at the end of October that the claimant was still recovering from his spinal cord stimulator surgeries. Dr. R's affidavit reflects his opinion that the claimant was not capable of engaging in employment during the filing period. Considering the written opinions of Drs. G and R that the claimant was unable to work during the filing period, the lack of any medical opinion contradicting the opinions of Drs. G and R concerning the claimant's inability to work during the filing period, and the fact that the claimant underwent two surgeries during the filing period as a result of his compensable injury, we conclude under the particular facts of this case, that the hearing officer's finding that the claimant had some ability to work during the filing period, is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The overwhelming weight of the medical evidence establishes that the claimant was unable to work during the filing period as a direct result of his impairment from his compensable injury, and, following our opinion in Appeal No. 931147, *supra*, the claimant was not required to look for work during the filing period in order to meet the good faith criterion for SIBS.

The hearing officer's decision is reversed and a new decision is rendered that the claimant is entitled to SIBS for the third quarter. The carrier is ordered to pay the claimant SIBS for the third quarter.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge