APPEAL NO. 990049

On September 24, 1998, a contested case hearing (CCH) was held. 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 CCH were the impairment rating (IR) of respondent (claimant) and whether claimant is entitled to supplemental income benefits (SIBS) for the first quarter. Appellant (carrier) requests reversal of the hearing officer's decision that claimant's IR is 17% as reported by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission) and that claimant is entitled to SIBS for the first quarter. No response was received from claimant.

DECISION

Affirmed.

Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the other medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors.

Claimant was working as a cook's helper at a school on _____, when she sustained a compensable injury. According to medical reports, claimant slipped and fell on her back, hitting her head and upper back with the onset of severe neck pain. Claimant underwent conservative treatment with Dr. W and then began treating with Dr. SV, who performed cervical surgery on claimant in April or May 1997. On August 18, 1997, claimant was seen by Dr. SP for a required medical examination and he certified on that date that claimant reached maximum medical improvement (MMI) on August 18, 1997, with a 17% IR. Dr. SV agreed with Dr. SP's certification of MMI and IR. The parties stipulated that claimant reached MMI on August 18, 1997.

Apparently there was a dispute of the IR because the Commission chose Dr. SA as the designated doctor and he examined claimant on October 15, 1997, and certified on that date that claimant has a 17% IR. Dr. C did not examine claimant but did critique Dr. SA's report, asserting that claimant gave submaximal effort on cervical flexion range of motion (ROM) testing and that cervical extension measurements did not meet consistency validity requirements. Dr. SA responded that he would not change the IR because claimant established consistent measurements, provided excellent effort, and met an adequate measure of validity. Dr. SA gave two percent impairment for cervical flexion ROM and two percent impairment for cervical extension ROM. It is clear from a review of Dr. SA's cervical ROM worksheet that the first three cervical flexion measurements recorded by Dr. SA would meet consistency criteria if either the maximum or median motion value is used and that the first three cervical extension measurements recorded by Dr. SA would meet

consistency criteria if the median motion value is used. *See* Texas Workers' Compensation Commission Appeal No. 980985, decided June 26, 1998.

We note that Dr. SP gave the claimant two percent impairment for cervical flexion ROM and three percent impairment for cervical extension ROM, which supports Dr. SA's findings on impairment for cervical flexion and extension ROM. More importantly is the fact that only two doctors, Dr. SP and Dr. SA, evaluated claimant for an IR and both determined that claimant's IR is 17%, and in addition, Dr. SV agreed with a 17% IR. The hearing officer found that the great weight of the other medical evidence is not contrary to Dr. SA's report and concluded that claimant has a 17% IR. We conclude that the hearing officer's decision that claimant's IR is 17% is supported by sufficient evidence and is not contrary to the great weight and preponderance of the evidence.

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 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. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by claimant during the prior filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)).

The parties stipulated that claimant did not commute IIBS. Claimant has an IR of 17%. The first quarter was from August 11 to November 9, 1998, and the filing period for the first quarter was from May 13 to August 10, 1998. Claimant is 44 years of age, has a general equivalency diploma, and went to trade school, where she obtained a nurse's aide certification and a food service certification. Claimant underwent a functional capacity evaluation on May 19, 1998, and the evaluator, a physical therapist, reported that claimant was performing at a light level and that that level did not match the moderate level required of her previous position. Dr. SV wrote on July 7, 1998, that at that time the claimant was unable to perform the duties of her regular work and recommended a work conditioning program. Dr. SV referred claimant to Dr. SP for an occupational rehabilitation program, which claimant undertook from July 14 to July 24, 1998.

Dr. SP wrote that claimant made good progress during her two weeks of rehabilitation, that she elected to be discharged and did not complete the program (another report reflects that claimant was present for eight of the nine scheduled days), that she does not plan to return to work but plans to return to school at a community college, and that she exhibited a moderate level of motivation. A report from a physical therapist involved in the rehabilitation program states that the claimant could return to work at a light physical demand level, that she could lift 20 pounds occasionally, and that she had no plans to return to work.

Claimant said that she is willing and ready to work and that she looked for jobs within her capabilities and limitations during the filing period in the newspaper and by calling job lines. She said that she was told not to lift more than 20 pounds. Claimant's Statement of Employment Status (TWCC-52) for the first quarter lists employment contacts prior to and during the filing period. Three employers are listed during the filing period. Claimant said she filed an employment application with those employers. Each involves a food service position. She said one employer, a retirement home, that she listed during the filing period offered her a job on the evening shift, but that she was unable to accept that job because she would be by herself during that shift and the lifting requirements of the job exceeded her limitations. Claimant's TWCC-52 also reflects that during the filing period she contacted the Texas Workforce Commission and the Texas Rehabilitation Commission (TRC). She said that she enrolled in a community college in August 1998, that she attends college two days a week, and that TRC is paying for her college. She said her course of study is in nutrition. A registration receipt reflects that TRC is paying her tuition and that her course started August 24, 1998, which was after the filing period. In addition to the three employers listed on the TWCC-52 during the filing period, claimant named eight to 10 other employers, including hospitals, nursing homes, and schools, she said she contacted through telephone job lines and indicated that those contacts were made during the filing period.

The hearing officer found that claimant made good faith efforts to look for work commensurate with her ability to work and that her unemployment during the filing period was a direct result of her impairment. He concluded that claimant is entitled to SIBS for the first quarter. Carrier argued, as it does on appeal, that claimant's job search was self-limiting in that she applied for food service jobs. Whether claimant made a good faith effort to obtain employment commensurate with her ability to work and whether her unemployment was a direct result of her impairment were fact questions for the hearing officer to determine from the evidence presented. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. Appeal No. 950084. We conclude that the hearing officer's findings on the good faith and direct result criteria for SIBS entitlement and his decision that the claimant is entitled to SIBS for the first quarter are supported by sufficient evidence and are not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge