APPEAL NO. 990091

On December 10, 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 appellant (claimant) requests reversal of the hearing officer's decision that he is not entitled to supplemental income benefits (SIBS) for the seventh quarter. The respondent (carrier) requests affirmance.

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. 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)). An injured worker 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. Rule 130.104(a). Claimant had the burden to prove that he is entitled 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, the Appeals Panel 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." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The Appeals Panel has stressed the need for medical evidence to show an inability to work if that is being relied on by claimant. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. In Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, the Appeals Panel noted that an assertion of no ability to work must be "judged against employment generally, not just the previous job where the injury occurred."

It is undisputed that claimant has an IR of 15% or more and that he did not commute IIBS. The seventh quarter was from August 6 to November 4, 1998, and the filing period for that quarter was from May 7 to August 5, 1998 (the filing period). Claimant was

remodeling apartments on _____, when he fell while walking backwards carrying a plank and sustained a compensable injury. Claimant said that he injured his low back, hips, and right knee. Claimant underwent back surgery in July 1994 for a herniated disc at L5-S1. He moved to (State 1) in 1995. He underwent a second back surgery in June 1996 for a recurrent disc herniation at L5-S1.

In October 1996 Dr. B released claimant to normal activities with a lifting limitation of 60 pounds, but in January 1997 Dr. B noted that claimant continued to have a lot of pain and wrote that he would let claimant go back to light-duty work with a lifting limitation of 20 pounds. Dr. W examined claimant in December 1996 and certified that claimant has a 15% IR. Dr. M examined claimant on May 4, 1998, and wrote that in May 1997 Dr. H, D.C., recommended light-duty work for claimant. Dr. M wrote that he would restrict claimant to sedentary work, that he recommends claimant undertake physical therapy, and that claimant's inability to work full duty is a direct result of his impairment from his injury. He attributed claimant's complaints of back pain and radicular symptoms into the left lower extremity to scar tissue from his surgeries. Claimant said he did not get a copy of Dr. M's report until a benefit review conference.

Claimant has been treating with Dr. L, D.C., since October 1997 and Dr. L reported on July 17, 1998, that claimant "now is pain free most of the time with only minor discomfort unless aggravated by falls." Dr. L also stated that claimant "is unable to stay pain free if he remains sitting or standing for more than 30 minutes, which for all intents and purposes leaves him unemployable. . . ." Claimant testified that during the filing period Dr. L did not release him to go back to work, that Dr. L performed spinal manipulations on him, and that he did not look for work. He said that at a prior hearing he was told to get in touch with a vocational rehabilitation agency in (State 1). He said that in April 1998 he started a training program with the (State 1) Department of Vocational Rehabilitation (Department), that the Department referred him to a computer school to undertake a computer and clerical training course, that the course usually takes 60 days to complete, that he was scheduled to go to that course three days a week for four hours a day, that because his back was bothering him he often missed classes, that it took him more than twice the usual time to complete the course, and that he completed the course on November 4, 1998.

The hearing officer found that claimant had an ability to work in a sedentary to light-duty capacity during the filing period, that claimant did not apply for employment during the filing period, that claimant did not make a good faith effort to seek employment during the filing period, and that claimant's unemployment during the filing period was not a direct result of his impairment. The hearing officer concluded that claimant is not entitled to SIBS for the seventh quarter. Whether claimant met the good faith and direct result criteria for SIBS during the filing period were factual determinations to be made by the hearing officer 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. The conflicting medical evidence on claimant's ability to work was for the hearing

officer to resolve. The hearing officer could also consider that claimant's retraining took at most 12 hours per week during the weeks that claimant went to scheduled classes. 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. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is 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). We conclude that the hearing officer's decision that the claimant is not entitled to SIBS for the seventh quarter is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge