APPEAL NO. 990094

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 15, 1998. The filing period for the 10th quarter for supplemental income benefits (SIBS) began on May 9, 1998, and ended on August 7, 1998. The hearing officer determined that during that filing period the appellant (claimant) had some ability to perform some work, that she was not excused from attempting to obtain employment, and that she did not attempt to obtain employment and concluded that she is not entitled to SIBS for the 10th quarter. The claimant appealed, contended that the hearing officer may have considered a videotape of her that was not admitted into evidence, that the hearing officer erred in determining that she had some ability to work during the filing period, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBS for the 10th quarter. The respondent (carrier) replied, stated that the videotape of the claimant was not available for the hearing officer to review, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The Decision and Order contains a statement of the evidence. Only a summary related to the ability of the claimant to work during the filing period will be repeated in this decision. The claimant injured her lower back in _____, had back surgery in November 1993, has a 27% impairment rating, and has not returned to work after sustaining the injury. She testified that in May 1996 she started having a lot of lower back pain with pain radiating into her right leg, that the pain became worse and worse, and that it became real bad at the end of October. She stated that she saw the report of a videotape; that she was alright in May 1996; that things started getting bad about the middle of June; that Dr. Z, her treating doctor, has not released her to return to work; that he does not think that she will ever be able to return to work; and that she does not think that she could work because if she walks a lot or stands for a long time she starts hurting.

In a report dated May 5, 1998, Dr. Z stated that the claimant said that she was doing well and had less pain; said her diagnosis was lumbosacral radiculopathy with adhesions and peripherial diabetic neuropathy; and reported that she continued in an off-work status. In a report dated July 7, 1998, Dr. Z indicated that the claimant complained of low back pain radiating to the lower extremities that was worse lately and said that she would remain in an off-work status. In a report of an MRI dated July 22, 1998, Dr. S stated that his impression was:

1. Mild annular bulging at L4-5 level, slightly more prominent to the right of the midline with slight disc protrusion in this region.

2. Moderate compression deformity of the inferior endplate of L4-5 vertebral body representing a change since 1992.

3. Mild annular bulging at the L5-S1 level.

On July 23, 1998, Dr. Z discussed the MRI report with the claimant, kept her in an off-work status, and said that she needed x-rays of the lumbar spine. In a letter dated August 3, 1998, Dr. Z said that the claimant took Tylenol # 2 for pain, used a TENS unit, and continued to be off work due to back pain. In a letter dated August 11, 1998, Dr. Z reported that neurological examination showed decreased lumbar range of motion, tenderness in the lumbar sacral area, hypoactive although equal and symmetrical deep tendon reflexes, and no motor deficit; that conservative treatment would be continued; and that she was to remain off work. In a letter to the carrier dated September 1, 1998, Dr. Z wrote "A[a]ccording to the patient, she is unable to work because of pain.

A report of an investigation states that the videotape of the claimant was obtained on May 28 and June 9, 1998; that the videotape depicts the claimant driving a vehicle, exiting a vehicle, bending at the waist retrieving bags of food from the vehicle, retrieving a package from the trunk of the vehicle, carrying a bag, and walking; and that all of this was done in a normal manner with no apparent restriction. At the request of the carrier, the claimant was seen by Dr. G-V. Apparently, he was provided with a copy of the videotape of the claimant. In a letter dated July 7, 1998, he stated that the claimant was able to engage in activity without much visible problem; that she was able to walk, stoop, and lift extremely well; and that it appeared that she should be able to return to at least a light to moderate job. In a letter dated July 9, 1998, Dr. G-V said that it was rather evident that the claimant had normal movement and normal gait that were not consistent with her examination and that in his opinion she could return to a medium job. On September 25, 1998, Dr. Z wrote that the claimant had been seen one time by Dr. G-V; that Dr. G-V advised that she could do some type of work; that she continues to have low back pain radiating to the lower extremities; that his records indicate that it has been worse starting with the visit on May 5, 1998; that she uses a TENS unit; that an MRI in July showed post-operative changes; and that she is unable to return to work or to even start on any work program.

The carrier did not provide the claimant a copy of the videotape and withdrew the videotape from exhibits that it offered. There is no indication that the hearing officer viewed the videotape. The investigative report based on the videotape and Dr. G-V's comments, apparently based on his viewing of the videotape, were in evidence and it was appropriate for the hearing officer to consider that evidence.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, 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. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated claimant's inability to do any work must be supported by medical evidence. In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. The hearing officer's determinations that during the filing period for the 10th quarter the claimant had some ability to work and did not look for work and that she is not entitled to SIBS for the 10th quarter are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge