APPEAL NO. 990117

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 16, 1998, a contested case hearing (CCH) was held. The issues concerned whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his 18th quarter of eligibility, and whether the respondent (carrier) had waived the right to dispute entitlement.

The hearing officer found that claimant was not entitled to SIBS because he had not made a good faith search for employment commensurate with his ability to work, and that his unemployment was not the direct result of his impairment. He found that the carrier was not required to request a benefit review conference (BRC) but had timely done so in any case.

The claimant has appealed, arguing that there is no job he can do because of his considerable pain. He argues that the adjuster lied. He attaches some documents not presented at the CCH. He argues that his treating doctor and psychologist both agree he cannot work. The finding that the carrier timely requested a BRC is appealed primarily by reference to the finding of fact as disputed. There is no response from the carrier.

DECISION

Affirmed.

The claimant was employed as a dock worker on _____, when he hurt his back lifting an extra large full-screen television. He had not worked since sometime in 1993. Although claimant had a course of injections (a complete rhizotomy), he had not had surgery. He said his entire family was being treated by a psychologist, Dr. B, who had concluded from what claimant's children told him that claimant could not work. Claimant's treating doctor was Dr. D, who also has filed several letters stating that because of his pain the claimant cannot perform any gainful employment and is not able to undergo vocational rehabilitation. The record indicated that claimant was 42 years old during the filing period in issue, which ran from June 22 through September 20, 1998.

Claimant had a 17% impairment rating (IR) for his injury and, although he asserted multiple injuries to his entire body, it appears that the IR resulted primarily from a lumbar injury but this was not made clear. In any case, the claimant was examined by a doctor for the carrier, Dr. W, on October 22, 1996, who, at that time, noted the lack of objective signs of injury to the cervical area, finding the only objective condition to be L4-5 and L5-S1 disc disruption. Dr. W noted that in December 1992 he had examined the claimant and MRI scans at that time were normal for all areas of the spine. Dr. W commented that claimant's working diagnosis was apparently myofascial pain syndrome and chronic pain problems with related depression. Dr. W's IR was based solely upon the lumbar area, but this was not the percentage ultimately adopted.

The claimant contended that he had made about 10 informal inquiries for employment during the filing period. He also said his family bred dogs. Claimant was asked if he would have accepted a job and he said he would have tried, but expected that the effort to do a job would have made him bedridden for weeks. Claimant contended he could not walk far due to muscle spasms and that he also had spasms in his arms. He had, however, driven approximately one and one-half hours to get to the CCH, although he said he would likely let his wife drive home. Claimant said that while he thought he probably had seen Dr. D during the filing period, he was unable to specifically recall when. He said he had not been accepted for rehabilitation by the Texas Rehabilitation Commission (TRC).

Claimant had a functional capacity evaluation in March 1998 at the request of Dr. D. The therapist administering the test stated that claimant made submaximal effort (the claimant said that he had taken several pain pills in preparation for the test). The therapist commented that there was overt symptom magnification. He estimated (because claimant did not pass all validity indicators) that the claimant could work in a light capacity. The therapist noted in his report that claimant's initial diagnosis had been lumbar sprain. The therapist noted that claimant's gait was normal and did not correlate with reports of pain. His range of motion testing was invalid, but movement patterns also did not correlate with reported pain (which was subjectively reported as "10," the highest measurement on a one to 10 scale). Against this were Dr. D's letters and Dr. B's assertion that he would not support a request for "disability" that he believed resulted from faking, and that he felt strongly that claimant's pain and limitations were bona fide.

The adjuster testified that TRC told him that claimant was not a candidate for rehabilitation due to his attitude. The hearing officer characterized this testimony as gross hearsay and instructed the carrier to develop more substantive testimony. The claimant's additional evidence, submitted with his appeal, is apparently directed at showing that the carrier was not entirely truthful in its testimony. We note that we may not consider evidence not submitted at the hearing but, in any case, the hearing officer appears to have given this testimony scant weight on the matter of TRC's actions, which was not set forth as any part of the decision.

On the matter of timely request for a BRC, the record showed that the carrier requested a BRC within 10 days of its receipt of the claimant's Statement of Employment Status (TWCC-52). The claimant was not eligible for SIBS for his 17th quarter; the carrier argued it thus had no duty to request a BRC for the 18th quarter. Because the claimant's 18th quarter request was essentially a request to reinstate entitlement, 28 TEX. ADMIN. CODE § 130.105(f) (Rule 130.105(f)) applies. This rule states that a carrier who is denying reinstatement need only inform the claimant how to contest the determination. We affirm the hearing officer's determination that there was no waiver.

The legislature has required that applicants for SIBS undertake a job search "commensurate" with the ability to work. The purpose of SIBS is to support a gradual reentry into the workplace, not to compensate for a "diagnosis." And ability to work is not

measured only by whether the injured worker can hold a full-time job. As we stated in Texas Workers' Compensation Commission Appeal No. 980722, decided May 28, 1998:

> Because SIBS are payable for underemployment as well as unemployment, and a worker need only search for jobs commensurate with the ability to work, an injured worker could obtain part-time employment and still qualify, if this is commensurate with what the doctor judges to be the maximum ability of the worker.

The requirement to search is particularly crucial because claimant does not qualify for lifetime income benefits and income benefits otherwise will end at 401 weeks after the date they accrued. Section 408.083. 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, 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. We have held that the burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and that a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

The hearing officer indicated that he did not believe Dr. D's blanket assertion that no work could be done to be credible. We note that the letters in the file appear to be based on reports of pain. However, given the limitation of SIBS by the legislature to persons whose IR is 15% and above, it stands to reason that there was a consideration that the obligation to search for work would indeed fall on those who may be in pain due to impairment. The credibility of the witnesses and evidence was the primary responsibility of the hearing officer to assess. An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

Having reviewed the evidence and appeal, we cannot agree that the hearing officer, in finding that neither the job search nor "direct result" criteria were met, made a decision that was so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust, and we affirm his decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge