

APPEAL NO. 990240

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 11, 1999, a hearing was held. She (hearing officer) determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the first and second compensable quarters; she also found that claimant would not be entitled to SIBS for part of the second quarter because of late filing, if he had qualified for it otherwise. Claimant asserts that he had no ability to work and cites the medical evidence of Dr. L; he adds that he should not be penalized for being late in the second quarter because of his hospitalization. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant testified that he hurt his low back on _____, when he picked up a container, thinking it empty, but it was not. The parties stipulated that claimant's impairment rating is 16%, that he had commuted no benefits, that the filing period for the first quarter began on April 15, 1998, and the filing period for the second quarter began on July 15, 1998.

The hearing officer found that claimant did not attempt in good faith to find work during either filing period in question. While she did not find that claimant was able to do some work, her Statement of Evidence shows that she determined that claimant did not show that he was unable to do any work at all. A finding of fact that claimant was unemployed during both filing periods, as a direct result, was not appealed and accurately follows the evidence presented at the hearing that claimant did not have any job and could not return to heavy work as an electrician.

Claimant also testified that he had fusion surgery in March 1996 at L4-5. His doctor, Dr. L, provided a short form statement that claimant was "disabled" from July 15 to October 13, 1998. While claimant provided no progress notes from any treatment or evaluation by Dr. L, he did provide several letters which Dr. L wrote. Two in June and one in August 1998 fall in the respective filing periods. One mentions an incident in which claimant's legs gave way causing a fall and referred to increased pain in May 1998. Dr. L also referred to pain in the back and legs, to muscle tightness, decreased flexibility of the low back, and in August, to a lymph node problem. Also, in August, a spinal cord stimulator trial was suggested. Then, in November, just beyond the filing periods in question, Dr. L wrote that claimant cannot do any lifting, carrying or bending and cannot sit, stand, or walk for any period of time; he concluded, "there is no way that this man can work." While the last statement could be interpreted as fairly emphatic on the part of Dr. L, his medical evidence was not all that was considered at the hearing.

Claimant had a functional capacity evaluation in July 1997, which was said by Dr. P to show that claimant could do light work, including lifting up to 10 pounds frequently. Dr. P wrote on July 23, 1998, that he had examined claimant and found no change from his condition when he evaluated him in July 1997. From this opinion the hearing officer could reasonably conclude that Dr. P found claimant able to do light work at a time just about in the middle of the two filing periods in question. Whether or not Dr. L provided conclusory opinions, the hearing officer could choose to give more weight to the opinion of Dr. P than she did to that of Dr. L even though Dr. L is the treating doctor.

The Appeals Panel will only overturn a factual determination, such as whether a claimant is capable medically of some type of work, when the determination is against the great weight and preponderance of the evidence. In this case, with conflicting medical evidence, the determination is not against the great weight of the evidence and the finding that claimant did not attempt in good faith to obtain work is sufficiently supported by the evidence.

With a determination that claimant did not file his Statement of Employment Status (TWCC-52) for the second quarter until November 23, 1998, we cannot overturn the conclusion of law that claimant would not receive a full quarter's SIBS even if he had attempted in good faith to find work. We note that Dr. L's records refer to hospitalization of claimant for various reasons in 1997, but do not indicate such occurred past early 1998. Dr. P does note in his July 1998 review that claimant passed a kidney stone on June 26, 1998, which could have resulted in hospitalization.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge