

APPEAL NO. 990244

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 13, 1999. The issues at the CCH were whether: (1) appellant (claimant) had disability from September 24, 1991, through April 15, 1993, resulting from the \_\_\_\_\_, injury; and (2) claimant is entitled to supplemental income benefits (SIBS) for the first through fifth compensable quarters. The hearing officer determined that claimant did not have disability and that she is not entitled to SIBS for the first five quarters. Claimant appeals the disability and SIBS good faith determinations on sufficiency grounds. The direct result determination in claimant's favor was not appealed. Respondent (carrier) responds that sufficient evidence supports the challenged determinations.

DECISION

We affirm.

Claimant first contends the hearing officer erred in determining that she did not have disability for the claimed period. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16).

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that on \_\_\_\_\_, she sustained a compensable injury to her back, neck, right hand, and wrist. She said she treated with Dr. BR, that he gave her a light-duty work release, and that she continued to work until Dr. SC removed a ganglion cyst from her wrist in April 1991. She said she has not worked since that time and that she received temporary income benefits from April 16, 1991, to September 16, 1991. Claimant claims disability from September 24, 1991, to April 15, 1993, which is the date of statutory maximum medical improvement. She asserts that she was treating with Dr. W during that time and that he had taken her off work. There is an off-work slip from Dr. W in the record which states that claimant was "totally disabled" from \_\_\_\_\_, to January 19, 1993. However, this off-work slip was dated in 1998. The record also contains a medical record from Dr. W in which he said that claimant did not give maximum effort during work hardening, that a pain clinic was considered, claimant was counseled about "alternative job duties, and she was "given a release as of September 19, 1991."

The hearing officer determined that claimant did not have disability from September 24, 1991, to April 15, 1993, stating that the medical evidence regarding disability is not

credible. The hearing officer was the judge of the credibility of the witnesses and medical evidence. As the fact finder, she considered the issue of whether claimant had disability for the claimed period, and resolved this issue against claimant. We will not substitute our judgment for hers in that regard because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Given our standard of review we will not overturn the hearing officer's decision. *Id.*

Claimant contends the hearing officer erred in determining that she is not entitled to SIBS for the first five quarters.<sup>1</sup> She contends that the medical evidence shows that she had no ability to work during the filing periods in question and that she met the good faith SIBS criterion.

The parties stipulated that: (1) claimant sustained a compensable injury on \_\_\_\_\_; (2) claimant had an impairment rating (IR) of 25%; and (3) she did not commute any of her impairment income benefits (IIBS). The filing periods for the five SIBS quarters in question began on June 23, 1994, and ended on September 21, 1995.

Claimant testified that she was unable to work during the filing periods in question due to her compensable injury of \_\_\_\_\_, and that she did not look for work. She testified that she attempted to work for a week at a motel desk, but that she was unable to do the work. Claimant said she sustained a subsequent cervical injury in March 1993 on a ride at an amusement park. During a deposition taken during the amusement park personal injury lawsuit, claimant said that she did not think she would be able to go back to work both because of her neck injury and because of pain in her back. Claimant testified that she has undergone three spinal surgeries for her \_\_\_\_\_ compensable back injury, and that Dr. SC has indicated that she requires more surgery. Claimant said her first lumbar spinal surgery was in March 1996, which was after the filing period in question.

In a January 14, 1994, medical report dated a few months before the filing periods began, Dr. PE stated that he saw claimant regarding her lumbar spine, that she had "minimal residual signs" and "a fairly normal range of motion," that claimant is motivated to return to work, and that she may need work hardening. In an undated letter, Dr. PE stated that claimant was unable to work from December 1993 to January 1994. In an October 1998 letter, Dr. R stated that claimant has multiple herniated discs, that she was unable to work from August 1994 to August 1995, and that she is under the care of Dr. SC for surgical intervention. In January 1992, Dr. W reported that a lumbar MRI report said claimant had a "mild posterior bulge at L-4 L-5" and that a myelogram showed "a mild defect at L4/5." A 1993 cervical MRI report states that claimant has a small bulging disc and mild osteoarthritic changes. In a July 1998 report, Dr. SC stated that an MRI showed "a herniated central disc at 4/5 with changes about her SI joint."

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<sup>1</sup>We will construe claimant's appeal as an appeal regarding all five quarters.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then that employee may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. The claimant has the burden to prove he has no ability to work because of the compensable injury. When a claimant alleges a total inability to do any work, that contention generally must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994.

In this case, the claimant had the burden to prove that she had no ability to work during the filing periods in question. The hearing officer was the sole judge of the credibility of the medical evidence and determined whether the medical evidence showed that claimant had no ability to work. The hearing officer specifically found that claimant was not credible, that she was capable of doing some work during the filing periods in question and that claimant did not meet the good faith requirement. The hearing officer made her determinations regarding good faith and ability to work based on the evidence before her. Because the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for hers. Cain, *supra*. We conclude that the hearing officer did not err in determining that claimant is not entitled to SIBS for the first five quarters.

We affirm the hearing officer's decision and order.

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Judy Stephens  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Alan C. Ernst  
Appeals Judge