

APPEAL NO. 990281

Following a contested case hearing held on January 21, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the seventh compensable quarter, which began on October 22, 1998, and ended on January 20, 1999. The appellant (self-insured) has appealed, urging that the hearing officer's determination is against the great weight of the evidence. Claimant has responded, urging the sufficiency of the evidence to support hearing officer's determination.

DECISION

Affirmed.

The parties stipulated that claimant was entitled to SIBS for the previous quarters and that the filing period for the seventh compensable quarter began on July 23, 1998.

Claimant testified that on _____, while employed as a supervisor in an office by (employer), she leaned over and twisted and tugged to open a stuck credenza drawer and injured her neck and low back; that she has since had conservative treatment, including chiropractic treatment from her treating doctor, Dr. H, and epidural steroid injections from Dr. D, a neurologist, until the self-insured stopped authorizing them; and that she also had work hardening from chiropractors Dr. SM and Dr. JM. She further stated that she attempted to return to work over a four-month period but was only able to work four to eight hours per week and would have to lie down after working for a short while; that the most she was able to work in a week while attempting to return to work was 12 hours; and that Dr. H has not released her to return to work and disagrees with the contrary opinions in the reports of the self-insured's doctor, Dr. G, and the functional capacity evaluation (FCE). Claimant, who stated she is 51 years of age, said she is on medications, sleeps poorly, is helped with her daily activities by her husband and her sister, and cannot drive for a long period of time. She also said that she contacted the Texas Rehabilitation Commission (TRC). In evidence is a TRC letter dated October 22, 1998, stating that claimant has been active with the TRC since September 3, 1998, that services to claimant were delayed by the hiring of a new counselor, and that claimant will be scheduled to meet with the counselor as soon as possible after the new counselor starts work on November 2, 1998. Claimant also stated that the TRC had closed her file because her doctor said she cannot sit through classes.

According to the April 30, 1998, FCE report, claimant is fit to work within the parameters outlined in the functional abilities form and with alternate sitting and standing with ranges of 17 to 30 minutes for standing and 12 to 30 minutes for sitting. Dr. SM wrote on May 4, 1998, that claimant was unable to continue her work hardening in May 1998 due to her high pain levels following the April 30, 1998, FCE, and that she had a similar experience following the March 11, 1998, FCE when she had complete bed rest for three

days before the FCE and was bedridden for almost a week after the FCE. Dr. SM wrote on July 2, 1998, that he disagrees with the FCE recommendation stating that claimant can return to work. Dr. H wrote on July 17, 1998, that after reviewing this FCE, he strongly disagrees with claimant's stated work ability; that after the FCE, claimant was in such pain that she could not perform her daily living activities for several days; and that as he has stated before, claimant is unable to return to work of any kind and is totally disabled.

Dr. G reported on July 27, 1998, that he performed an independent medical evaluation of claimant on July 20, 1998; that she has been seen by numerous chiropractors and other doctors; that in his opinion, her cervical, shoulder, and lumbar spine injuries were soft tissue injuries which usually resolve within several months and do not take four years to recover; and that her diagnosis is chronic pain syndrome with myofascial pain and strain injury secondary to the _____, accident. Dr. G further stated that based on her FCE and his examination, claimant should be able to return to work in a light-duty capacity with restrictions against lifting more than 20 pounds and against repetitive bending, stooping, kneeling, crawling, or overhead work.

Dr. H wrote on October 23, 1998, that in his opinion, while Dr. G's examination findings are accurate, his recommendations are "somewhat biased" and he disagrees with them. Dr. H further stated that it remains his opinion that claimant has a permanent disability and should continue chiropractic treatment; that although claimant has completed work hardening and work conditioning, she is still unable to work; and that "there is no way this patient can work even on a part time basis due to her inability to stand or sit for longer than 10-15 minutes at a time."

The hearing officer found that on _____, claimant sustained a serious injury with lasting effects that precluded her from returning to the type of work she did when she was injured; that during the filing period for the seventh compensable quarter, claimant was unable to work at all as a direct result of her impairment from the compensable injury; and that during the filing period, claimant did not attempt to obtain any employment at all. Based on these findings, the hearing officer concluded that claimant is entitled to SIBS for the seventh compensable quarter.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, 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." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. 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 a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." 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 the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to light duty 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*.

We are satisfied that the hearing officer's findings are 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could credit the opinion of Dr. H that claimant could not perform any type of work during the pertinent time period.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge