APPEAL NO. 990356

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 31, 1998, a hearing was held. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Claimant asserts that medical evidence in or near the filing period in question indicates that she cannot work, that the hearing officer doubted claimant's reflex sympathetic dystrophy (RSD) was caused by the injury, and that the "standard" for seeking employment is whether the claimant "can be gainfully employed"; claimant appeals certain findings of fact that are associated with these points. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____. Claimant testified that she had to pull loaded pallet jacks, which hurt her elbows and decreased her strength in her hands. She was diagnosed with bilateral epicondylitis. The parties stipulated that claimant sustained a compensable injury on _____, that resulted in an impairment rating of 18%; that she commuted no benefits; and that the filing period for the quarter in question began on June 1, 1998. Claimant testified that she could not do any kind of "gainful employment" during the filing period. She did not testify about any type of job search conducted. She also said that she could not work from early 1997 to the present time. A finding of fact that said claimant did not look for work and did not conduct a job search during the filing period is sufficiently supported by the evidence and was not appealed. Another finding of fact, number four, which was appealed, said that claimant's job search lacked timing, forethought and diligence, among other things. However, as stated, a finding of fact accurately reflected the evidence when it said that claimant conducted no job search. Finding of Fact No. 4 is disregarded as not necessary to the decision in this case.

Claimant questions the hearing officer's comment in his Statement of Evidence that said Dr. E stated that claimant could not be gainfully employed but did not say she was unable to work; claimant then stated that the standard that requires a claimant to seek work is whether she can be gainfully employed. Sections 408.142 and 408.143, state respectively, that a claimant has to have "attempted in good faith to obtain employment commensurate with the employee's ability to work," and that a claimant "has in good faith sought employment commensurate with the employee's ability to work." (Emphasis added.) Neither section that sets forth requirements for SIBS says anything about "gainful employment." *See* Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998, for a discussion of "gainful employment"; that opinion questioned what that phrase may entail relative to a medical ability to do some work and what it may entail relative to the statutory requirement of "ability to work." While Appeal No. 980879 said that medical opinion that uses the phrase "gainful employment" may be considered by a fact finder when the evidence indicates that it did not include factors other than medical, such as potential job markets, the hearing officer committed no error when he noted Dr. E's

statement did not say that claimant was unable to work, even though Dr. E did attribute his use of "gainful employment" to claimant's pain. The requirement or standard for a claimant to seek work during a SIBS period is not based on "gainful employment."

The hearing officer's intensive Statement of Evidence does not appear to question the diagnosis of RSD (claimant pointed out that the RSD was not diagnosed until she was seen by the designated doctor and that Dr. H began treating her in 1997, not 1992), but he does question the credibility of the claimant, specifically pointing out that claimant indicated no attempt to do any job search during the filing period; Dr. H noted on September 15, 1998 (approximately two weeks after the filing period in question ended), that claimant was having "trouble getting job [because of] ongoing right upper extremity pain/concern if could work regularly." The hearing officer does not appear to have wrongfully limited the extent of claimant's injury; no error was committed in questioning the credibility of claimant. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165.

The medical evidence in this case was conflicting. However, the Texas Workers' Compensation Commission did send claimant to see Dr. T in May 1997, and he stated:

> It is questionable whether she would be able to work at a sedentary level at this time with the restrictions that she has but I would leave this up to her employer and see if a job can be developed for her.

Dr. T also said she should not lift more than five pounds and cannot use her hands for "fine manipulations."

In an undated letter which the hearing officer stated was probably written in July 1998, Dr. H referred to claimant's RSD and said it has "completely and totally disabled her to the present time." He added that she has improved somewhat with time and sympathetic blocks but he said she was not likely to return to "normal." Dr. H then said, "I encourage her to try to find work or a hobby that perhaps can accommodate her severe activity restrictions (absolutely no repetitive motion) - we shall see."

The hearing officer is charged with resolving conflicts in evidence including medical evidence; he is also responsible to reasonably interpret a medical opinion which may appear to be contradictory within itself. As such, the hearing officer could reasonably interpret Dr. H's July 1998 letter as not saying that claimant could not do any work at all. The determination that claimant did not attempt in good faith to find work is sufficiently supported by the evidence.

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

CONCURRING OPINION:

I concur that the hearing officer's decision should be affirmed. The hearing officer in this case, as the fact finder, was free to determine that the claimant had some ability to work. I write separately, as did Judge Stephens, to express my belief that a reasonable interpretation of the phrase "cannot engage in gainful employment" is that the doctor is expressing the opinion that the claimant cannot work at all and that the doctor's use of the phrase is intended to distinguish inability to return to the preinjury job from inability to work generally. In addition, I certainly disagree with the view that an opinion expressed in terms of "gainful employment" is insufficient, as a matter of law, to support a hearing officer's determination that the claimant is entitled to supplemental income benefits based on an inability-to-work theory.

Elaine M. Chaney
Appeals Judge

CONCURRING OPINION:

I would also affirm. I write separately to address the interpretation of the words "gainful employment." I would merely note that the meaning of those words is for the hearing officer to determine. However, in my view, if a doctor says a claimant "cannot engage in gainful employment," it seems most logical that the doctor means "[t]he claimant cannot work at all." In stating that a claimant cannot engage in “gainful employment,” I believe that a doctor is typically trying to state that, not only is the claimant unable to perform his former job, he cannot perform *any* job. When a doctor says a claimant cannot engage in “gainful employment,” I doubt that the doctor is expressing a belief that a claimant may perform work so long as he does not get paid. It is more likely that the doctor is attempting to explain a claimant’s physical ability to work in general rather than discuss whether a claimant is able to perform volunteer work. It is more logical that the use of the words “gainful employment” means that the doctor is trying to distinguish between the inability to perform the old job versus the inability to perform employment generally. I acknowledge that other appeals judges have expressed a different view. Texas Workers’ Compensation Commission Appeal No. 971900, decided October 31, 1997. However, I write separately to express disagreement with some appeals judges’ interpretation of those words.

Judy L. Stephens
Appeals Judge