

APPEAL NO. 990411

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 14, 1998, a contested case hearing (CCH) was held. There were eight issues before the hearing officer at the CCH; supplemental income benefits (SIBS) entitlement for quarters one through six, whether respondent/cross-appellant (claimant) had permanently lost entitlement to SIBS because he was not entitled to SIBS "for twelve consecutive quarters," and whether claimant had timely filed a Statement of Employment Status (TWCC-52 or SES) for the first, second, third, fifth and sixth quarters. The hearing officer determined that claimant was "excused" from attempting to find work during the filing periods because he "had no ability to perform any work," that claimant was entitled to SIBS for the first through sixth quarters, that appellant/cross-respondent (carrier) was relieved of liability for the first, second, third, fifth and sixth quarters because claimant's applications for those quarters were untimely and that claimant has not permanently lost entitlement to SIBS because there was no "twelve consecutive quarters" that he was not entitled to SIBS.

Carrier appealed the entitlement to SIBS determinations and argues that claimant should be permanently "disqualified" from receiving SIBS pursuant to Section 408.146(c). Carrier requests we reverse the hearing officer's decision on those issues. Claimant appeals the determinations that carrier is relieved of liability because of claimant's untimely filing of applications, urging that claimant has a "mental incapacity" and "should not be judged by the usual standards set for behavior of a reasonably prudent person." Claimant urges reversal on that issue. Carrier timely filed a response to claimant's appeal, urging affirmance on the appealed issue. Claimant timely filed a response to carrier's appeal and a "Response to Carrier's Response to Claimant's Request for Review." We note, at this time, that Section 410.202 does not provide for responses to responses, consequently, so much of claimant's response as is a response to carrier's response will not be considered.

DECISION

Affirmed, as reformed, in part and reversed and rendered in part.

First, we note that the issue from the benefit review conference, and recited by the hearing officer at the CCH, was whether claimant had lost permanent entitlement to SIBS "because he was not entitled to them for twelve consecutive months." We perceive the hearing officer's substitution of the word "quarters" for "months" to be an inadvertent administrative or typographical error and reform both the hearing officer's recitation of issues in the "Statement of Case" and Conclusion of Law No. 5 to read "twelve consecutive months" instead of quarters. Further, in Conclusion of Law No. 2, the hearing officer states that claimant "is excused" from complying with the good faith requirement of the 1989 Act and Texas Workers' Compensation Commission (Commission) rules "because Claimant had no ability to perform any work." While we realize that this may be an exercise in semantics, we must again point out that neither the hearing officer, nor the Appeals Panel, nor the Commission has the authority to "excuse" a party from a statutory requirement.

See Texas Workers' Compensation Commission Appeal No. 990048, decided February 18, 1999. The hearing officer's conclusion of law that the claimant was "excused from attempting to find work" is incorrect. We reform that conclusion of law to say that "Claimant demonstrated a good faith effort to attempt to find work during the filing periods . . . because Claimant had no ability to perform any work."

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than 80% of the employee's 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.

The parties stipulated that claimant sustained a compensable (traumatic brain injury, a fractured clavicle, a right shoulder injury, neck and lumbar spine injuries) injury on _____. (Apparently, claimant was struck in the head and knocked off a forklift by a large metal hook suspended on a chain. Claimant was hospitalized and was in a coma for some weeks.) The parties stipulated that claimant reached maximum medical improvement on October 11, 1995, with a 24% IR as assessed by Dr. C, claimant's treating doctor. Although there were no stipulations or findings regarding the filing periods, they appear to be the 90 days prior to the respective quarters during the period from February 27, 1997, through May 26, 1998. Claimant testified that he had worked for the employer for more than 20 years and, at the time of his injury, had been a supervisor assigning workers to tasks, bidding jobs and reading blueprints. Claimant testified that he began having seizures about two years after his injury.

Medical reports of Dr. C beginning August 31, 1995, document treatment of claimant's seizure disorder and urged claimant "not to consume any alcohol whatsoever." A neuropsychological evaluation performed on September 16, 1995, shows claimant has an average intelligence, some impairments in visual scanning and difficulty learning new information. "Persistent cognitive impairments" were attributed to claimant's traumatic brain injury. Claimant expressed a "motivation to return to work" but the report indicated he would require vocational counseling "for vocational re-entry." In a September 21, 1995, note by Dr. C, claimant was again warned about alcohol consumption related to his seizures. Dr. C comments that claimant may need a guardian "if he continues to exercise poor judgment that jeopardizes his safety and the safety of others." Claimant continued to receive medical care from Dr. C through, at least, January 20, 1998. A March 6, 1997, note of Dr. C indicates that claimant "continues to refuse referral to the Texas Rehabilitation Commission [TRC]." A May 14, 1997, note by Dr. C refers to claimant's "severe traumatic brain injury" and posttraumatic epilepsy, establishes restrictions of not operating hazardous equipment (which was explained at the CCH to include driving tractor-trailer trucks), says that he cannot return to work as a welder and indicates that he is "restricted from climbing any height off the ground." In a note to the carrier dated September 17, 1997, Dr. C writes that the compensable injury includes posttraumatic epilepsy, short-term memory deficits, attention and concentration difficulties "and problems with executive functioning." Dr. C

said claimant has been evaluated vocationally and has "few, if any, transferable skills." A November 13, 1997, note indicates that claimant has contacted the TRC.

Dr. M did an assessment of claimant (apparently for the Commission), performed a functional capacity evaluation (FCE) and, in a report of March 11, 1998, stated claimant "was in the middle of the medium level work category," apparently based on physical ability. Carrier status reports of September 18 and October 9, 1998, confirm claimant has been in touch with the TRC.

Claimant relies principally on the reports of Dr. F, a psychologist, who, in a report of May 26, 1998, recites claimant's physical injuries and impairments and reports that claimant has difficulty comprehending instructions and directions, is "unable to remember significant background information" and is hard of hearing. Claimant was placed in the low average range of intellectual functioning. Dr. F comments:

He has severe memory impairments, decreased reasoning, and severe impairments in his attention span and information processing. He frequently calls people by other names. For instance, he will call his daughter by his niece's name. He loses items easily, such as forms, his wallet and keys. [Claimant] cannot think simultaneous thoughts without becoming confused.

In a June 8, 1998, report, Dr. F states:

Furthermore, his neurocognitive impairments are so severe that there are no jobs in the world of work that he could perform unless he has the extensive rehabilitation. Serious consideration for long-term disability is highly recommended. At present, [claimant] is completely and totally disabled vocationally.

In a July 8, 1998, report, Dr. W, apparently an orthopedic surgeon, evaluated claimant, as a consultant, and commented:

He has work restrictions which give him only a sedentary desk-type occupation although he has traumatic brain symptomatology post this which limits his ability to concentrate and work in a sedentary occupation. I think there is not a high likelihood of him being able to return to gainful employment in the future.

(Carrier notes in its appeal that the hearing officer incorrectly refers to Dr. W as the treating doctor whereas Dr. C is actually the treating doctor.) In an affidavit dated December 13, 1998, Dr. F states that claimant "is mentally incompetent to perform tasks where he is expected to process information in a sequential manner" and that:

[Claimant] is completely and totally disabled vocationally and serious consideration for long-term disability is highly recommended. It is also my

professional opinion that [claimant] has not been mentally competent since his traumatic brain injury to effectively advocate and represent himself in his efforts to obtain the workers compensation benefits available to him. Consequently, as a direct result of his frontal lobe injury, [claimant] has been unable to fulfill the necessary requirements to obtain TWCC benefits due him. [Claimant] should not be penalized because of a lack of understanding on the part of others with regards to the true devastating nature of [claimant's] injuries.

The hearing officer made a finding (Finding of Fact No. 11) that claimant "was unable to perform any work during the first through sixth quarter filing periods as a direct result of his impairment." The hearing officer also found that claimant had not attempted to obtain employment during the first, second or fourth quarter filing periods (Finding of Fact No. 13) but had attempted in good faith to obtain employment during the third, fifth and sixth quarter filing periods (Finding of Fact No. 12). We see those findings as somewhat inconsistent in that the hearing officer says that claimant had a total inability to work throughout the six quarters but had attempted to obtain employment during the third, fifth and sixth quarters. 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. 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*.

Claimant basically testified that he is unable to work, certainly without retraining. Carrier asserts that claimant has not been cooperating with the TRC, that he waited three years before contacting the TRC and that claimant is uncooperative in his treatment plan in that he continues to drink alcohol, contrary to Dr. C's instructions. Carrier further cites testimony that claimant lives alone (although claimant apparently had a friend who wrote checks, paid bills and helped him with paperwork, living with him for awhile) on some acreage, takes care of some cows, horses and a dog (claimant testified that he fed them) and that claimant worked for a short period of time for another company (where claimant said he nearly had an accident or two, and which may have led to Dr. C's strict restriction not to work around hazardous equipment.) Claimant testified he had to quit that job because he "got sick," apparently due to a nonwork-related condition. Claimant agreed that he worked with his brother one time after February 1996, where he "watched the hole," and

that he attempted to open and run a feed store, which he was unable to do. (Claimant's father had put up the capital for the store and, when claimant was unable to run the store, the father took over the store.) One of claimant's four job applications was to his father's feed store, and another was to a trucking company that the friend, who was living with him, was associated with. Claimant apparently made two other job applications during the fifth and/or sixth quarter filing periods. Claimant testified that his condition is getting progressively worse. On the other hand, carrier points out that Dr. F's reports are after the sixth quarter filing period.

As should be evident from our very brief summarization of the evidence, the evidence was in conflict. As we have frequently noted, Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In addition, the hearing officer had the advantage of seeing the claimant and observing him testify at the CCH. Consequently, we affirm the hearing officer's findings and decision that claimant is entitled to SIBS for the first through the sixth compensable quarters, having made a good faith effort to seek and obtain employment commensurate with his ability (either based on a total inability to work or an actual good faith effort), and that his unemployment is a direct result of his impairment. We disagree with carrier that "[t]here is no medical evidence within any of the six filing periods indicating that the claimant had a total inability to work." We have allowed hearing officers to consider medical evidence and reports made close to, but out of the filing periods, as supporting assertions of ability or inability to work during the filing period. The Appeals Panel has further held that the reports of a clinical psychologist are considered as part of the general category of medical evidence. See Texas Workers' Compensation Commission Appeal No. 970730, decided June 9, 1997, and Texas Workers' Compensation Commission Appeal No. 970845, decided June 23, 1997. Further, the hearing officer could find that the FCE that was performed measured only claimant's physical capability but not his mental capacity. Further, the medical reports make amply clear that claimant's inability, or reduced ability, to work is not so much physical, but rather due to the "severe traumatic brain injury." Our affirmance of the hearing officer's decision on this issue should not be interpreted to mean that the same caliber of evidence will necessarily be sufficient to prevail for another quarter. As we have noted, another fact finder could well have drawn different inferences from the evidence, which would have supported a different result, but that does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Regarding claimant's appeal that the carrier is relieved of liability because claimant failed to timely file his applications for the first through third and fifth and sixth quarters

(claimant timely filed for the fourth quarter), the hearing officer made an unappealed Finding of Fact No. 4 that the Commission did not make its initial determination of entitlement to SIBS until December 3, 1997 (which would have been the filing period of the fifth compensable quarter) and that the claimant's obligation to file applications for SIBS was tolled until March 3, 1998 (90 days after the Commission's initial determination). It is undisputed that claimant did not file applications for the first or second quarters (and the hearing officer so found). Regarding the first compensable quarter, Rule 130.10(a) and (b) requires the Commission to conduct a review of all employees who have a 15% or greater IR and who have not commuted IIBS annually and not later than 10 days before the last day of the IIBS period. Rule 130.10(d) requires the Commission to send the employee a copy of the TWCC-52 (or SES) with filing instructions and a description of the consequences of late filing and failing to file. Section 408.143 provides that after the Commission makes the initial determination of entitlement to SIBS, the employee must file a TWCC-52. The evidence is not developed in this regard other than claimant denied remembering getting any such correspondence. Nonetheless, the Commission apparently made its initial determination of nonentitlement on December 3, 1997, apparently without claimant having ever filed a TWCC-52. The hearing officer, in this decision, reversed the Commission's initial determination of nonentitlement and found claimant was entitled to SIBS for the first six quarters in Conclusion of Law No. 3. We find no authority in either the statute or Commission rules that requires a claimant to file a TWCC-52 for the initial quarter after the Commission's initial determination of nonentitlement. *Compare* Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995 and Texas Workers' Compensation Commission Appeal No. 951975, decided January 8, 1996. In Appeal No. 941753, *supra*, the Appeals Panel affirmed a hearing officer's finding that a claimant was entitled to SIBS for the first compensable quarter (where the Commission had delayed for over one year in making its initial determination), stating, "[t]here is no provision in the applicable statute or rule that would in any way mandate a denial of an initial quarter of [SIBS] as a result of tardiness in the [Commission's] sending notice to Claimant for filing the [SES]." Similarly, in Appeal No. 951975, *supra*, the Commission was over a year late in determining initial entitlement to SIBS, but then the claimant in that case filed the TWCC-52 "right after learning he was eligible for SIBS," a fact that distinguishes this case. We reverse the hearing officer's decision that the carrier is relieved of liability for the first quarter of SIBS based on claimant's late filing, or nonfiling, of the TWCC-52, and render a new decision that the hearing officer, having determined claimant was entitled to SIBS for the first compensable quarter, and having that determination affirmed by the Appeals Panel, claimant is to be awarded SIBS for the first compensable quarter.

Claimant filed applications for the third, fifth and sixth quarters of SIBS with carrier on September 3, 1998, which the hearing officer found to have been untimely filed. Our affirmance of the hearing officer's decision on entitlement to SIBS and the Commission's late, initial determination of entitlement does not necessarily endorse the hearing officer's Finding of Fact No. 5, which states:

5. Claimant's obligation to file his applications for [SIBS] was tolled until March 3, 1998, ninety days after the initial determination by the Commission.

In Appeal No. 947153, *supra*, the Appeals Panel only recited that the claimant, in that case, had filed SES's for the second through eighth compensable quarters "well within three months of the initial determination," which is not to establish that 90 days or three months is the mandatory period of time which a claimant has to file SES's after a late initial determination. However, since claimant does not predicate his appeal on this point and, in fact, does not appeal that finding, we decline to discuss that point further.

Claimant appears to be arguing, both on appeal and at the CCH, that claimant's mental condition "constitutes good cause for failure to file timely and recovery of compensation should not be barred," citing Travelers Insurance Company v. Garcia, 417 S.W.2d 630 (Tex. Civ. App.-El Paso 1967, writ ref'd n.r.e.). In Garcia, the appeals court upheld, as supported by sufficient evidence, findings that a claimant was suffering from a mental condition arising from a robbery at the store where she worked, that her behavior could not be judged by the usual standards of a reasonably prudent person and that her condition constituted good cause for failure to file her claim earlier. Garcia involved a case of timely reporting the injury to the employer, and Section 409.002(2) contains a good cause exception for failure to provide notice in a timely manner. However, neither Section 408.143 (dealing with SIBS filing) nor Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104) provides for such a good cause exception for failing to timely file the claimant's application for SIBS. The Appeals Panel has, on several occasions, held that there is no good cause exception to the SIBS eligibility criteria. Texas Workers' Compensation Commission Appeal No. 951487, decided October 19, 1995; Texas Workers' Compensation Commission Appeal No. 961416, decided August 28, 1996; Texas Workers' Compensation Commission Appeal No. 981040, decided July 2, 1998. However, those cases have dealt with the eligibility requirements involving the "good faith" and "direct result" criteria and, so, are not precisely on point. We find no cases, and claimant cites none other than Garcia, which touches on a good cause exception for not filing a timely SIBS application. As noted, there is presently no good cause exception to the timely filing requirement of Section 408.143 and Rule 130.104. However, new SIBS rules have been written to be effective January 31, 1999. In the new rule, Rule 130.105, entitled "Failure to Timely File Application for [SIBS]; Subsequent Quarters," the carrier is relieved of liability for failure of the claimant to timely file an application for SIBS, but it contains three exceptions, being: (1) failure of the carrier to timely mail the form to the claimant; (2) failure of the Commission to issue an initial entitlement (as was the case here and where the filing period was tolled); and (3) where an IR of less than 15% is increased to 15% or more. Consequently, we interpret the new rules to say those are the only exceptions and the Commissioners consciously omitted including a good cause exception similar to the one contained in Section 409.002. Consequently, we decline to attempt to engraft some kind of exception for diminished mental capacity. Had claimant been formally adjudicated as being mentally incompetent, that may have raised a different issue; but, since that is not the case, we decline to establish a diminished mental capacity exception, particularly in the absence

of statutory or regulatory authority and where the pertinent rule has been recently reconsidered.

In that we are affirming the hearing officer's decision that claimant is entitled to SIBS for the first six quarters, we similarly affirm the hearing officer's decision that claimant has not permanently lost entitlement to SIBS for 12 consecutive "months."

We affirm the hearing officer's decision, as reformed, that claimant is entitled to SIBS for the first six quarters of SIBS and that claimant has not permanently lost entitlement to SIBS. We also affirm that carrier is relieved of liability for the second, third, fifth and sixth quarters because claimant's SES applications were untimely. We reverse the hearing officer's decision that the carrier is relieved of liability for the first compensable quarter for reasons stated in this opinion and render a new decision that carrier is liable for claimant's first compensable quarter of SIBS.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge