

APPEAL NO. 990418

Following a contested case hearing held on February 5, 1999, with the record closing on February 9, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fourth, fifth, and sixth compensable quarters, and that her average weekly wage (AWW) is \$597.72. The appellant (carrier) appeals the hearing officer's determinations that claimant is entitled to SIBS for these quarters. The file does not contain a response from claimant.

DECISION

Affirmed.

The hearing officer's determination of claimant's AWW has not been appealed and has become final. Section 410.169.

The parties stipulated that on _____, claimant sustained a compensable injury; that she reached maximum medical improvement (MMI) on September 23, 1996, with an impairment rating (IR) of 17% and has not commuted any portion of the impairment income benefits (IIBS); that the fourth compensable quarter began on June 16, 1998, and the sixth compensable quarter ended on March 15, 1999; that the filing period for the fourth compensable quarter began on March 17, 1998, and the filing period for the sixth compensable quarter ended on December 14, 1998; and that during the three filing periods, claimant had no earnings and made no attempt to seek employment.

Claimant testified that she is 42 years of age and a high school graduate; that prior to her compensable injury, she worked for (employer) for 18 years performing clerical work, and that preceding her bilateral carpal tunnel syndrome (CTS) injury of _____, she was performing data entry for eight hours a day and sometimes longer; that she underwent right-side carpal tunnel release surgery by Dr. S in December 1994, her only surgery for her injury; and that she returned to work in February 1995 performing the same data entry job, and worked until June 21, 1995, at which time she was taken off work by Dr. R due to her pain and the problems she had using her hands. She stated that since February 1996, her treating doctor has been Dr. C, who is not a hand specialist, and that during the filing periods she saw him every six months for examination and renewal of her medications for pain, muscle relaxation, and sleep. She said that at her last visit, Dr. C suggested injections but she said she had previously had injections which did not provide relief and that she had a reaction to the last one. Claimant also indicated she uses a TENS unit and a wrist brace, that she did not obtain relief from physical therapy, and that a pain management program has not been recommended to her.

Claimant further testified that during the three filing periods, her pain was a "10" on a 10-point scale; that she has constant, severe pain in her hands, numbness in her fingers,

and also experiences swelling in her hands and fingers upon activity; that her right hand is worse than the left and she is right hand dominant; and that she has very little motion in her right wrist and elbow and cannot raise her right arm above her head. She also said she has a diagnosis of reflex sympathetic dystrophy (RSD). Claimant stated that she lives with her mother who has to help her with virtually all tasks requiring the use of her hands including dressing and personal hygiene; that in August 1998, Dr. C told her to stop driving since she cannot grip and hold the steering wheel; that she cannot cut her meat at meals nor help out around the house; and that she spends her days at home mainly trying to find comfortable positions. She introduced a December 8, 1998, letter from her mother describing in detail the many functions of daily living that claimant cannot perform and which her mother does for her. She also indicated that she underwent a functional capacity evaluation (FCE) in November 1996 which indicated that she lacked the capacity to work.

Dr. C wrote on February 27, 1998, that claimant has severe impairment of her hand functions and is unable to grasp or hold anything with any amount of functional force; that she is unable to use either hand for work or activities of daily living; that she has extreme pain with grasping activities or pressure of any kind to either hand; and that she is totally disabled for any occupation and will never be able to resume work activities. Dr. C wrote on November 6, 1998, that claimant has been under his care since February 18, 1996, for treatment of a work-related injury; that she has been diagnosed with bilateral CTS and RSD of the right upper extremity; that she reached statutory MMI with a 17% IR; that she has been treated with conservative and surgical modalities; that notwithstanding these treatments, she continues to be symptomatic and her condition has deteriorated to the point that she is unable to perform any type of work or take care of her personal needs without assistance; and that her overall prognosis for recovery is poor. Dr. C further stated that an FCE was attempted in January 1997 but claimant was unable to complete it and that he agrees with Dr. H that claimant is a handicapped person. Dr. H's records reflect that he was the designated doctor and that he certified that claimant reached MMI on "9/23/96" with an IR of 17%.

Claimant's assistant wrote Dr. C on November 16, 1998, asking him to describe, for the time period from March 17, 1998, to the present, when he saw claimant, what treatment she received, what complaints she had, and whether in his opinion she was able to do some type of work. Dr. C responded on November 30, 1998, stating that he saw claimant on August 26, 1998; that claimant is treated with prescribed oral medications; and that claimant has stated that she is unable to bathe herself, cook, clean, grab or hold anything, that her condition has deteriorated, that she is in constant pain, that her range of motion is restricted, that she has difficulty writing, and that her symptomatology is more severe on the right side. Dr. C concluded as follows: "I believe that with her symptoms, she would not be able to do any type of work. The movement on both upper extremities is severely limited by pain."

The carrier has appealed findings that during the filing periods involved, claimant has suffered a severe injury which has resulted in the loss of her ability to grasp and hold objects with her hands; that as a result of the loss of function of her hands, she was totally

unable to work; and that she made a good faith effort to seek employment commensurate with her ability to work.

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 employee's AWW 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.

Further, 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 challenged 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 Dr. C's several reports stating why he regarded claimant as unable to perform any work at all during the pertinent filing periods.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge