

APPEAL NO. 990452

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 February 4, 1999. The issue at the CCH was whether respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fourth compensable quarter. The hearing officer determined that claimant is entitled to SIBS, from which determination appellant (carrier) appeals on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant had no ability to work, that he met his burden to prove the good faith and direct result requirements, and that he is entitled to SIBS. Carrier asserts that claimant did not provide sufficient evidence to show that he had no ability to work during the filing period in question.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant had an impairment rating greater than 15%; (3) claimant did not commute any of his impairment income benefits; and (4) the filing period for the fourth quarter was from June 5, 1998, through September 3, 1998.

Claimant testified that he sustained a compensable injury on _____, when he slipped while carrying buckets and fell. He said he underwent cervical and lumbar fusion surgery in 1995. Claimant said that during the filing period in question, he was having severe pain and muscle spasms, and that his doctors have recommended that he attend a pain management program. Medical records indicate that Dr. R had released claimant for retraining with the Texas Rehabilitation Commission in May 1998. However, Dr. R noted on June 3, 1998, that claimant had performed lifting at a recent functional capacity evaluation (FCE) and he had "developed a marked increase in his low back pain and neck pain." Dr. R then said, "I have given him an off-work slip as he cannot possibly work in his current clinical condition, both physically and mentally." In an August 20, 1998, letter written during the filing period, Dr. R stated, "[claimant] suffers from chronic pain syndrome with radiculopathy secondary to his injury. The patient is currently unable to work secondary to his pain." In an August 10, 1998, medical report, Dr. R noted that claimant "is unfit to return to work as he is still taking sedating medications and still is having chronic pain and depression." In a June 8, 1998, medical report, Dr. BU, a required medical examination doctor, wrote to the Texas Workers' Compensation Commission benefit review officer regarding his opinion of claimant's ability to work. He stated, "[a]t the present time, I feel the patient is unable to work, secondary to his chronic pain and psychological profile." Dr. BU recommended that claimant enter a chronic pain program. A May 27, 1998, FCE report indicates that claimant gave submaximal effort during testing. In a December 10, 1998, letter, Dr. BL indicated that he did not see any medical reason which would preclude claimant from working.

The criteria for entitlement to SIBS are set forth in Sections 408.142(a) and 408.143. The law regarding SIBS, good faith, and an assertion that there was no ability to work at all during the filing period is discussed in Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994; Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995; Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994; Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995; and Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994. The Appeals Panel's standard of review in this case is discussed in Section 410.165(a); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); and Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer determined that claimant had no ability to work during the filing period, that he attempted in good faith to obtain employment commensurate with his ability to work, that his unemployment is a direct result of his impairment, and that he is entitled to SIBS.

In this case, the claimant had the burden to prove he had no ability to work during the filing period in question. Appeal No. 950582, *supra*. 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. There was evidence from Drs. R and BU from which the hearing officer could determine that claimant had no ability to work during the filing period. Although Dr. BL indicated that claimant could return to work, the hearing officer chose to credit the evidence from Dr. R and Dr. BU. The hearing officer made his determinations regarding good faith and ability to work based on the evidence before him and he determined what weight to give to Dr. BL's reports. We have reviewed the medical evidence and considered carrier's assertions that the medical evidence was "conclusory" and we conclude that the hearing officer could and did find that claimant had no ability to work based on the evidence in this case. We would further note that any evidence that claimant voluntarily limited his efforts during examinations or exhibited inappropriate pain behavior was for the hearing officer to consider in making his determinations in this case. 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 his. Cain, *supra*. The hearing officer's direct result determination is also sufficiently supported by evidence that claimant sustained a serious injury with lasting effects and that, during the filing period, he could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Dorian Ramirez
Appeals Judge