APPEAL NO. 990582

On February 10, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were whether appellant (claimant) is entitled to supplemental income benefits (SIBS) for the first and second quarters. The claimant requests reversal of the hearing officer's decision that he is not entitled to SIBS for the first and second quarters. No response was received from the respondent (carrier).

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has an impairment rating (IR) of 15% or more, has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment, has not elected to commute a portion of the IIBS, and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by claimant during the prior filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b).

This case concerns an assertion of no ability to work. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he had no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. In Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, the Appeals Panel stressed the need for medical evidence to affirmatively show an inability to work if that was being relied on by the claimant, and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, the Appeals Panel noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred."

The parties stipulated that claimant sustained a compensable injury on _____; that he has a 34% IR; that he did not commute IIBS; that the first quarter for SIBS was from August 14 to November 12, 1998, with a filing period of May 16 to August 13, 1998; and that the second quarter for SIBS was from November 13, 1998, to February 11, 1999, with a filing period of August 14 to November 12, 1998. There is no appeal of the hearing officer's finding that claimant's unemployment during the relevant filing periods was a direct result of his impairment.

Claimant had lumbar spine surgery in 1982. He was working as a construction laborer when injured on _____. He said that on that date he fell off a scaffold and injured his back, neck, and right shoulder. He said he has not worked since _____. Medical records of the initial treating doctor, Dr. P, are not in evidence. A herniated disc at C5-6 and a disc bulge at C6-7 were shown on an MRI in January 1995. Dr. PA recommended cervical surgery. Dr. B agreed with the need for cervical surgery and also diagnosed right shoulder adhesive capsulitis. Claimant underwent a cervical fusion at C5-6 and C6-7 in July 1995. Dr. PA stated in September 1995 that claimant had no further radicular pain into his arms and was somewhat better after his surgery. At some point prior to September 4, 1996, Dr. W diagnosed claimant as having a right shoulder acromioclavicular (AC) joint separation. Claimant is right handed. Claimant said that Dr. W recommended that he have right shoulder surgery in 1996. Claimant said that he has not had right shoulder surgery.

Claimant was examined by Dr. S at the carrier's request on several occasions, including April 23, 1996. Dr. S wrote on April 25, 1996, that x-rays of the right shoulder showed some widening of the AC joint, that x-rays of the cervical spine showed evidence of a solid fusion, and that x-rays of the lumbosacral spine showed stability of the fusion from L4 to S1. Dr. S also noted that the right shoulder and the right shoulder AC joint felt stable on examination, although claimant complained of tenderness in the distal clavicle area. Dr. S also wrote on April 25, 1996, that claimant may return to work and that he saw no contraindications for full-duty work.

Dr. R, the designated doctor chosen by the Texas Workers' Compensation Commission (Commission), examined claimant on September 4, 1996, and reported on October 1, 1996, that claimant has a 34% IR, for impairment of his cervical region and right shoulder. Dr. R wrote that she agreed that claimant should have a right AC joint repair by Dr. W.

In a report dated December 2, 1996, for a date of visit of May 10, 1996, Dr. W wrote that an MRI was positive for a partial rotator cuff tear and recommended an arthroscopic examination with a distal clavicle resection and repair of the partial rotator cuff tear if it is found to be significant.

The first quarter began on August 14, 1998. On September 1, 1998, the Commission sent claimant a letter informing him that he was not entitled to SIBS. Claimant indicated that he did not receive that letter. There are no medical records or reports in evidence after Dr. W's report of December 2, 1996, until Dr. R's report of October 18, 1998, which is the date claimant said he changed treating doctors to Dr. R. Dr. R wrote that she had last seen claimant in September 1996 (as the designated doctor); that his treating doctor, Dr. P, had retired; that he had cervical surgery in July 1995; that Dr. W had informed claimant that his right shoulder is separated at the AC joint; and that, because Dr. P had retired, claimant had gone to the emergency room for neck and back pain three to four times in the last year and one-half without workers' compensation payment because he did not know what to do about his physician. Dr. R diagnosed claimant as having right C6 radiculopathy and a right AC joint separation with resultant brachial plexus neuritis. Dr. R

noted that claimant has not had a right AC joint repair by Dr. W and that it was unclear whether the surgery was delayed due to other problems or denied. Dr. R wrote that she believes that claimant can be returned to work if his right upper extremity problems are addressed.

On November 11, 1998, Dr. R wrote that she would be trying to get claimant in touch with Dr. W or another orthopedic surgeon to complete care of his shoulder, noting her previous diagnoses and that claimant has a right partial rotator cuff tear per Dr. W. Dr. R wrote that claimant has constant pain; that he has difficulty using his right arm; that he is on social security disability; that his unemployment from May through November 1998 was a direct result of his _____, work injury; that claimant's medical care had been interrupted due to claimant's limited mental status and retirement of his treating doctor; and that she believes that with proper treatment there is a chance for claimant to return to some degree of manual work with limited lifting. In a written question, the ombudsman asked Dr. R whether she believes that claimant had the ability to perform a manual labor job or any other job between May 15 and November 12, 1998, and Dr. R's written answer of February 1, 1999, was "No - though with surgery - he may in the future."

It is undisputed that during the relevant filing periods, claimant did not work and did not seek any employment. Claimant is 41 years of age and is a high school graduate. He testified that he was on pain medication during the relevant filing periods, that Dr. R told him that he is unable to work, and that he was unable to work during the relevant filing periods because he is unable to use his right shoulder and because of his neck and back. Claimant said that during the relevant filing periods his girlfriend did the household chores, that he watched television a lot, and that he was able to take care of his personal hygiene and dress himself. Claimant said that he was supposed to have had shoulder surgery but that he had not "gotten to it yet." When he was asked why he had not had that surgery, claimant mentioned that he is right handed and that he may have to go on and have the surgery because he is still having problems with his right shoulder. When asked if he would agree to have surgery on his right shoulder if it was "recommended or approved," claimant said he would. The CCH record does not indicate that carrier denied authorization for shoulder surgery.

The hearing officer found that claimant had some ability to work, that he failed to prove that he had a total inability to work, and that he did not attempt in good faith to seek employment commensurate with his ability to work. The hearing officer concluded that claimant is not entitled to SIBS for the first and second quarters. Whether a claimant has no ability to work is a fact question for the hearing officer to determine from the evidence presented. The absence of a doctor's release to return to work may be subject to varying inferences. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts in the evidence, as in this case, the hearing officer resolves those conflicts and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No.

950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge