

APPEAL NO. 990607

On February 23, 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 issue at the CCH was whether appellant (claimant) is entitled to supplemental income benefits (SIBS) for the eighth quarter. The claimant requests reversal of the hearing officer's decision that he is not entitled to SIBS for the eighth quarter. Respondent (carrier) requests affirmance.

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 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 absence of a doctor's release to return to work is subject to varying inferences. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Claimant had the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement on August 9, 1995, with a 24% IR; and that the filing period for the eighth quarter was from June 25 to September 23, 1998. The eighth quarter was from September 24 to December 23, 1998.

Claimant was working as a welder on _____, when he injured his back. He had a fusion with instrumentation from L4 through S1 in February 1994. He said that in 1994 he returned to his welding job for several days but was not able to handle it. He said that it is heavy work and not within his restrictions. Dr. L, who performed the surgery, wrote in May 1998 that he does not know if further surgery would help claimant. Claimant said that he moved to Florida to find work that does not involve physical work, such as a ticket taker. He said he looked for work during the filing period for the seventh quarter, but that he stopped looking for work when he received a letter dated June 10, 1998, from JC, the carrier's adjustor, which he read to mean that he was not to look for work until he obtained work restrictions from a doctor. The June 10th letter from JC states in part "regarding your decision to begin a job search, we suggest you be examined and get a work release with physical restrictions from your new doctor." JC testified that she did not tell claimant not to look for work and that the purpose of the suggestion was for claimant to have a work release to give to prospective employers and for claimant and carrier to know what claimant could do. Claimant wrote JC on June 23, 1998, stating that she had told him to wait until he got a work release with restrictions.

Dr. M wrote on June 24, 1998, that claimant, by history, is able to do only minimal activities of daily living. Claimant underwent a functional capacity evaluation (FCE) on June 29, 1998, and MP, "ATC," and a physical therapist, reported that claimant is capable of work at a medium physical demand level; that from claimant's description of his welding work, that work falls into the medium work classification; that based on the Dictionary of Occupational Titles, the work of a welder is in the heavy work classification; and that claimant's performance was not adequate for him to return to the work described by claimant. Claimant said he received the FCE report on some unspecified date, that he called MP, and that MP told him that there was no doctor at the place where the FCE was done and that the FCE should not be interpreted as a work release.

Claimant was seen by Dr. R for an independent medical evaluation on July 27, 1998, and Dr. R wrote in a report of that date that, by x-ray, claimant has a solid fusion and that there was no evidence of instability, radiculopathy, or stenosis. Dr. R stated that he would not recommend further surgery, but that it is possible claimant could require surgery at adjacent levels in the future. Dr. R stated that he thinks claimant can return to work within a light-duty physical demand level, with no lifting over 30 pounds and no frequent bending or stooping. In December 1998, Dr. J, whom claimant said is his new treating doctor, wrote that claimant has failed back syndrome, but is not a candidate for additional surgery, and that he agrees with Dr. R's assessment regarding work issues.

Claimant said he did not work during the filing period for the eighth quarter, that he does not believe that he can work, that he is not sure that he can work, and that he disagrees with Dr. R's report that he can work. Claimant said that he received Dr. R's report on Saturday, August 22, 1998; that he did not look for work during the filing period for the eighth quarter prior to receiving Dr. R's report because of what was stated in JC's letter of June 10th; that he began looking for work on Monday, August 24, 1998; that he filed job applications with the employers listed on his Statement of Employment Status

(TWCC-52) for the eighth quarter; and that he assumes that he did not get a job because of his work restrictions. According to claimant's TWCC-52, he applied for 14 jobs from August 24 to September 16, 1998. There is a handwritten attachment to the TWCC-52, which is mostly illegible, and which appears to list several job contacts on September 21st and 22nd. Claimant said that he applied at places that were hiring.

Claimant said that he was incarcerated from July 12 to August 20, 1998, for "making and placing a destructive device." He said that he had set someone's lawn on fire by setting fire to a beer can he had filled with gasoline. He did that across the street from the sheriff's department. Claimant said that he was put on probation when released from jail, that his probation was revoked on some unspecified date, and that he was placed on community control for one year, which requires him to look for and obtain employment, and which, except for four hours a week, restricts him to his house except to look for work during the day.

The hearing officer found that claimant had an ability to work in a light-duty capacity during the filing period for the eighth quarter, that he did not make a good faith effort to seek employment during that filing period, and that his unemployment during that filing period was not a direct result of his impairment from his compensable injury. Claimant states in his appeal that he does not think he is capable of working at all, that he did not receive the doctor's report with restrictions until late in the filing period, and that his unemployment is a direct result of his impairment. The questions concerning ability to work, good faith efforts, and direct result were questions of fact for the hearing officer to determine from the evidence presented. 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). As the trier of fact, the hearing officer resolves conflicts in the evidence, and may believe all, part, or none of the testimony of any witness. 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's findings, conclusions, and decision are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge