

APPEAL NO. 990628

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 16, 1999. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the third and fourth compensable quarters. The hearing officer determined that the claimant was not entitled to SIBS for the third compensable quarter but that she was entitled to SIBS for the fourth compensable quarter on the basis of an inability to work during the filing period for the fourth quarter. The appellant (carrier) appeals the award of fourth quarter SIBS and urges that the determination that the claimant was entitled to SIBS for that quarter is supported by insufficient evidence or, alternatively, contrary to the great weight and preponderance of the evidence. The claimant responds that there is sufficient evidence to support the determinations of the hearing officer and asks that the decision be affirmed.

DECISION

Affirmed.

The crux of the matter on appeal in this case is whether the evidence supports the determination that the claimant did not have an ability to work during the filing period for the fourth compensable quarter and thus satisfied the requirement to attempt in good faith to seek employment commensurate with her ability to work. It was undisputed that the claimant sustained a back injury on _____, and that she was subsequently assessed an 18% impairment rating. The filing period for the fourth quarter began on June 9, 1998, and ended on September 7, 1998. During this time, the claimant did not look for work and testified that she was not able to work because she was in considerable pain and taking medication, had been advised by her doctors not to work during this period since injection treatments were being performed and that for the efficacy of her treatment she should not work. The claimant also stated she got worse over time.

A number of medical records were in evidence which showed the course of the claimant's treatment which progressed and ultimately lead to epidural steroid injection procedures being performed in June and July 1998 with an incident of infection, as a result of an injection, being evaluated in August. According to the January 5, 1999, correspondence from Dr. M, an orthopedic surgeon, "the claimant was in an off work status for the course of treatment from June 4, 1998, through September 28, 1998." Dr. M goes on to state, "[d]uring this period of time, the patient was actively undergoing treatment with ESI injections and her response to the treatment was being evaluated" and "[f]urther, it was necessary for the efficacy of the treatment that the patient not work or look for work." Dr. M's treatment records were also in evidence showing the course of the injury and treatment. The records of the claimant's treating doctor, Dr. R, were in evidence and while he indicated in a February 1998 report that the claimant could perform restricted duty he stated in a June 9, 1998, note, after the claimant was referred to Dr. M and injections were prescribed, that the claimant "needs to be off work during this treatment period" and that

"she is not to look for employment until after the injection treatments are over." Other medical records do not state the claimant's work ability during the period in issue.

The hearing officer determined that the claimant did not have an ability to work during the filing period for the fourth quarter and thus satisfied the job search requirements. Accordingly, he awarded SIBS for the fourth compensable quarter. In his discussion, it is apparent that the hearing officer found the opinions from the doctors for claimant not to work as "necessary for the efficacy of the treatment" established that the claimant had no ability to work. While we would not agree that such opinions, in and of themselves, would, per force, establish no ability to work, we cannot conclude that under the circumstances of this case, the determination of the hearing officer was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

As the hearing officer correctly noted during the CCH, the Appeals Panel has held that the burden to establish no ability to work is on the claimant and that medical evidence is necessary to establish no ability to work. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994; Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. While medical evidence is necessary to establish no ability to work, and a claimant's testimony alone is not sufficient to show no ability to work, that does not mean such testimony and other evidence on the issue is irrelevant. Rather, the testimony of the claimant can appropriately be considered along with the medical and other evidence on the issue. Texas Workers' Compensation Commission Appeal No. 971678, decided October 9, 1997; Texas Workers' Compensation Commission Appeal No. 982844, decided January 20, 1999. Further, while mere conclusory medical evidence may well not be sufficient to establish no ability to work, that is not the case where there are other numerous background medical records leading up to the opinion that a claimant has no ability to work as a result of the particular ongoing treatment for the injury. Texas Workers' Compensation Commission Appeal No. 982121, decided October 21, 1998; Texas Workers' Compensation Commission Appeal No. 981707, decided September 8, 1998.

Reviewing all the evidence of the record, we conclude that the determination of the hearing officer that the claimant had no ability to work under these circumstances is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge