

APPEAL NOS. 990637 and 990647

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 19, 1999. Although there had been two benefit review conferences held in this matter, a single CCH resulted. As a consequence, two appeal numbers were assigned but this matter is treated as a single appeal, and cross-appeal, of a single hearing decision.

The issues before the hearing officer were the proper impairment rating to be assigned to the claimant (respondent/cross-appellant), which was resolved by agreement at the beginning of the CCH, and whether the claimant was entitled to supplemental income benefits (SIBS) for his fifth and sixth quarters of eligibility.

The claimant was found by the hearing officer to be underemployed during the qualifying period for the fifth quarter of SIBS as a direct result of his impairment. The hearing officer further found that the claimant made a good faith search for employment during this quarter. However, the hearing officer found that, because the claimant did not make any search during the qualifying period for the sixth quarter, although he had some ability to work, he was not entitled to SIBS. For the sixth quarter, it was held that the claimant's unemployment was a direct result of his impairment.

The carrier (appellant/cross-respondent) has appealed the determination that the claimant was entitled to SIBS for the fifth quarter. The carrier argues that the claimant's brief period of employment during the filing period itself does not fulfill the requirement to search for employment, and that his search for actual employment was self-limited. The carrier argues that the claimant's testimony about further searches was vague and insufficient to support that he made a good faith search. There is no response. The claimant has appealed the finding that he was not entitled to the sixth quarter, arguing that he is completely unable to work. He maintains that no employer can meet his requirement that he have a chemical-free environment in which to work. He argues that he worked during the fifth quarter against doctor's orders and had to quit because he became very ill. The carrier responds that the decision on the sixth quarter is supported by the record.

DECISION

Affirmed.

This is a case in which an exposure to dust while sanding on a construction job on _____, is asserted to have caused a host of multiple chemical sensitivities. The claimant asserted that odors from cleaning fluids, some (but not all) perfumes, dust, pollens, and paint and other construction materials will cause him to become ill, primarily manifested as migraine headaches of several days duration. The claimant also said he would experience shortness of breath and nervousness. The injury and extent thereof, however, were not in dispute in this CCH.

The claimant testified by telephone. He agreed that during his last few years of working, he also had a side business in appliance repair; he asserted he no longer conducted this business during the quarters in question. The qualifying periods for each quarter ran from July 12 through October 11, 1998, and from October 12, 1998, through January 10, 1999.

The claimant said that he found a job working at a nursing home through the efforts of his wife. He could not precisely recall, contending faultiness of memory, what his periods of work at this care facility were. Payroll records from the nursing home which are in evidence showed that he worked there from July 31 through September 10, 1998. (The hearing officer found he worked from August 1 through 10 and September 1 through 10, 1998.) The administrator for the nursing home said his performance on the job as a maintenance man was superior. She stated that when the claimant quit, he asked her to prepare a statement that he was unable to work there because of the chemicals, but she declined to prepare such a statement because she had no documentation from his doctor to back that up, although she requested it. The claimant contended that the payroll records did not reflect two weeks off from work that he took in an effort to regain strength to return. The claimant testified, and the administrator agreed, that he was hired to perform a full-time position. The administrator said that the claimant told her he was self-employed, but the claimant denied that he was and said she must have misunderstood. The claimant contended he had not attempted to work in his appliance business for either of the quarters in dispute.

The claimant's treating doctor, Dr. J, worked with an environmental health center in a large city, and wrote on November 9, 1998, that the claimant has sustained neurotoxic effects and injuries to his respiratory system. Dr. J stated that the claimant was treated with shots but that "once an individual is sensitized to petrochemical type substances, he is never able to return to jobs that utilize these substances." Dr. J maintained that the claimant would experience dizziness, disorientation, nervousness, shortness of breath, and agitation.

An independent medical examination doctor, Dr. K, determined that the claimant had no objective pulmonary problems, and that he was likely clinically depressed and could very well be suffering from somatization disorder.

The designated doctor, Dr. A, found that the claimant had multiple allergies. He cited a brain spect scan analysis as being supportive of neurotoxic effects. He noted that the claimant had declined to have recommended objective pulmonary testing. Dr. A said he left to others the apportionment of liability over the prior 30 years, noting the opinion of another doctor that such toxicity more likely developed through chronic exposure over years, rather than a three-week exposure on the job. Dr. A did a subsequent addendum in which his review of psychological testing indicated that some of the claimant's symptoms might relate to mental stress rather than toxic encephalopathy, and he recommended further evaluation of the latter condition.

The carrier produced medical evidence to support its contention that the claimant could return to work, but much of it preceded the qualifying periods by years. The claimant filed a Statement of Employment Status (TWCC-52) for the fifth quarter claiming he could not work at all, and listing no current employment or job contacts. He stated that he made no efforts to find employment during the sixth quarter. His testimony indicated that during the fifth quarter he (or his wife acting for him) placed some calls, one of which led to his nursing home job. He said his daughter likely filled out the fifth quarter TWCC-52 for him and that he had not reviewed it prior to sending it in.

An injured employee is required to make a good faith search for employment commensurate with the ability to work in order to continue to qualify for SIBS. Section 408.143(a)(3). In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated 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." 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. We have held that 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 that a finding of no ability to work must be based on medical evidence. 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 injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. We have held that the good faith effort necessary for SIBS is to obtain employment commensurate with the ability to work, not to obtain employment at a certain wage scale. Texas Workers' Compensation Commission Appeal No. 960946, decided July 1, 1996. The hearing officer's determination that the claimant made a good faith search for employment for the fifth quarter is supported by the evidence in this case, although the evidence for a good faith search after the claimant left his employment was scant. We will not disturb the fact finder's resolution of conflicting evidence, even though contrary inferences could be made.

Likewise, we affirm the hearing officer's determination as to the sixth quarter. The complete inability to work must be proven by medical evidence. The claimant actually worked during the fifth quarter and was judged to be superior in his performance by that supervisor. He only made the case through lay testimony that there was something about that environment which necessitated him leaving. The claimant undertook no efforts during the sixth quarter period to attempt to identify workplaces that would minimize any exposure to chemicals. The hearing officer could validly interpret his doctor's statements as ruling out certain types, but not all types, of employment. It is incumbent upon his doctors to work with the claimant to determine what he can do, not what he cannot do, so that he may make a tailored search. This is important because income benefits do not last forever, and

will end utterly 401 weeks after the date income benefits first accrued. Furthermore, new SIBS rules, effective January 31, 1999, require that specific, continuous, and verifiable job search efforts be made to prove entitlement to SIBS.

The decision and order of the hearing officer on both quarters is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge