

APPEAL NO. 990713

Following a contested case hearing held in Midland, Texas, on March 2, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the sole disputed issue by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Claimant has appealed, asserting that the hearing officer's determination is against the great weight of the evidence. The respondent (carrier) urges in response that the evidence is sufficient to support the decision.

DECISION

Affirmed.

The hearing officer's decision states that the parties stipulated that claimant suffered an injury in the course and scope of employment on _____, for which she received a 17% impairment rating (IR); that she did not commute her impairment income benefits; that the eighth compensable quarter started on October 22, 1998, and ended on January 20, 1999; and that claimant made no effort to seek employment during the filing period for the eighth compensable quarter. The stipulation worksheet signed by the parties at the benefit review conference and introduced by the hearing officer also reflects a stipulation that the filing period began on July 24 and ended on October 21, 1998.

Not appealed are findings that claimant resides in a small town (city 1) which is more than one hour from another small town (city 2) and two hours from (city 3), a small city; that claimant does not read or write English and has always worked at manual labor; that claimant uses crutches to ambulate; that claimant has no atrophy in her right leg; that claimant has been released by the carrier's doctor to return to her regular work duties and by a Texas Workers' Compensation Commission (Commission)-ordered doctor to sedentary work; and that neither Dr. MG, the carrier's doctor, nor Dr. D, the Commission's doctor, could identify sufficient pathology to account for claimant's condition.

Claimant testified that she resides in city 1, a small town on the Texas-Mexico border; that the distance from city 1 to city 2, the closest town, is 60 miles; that the distance to city 3, the closest larger town, is a two-hour drive; that she does not speak, write or read English; that prior to her employment as an office cleaner, the work she was doing when she injured her knee, she had worked on a farm and at a packing house; and that she has never had a "sit down, paper-work" job. Claimant indicated that her treating doctor for her knee injury is Dr. OG, whose records indicate that his office is in city 4; that she has undergone two operations on the injured knee and Dr. OG has recommended a third; and that the carrier will not authorize further surgery until she undergoes bone scan and arthrogram testing which Dr. OG refuses to order, not feeling them to be necessary. She further stated that she uses crutches regularly; that she cannot sit or stand for more than 15 minutes without alternating between sitting and standing; and that she also rests during the day and applies ice packs to her knee. Claimant, who indicated she had three children at

home, also said she does some helping with the meals and dishes and that her husband's sister also helps her out around the house.

The February 8, 1996, report of a designated doctor, Dr. B, stated a history of claimant's slipping while descending stairs at work on or about _____, and hyperextending her right knee; of claimant's undergoing arthroscopic surgery by Dr. P on February 22 and June 20, 1995, and not thereafter gaining relief; and of claimant's undergoing conservative treatment from Dr. OG. Dr. B's impression was "status post arthroscopic surgery of the right knee with a right medial meniscectomy, right lateral meniscectomy and shaving of the patella femoral articulation with residual right knee pain and reduced range of motion [ROM]." Dr. B assigned a whole person IR of 17%.

The May 1, 1997, report of Dr. M, to whom claimant was referred by Dr. OG, recited a similar history and also stated that claimant, then 31 years of age, has not worked since the surgery and has ambulated with crutches, and that x-rays revealed no bony pathology. Dr. M's preliminary diagnosis was "right knee pes anserinus bursitis (tendonitis)" and "right knee internal derangement, probably torn menisci." Dr. M further stated that playing a role may be "an element of emotional or psychological overlay associated with the pain given the duration of the symptoms and the fear concerning pain," and that he coached her in the conduct of home exercises.

Dr. OG wrote the carrier on October 7, 1997, stating, among other things, that he will not order a bone scan or an arthrogram and will continue to insist on an arthroscopy.

Dr. OG wrote on May 11, 1998, that claimant is not able to work at this time; that her prognosis is poor; that she is on crutches because she is unable to walk without them; that she has done poorly since surgery and has had no treatment to this point since it has not been approved by the carrier; and that there have been changes in her condition including weakening of the extremity. Dr. OG further stated that claimant can neither stand nor walk for prolonged distances or times; that she lives in a small town which has no capability to hire people of her experience and qualifications; and that she lacks the capability to work the jobs that are available in that region. Dr. OG also wrote that it must be considered that claimant "has no real work skills, no real command of the English language, and no skills related to sedentary type work in office type procedural capability or in managerial type capability"; that nobody will hire her because they all know she has a bad knee; that the carrier has refused the surgery she needs; and that she lacks the skills to work the jobs which are available in the area.

Dr. OG wrote on October 2, 1998, that claimant "is not going to be able to work, is not going to be able to do anything"; that she "is in a losing situation because of living in [city 1]"; that she has suffered a set back because of where she lives, referring to city 1; and that he could not do the things he wanted to do for her. Dr. OG concluded, saying: "Again, no help for this lady at this time. The prognosis is poor. I do not feel that she can work. She is not hireable. She is not educated at this point in time, poor English command."

Dr. MG wrote on September 14, 1998, that he considered the physical exam of claimant's legs to be entirely within normal limits; that she refused to walk without crutches; that she "allegedly cannot bend her knee more than 90 degrees" but that passive ROM was entirely normal; that there is no swelling, no instability, and no atrophy; and that her ROM was invalid when compared to observed ROM. Dr. MG further stated that he had no objection to her return to work as a cleaning lady but that she will maintain that she is unable to do so because she has to walk on crutches by her own admission. He concluded, stating: "I do not find this a convincing argument in the absence of atrophy of the leg, in the absence of arthritis, or crepitus, in the absence of findings of meniscus problems, and in the absence of instability in the leg." He also assigned claimant an IR of four percent.

Dr. D's January 27, 1999, report states that she may have a trace of effusion; that she has some tenderness in certain areas; that he found no crepitance, no thigh atrophy, and normal foot sensation; that various tests were either negative or could not be performed; and that his impression is patella femoral pain most likely chondromalacia. Dr. D further stated that claimant's current knee condition was very difficult to assess "because of the emotional overlay" and that an MRI and bone scan would be useful in further defining the diagnosis and assessing the need for surgery, given the emotional overlay. Concerning claimant's ability to work, Dr. D stated that he thinks she could do some type of sedentary work or work as her discomfort would permit her; that he agrees with Dr. OG that she is "probably not very hireable" given her education, poor command of English, and being on crutches; and that "most certainly the patient should be suitable to some type of sedentary work with some type of light walking if she would be allowed to use her crutches for support."

Claimant appeals findings that her inability to obtain employment was not a direct result of the impairment from the compensable injury; that she has some ability to work; and that she did not make a good faith effort to obtain employment commensurate with her ability to work during the filing period for the eighth compensable quarter.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104).

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, 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." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. 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 a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." 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 the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to light duty does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to resolve.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case.

Concerning the "good faith attempt" criterion, the hearing officer could credit the report of Dr. MG, to the effect that claimant could return to her office cleaning job because her physical condition does not actually require the use of crutches, or the report of Dr. D, to the effect that claimant could perform sedentary work even if she continued to use crutches to assist in ambulation. The Appeals Panel has held that where there is some ability to work, even light duty or part time or sedentary duty, then a good faith attempt must be made to obtain employment commensurate with that ability. Texas Workers' Compensation Commission Appeal No. 962461, decided January 8, 1997. As for Dr. OG's assessment of the likelihood of her being hired given her education level, poor command of English, and small town residence, the Appeals Panel has noted that while such comments from a doctor can be considered, as can all the admitted evidence, such comments do not constitute "medical evidence." Texas Workers' Compensation Commission Appeal No. 951923, decided December 29, 1995. We further observed in that opinion that such factors may have an effect, one way or the other, on the questions of whether a "good faith" attempt was made and whether the unemployment was "a direct result" of the impairment, but they are not contained in any criteria set out in Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, describing an inability to do any work as requiring no job search. In Texas Workers' Compensation Commission Appeal No. 951813, decided December 14, 1995, *citing* Texas Workers' Compensation Commission Appeal No. 941509, decided December 22, 1994, and Appeal No. 941439, *supra*, we stated that "questions of limited education and language skills could affect the question of 'direct result' as to 'not obtaining employment' but were not described as factors in deciding whether a claimant had no ability to work," and that job experience, education, and language skills "may be relevant, along with other evidence, when some ability to work is present and the question has become one of employment in which 'direct result' or 'good faith effort' are criteria. [Emphasis in original.]"

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge