

APPEAL NO. 990780

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 March 15, 1999. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the second and third compensable quarters. The hearing officer determined that the claimant was not entitled to SIBS for either period and the claimant appeals, urging that the evidence proves that he could not work during the filing periods for the quarters in issue and that he was entitled to SIBS for those periods. The respondent (carrier) argues that there is sufficient evidence to support the hearing officer's findings that the claimant had some ability to work and did not attempt in good faith to seek employment commensurate with his ability to work, and urges that we affirm the decision of the hearing officer.

DECISION

Affirmed.

The claimant sustained a back injury in \_\_\_\_\_, subsequently had surgery in November 1995 and May 1996, reached maximum medical improvement on November 4, 1996, and was assessed a 17% impairment rating. The claimant testified that he did not feel he was capable of working during the filing periods (October 28, 1997, to January 26, 1998, and January 27, 1998, to April 27, 1998, respectively) and that he has chronic pain. Somewhat vague as to specific information, he did not offer evidence to show that he made any job contacts or inquiries during the filing periods in issue. A functional capacity evaluation (FCE) and other medical reports in evidence do not support that the claimant has no ability to work. The FCE indicates that the claimant is not able to return to his former employment but can perform at a sedentary work level. Medical reports from Dr. W, Dr. S, and Dr. R note the claimant's pain complaints but, other than pain management, do not indicate further treatment. One report notes uncooperativeness by the claimant with the examination. It was also brought out that during the entire filing period for the second quarter and the first few days of the filing period for the third quarter, the claimant was incarcerated.

The hearing officer found that the claimant has some ability to work during the filing periods for both the second and third quarters and that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. Clearly, there was sufficient evidence from which the hearing officer could find that the claimant had some ability to work during those periods even though the claimant testified that he did not feel he could work and the medical records do corroborate chronic pain from the injury and surgeries. If and when there is conflict in the evidence, it is the responsibility of the hearing officer to resolve such conflict and make findings of fact. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Section 410.165(a). Where there is sufficient evidence to support the findings and conclusions of the hearing officer, we do not substitute our judgment for his. Texas

Workers' Compensation Commission Appeal No. 962318, decided December 31, 1996. Since we uphold the determinations that the claimant had some ability to work and that he did not make a good faith effort to obtain employment commensurate with his ability to work, the claimant has not established an entitlement to SIBS for either quarter as he has not shown that he met all the requirements. Sections 408.142 and 408.143. On this basis, the decision and order of the hearing officer is affirmable.

The hearing officer also found that during both the second and third quarter filing periods the claimant's unemployment was a direct result of the impairment from his compensable injury. These findings are not on appeal; however, we do not put our imprimatur on the hearing officer's determination regarding the filing period for the second quarter during which time the claimant was incarcerated. Incarceration during a filing period can directly impact the direct result requirement for the qualification for SIBS. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 951487, decided October 19, 1995; Texas Workers' Compensation Commission Appeal No. 970186, decided March 6, 1997; Texas Workers' Compensation Commission Appeal No. 982198, decided October 30, 1998; Texas Workers' Compensation Commission Appeal No. 990447, decided April 12, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 990555, decided April 27, 1999 (Unpublished).

The decision and order of the hearing officer are affirmed.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

CONCUR IN RESULT:

I do not disagree that incarceration can preclude direct result, I merely see no reason to address an unappealed matter.

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Gary L. Kilgore  
Appeals Judge