APPEAL NO. 990819

Following a contested case hearing held on March 31, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that during the filing period for the seventh compensable quarter, the appellant (claimant) had some ability to work, that he did not make a good faith effort to obtain employment commensurate with his ability to work, and that he is not entitled to supplemental income benefits (SIBS) for that quarter. Claimant has appealed this determination on evidentiary grounds, asserting that the hearing officer considered a videotape of claimant taken in May 1998 and the required medical examination report of Dr. JB but ignored a more contemporaneous MRI report as well as the opinion of claimant's treating doctor, Dr. L, and the fact that claimant was being processed for additional spinal surgery during the filing period. The respondent (carrier) urges in response that the evidence is sufficient to support the hearing officer's determination.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement on September 5, 1996, with a 15% impairment rating (IR) and has not commuted any portion of the impairment income benefits (IIBS); that the seventh compensable quarter began on January 15 and ended on April 15, 1999; and that during the filing period (a period of at least 90 days preceding the compensable quarter), claimant earned no wages and did not seek employment.

Claimant testified that he injured his low back at work when he picked up a bundle of pants to carry to the seamstresses and heard a "snap"; that he had spinal surgery on January 15, 1996; that until approximately September 1998 his treating doctor was Dr. AB; that his current treating doctor is Dr. L; that Dr. L has not released him to return to work and has proposed additional spinal surgery; and that he is in the midst of the Texas Workers' Compensation Commission's spinal surgery process and saw a second opinion doctor, Dr. V, the previous week. Claimant further stated that he has low back pain which radiates down both legs; that he takes Soma and Hydrocodone; that he cannot even bend down to tie his shoes or wash his legs in the shower; that he spends approximately eight hours per day in bed although he tries to do some exercising and walking around the yard; and that he sometimes has "problems" walking. He said he did not look for work during the seventh quarter filing period because he cannot work. It was claimant's contention that during the filing period he had no ability to work.

Dr. JB wrote on October 27, 1998, that he examined claimant on that date; that following this examination, a functional capacity evaluation (FCE) was performed and indicated that claimant, who is 26 years old, is capable of performing sedentary activity for eight hours per day; that claimant underwent a laminectomy and discectomy by Dr. L on

January 15, 1996; that he subsequently had physical therapy for three months and then recurrent nerve blocks, acupuncture, oral medication, and restriction from work by Dr. AB; that claimant states he has pain 20 hours a day, that he can walk one-half block, stand and sit for 10 minutes, and lift eight-pound objects; that he says he has stocking-glove numbness over all aspects of his left leg; that he does not appear in acute distress; that there is no atrophy; that in a sitting position, his straight leg raising (SLR) can achieve 90 degrees on the right and 80 on the left, but in a supine position he achieves 15 degrees on either leg; that his MRI reveals mild bulging at L4-5 and L5-S1; and that after approximately two years, he has changed his mind and decided to proceed with additional spinal surgery. Dr. JB further stated that while claimant is experiencing discomfort in his back and left leg, "a significant portion of his findings cannot be explained on the basis of his physical findings," and that the fact that he has a nearly normal SLR in a sitting position and an abnormal SLR in a supine position at 15 degrees, coupled with complaints of stocking-glove numbness to the entire left leg, and inappropriate pain response when his foot is dorsiflexed while his knee is flexed, combined with a high number of Waddell's signs in the lumbar spine would tend to indicate a portion of the symptoms are a result of symptom magnification.

Dr. L wrote on November 23, 1998, that claimant still complains of severe, intense pain in his back and down to his left leg; that his pain is still worse with mechanical activity; that any sitting, standing, stooping, bending, getting up and down from a chair, getting in and out of a car, and going up and down stairs exacerbates his pain; that Dr. C examined claimant and has also recommended surgery; and that "[a]t the present time he still remains totally disabled for work, no return to work." Dr. L wrote on January 11, 1999, that claimant is under his medical care and will be unable to work until further notice. Dr. L wrote on January 26, 1999, that a January 12, 1999, MRI showed a recurrent, moderately large, left herniated disc at the L4-5 level with significant narrowing of the neural foramen and deformity of the thecal sac; that it appears that claimant is in need of surgical intervention; that he has real organic pain; and that he has a markedly antalgic gait when walking and walks with a limp due to the pain in his back and down his left leg. Dr. L further stated that claimant is "100% disabled from any type of gainful employment and is not able to do any kind of work." The January 12, 1999, MRI report states the impression as a suspected recurrent moderate-to-large central/left paracentral herniated nucleus pulposus at the L4-5 level with significant narrowing of the left neural foramen and deformity of the thecal sac.

In evidence is a surveillance videotape taken on May 18, 1998, showing claimant walking without any limp or antalgic gait, getting in and out of a small car with ease, and walking up a driveway pulling an empty garbage can with one hand and carrying another empty garbage can with the other.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the IIBS period, the employee: has an 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 a portion of the IIBS; and

has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]."

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*.

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 determinations 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. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could consider the content of the surveillance videotape notwithstanding that it preceded the pertinent filing period and could credit the report of Dr. JB and the outcome of the FCE. The hearing officer was not bound by the differing opinion of Dr. L concerning claimant's ability to work during the filing period.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge