

APPEAL NO. 990897

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 9, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 15th compensable quarter, based on a total inability to work ("unable to work and had been advised not to return to work by her treating doctor"), and that carrier "is liable for fifteen quarter [SIBS] only if the Claimant has not lost entitlement under § 408.146(c) of the Act."

Appellant (carrier) appeals, contending that there is insufficient medical evidence to support a total inability to work, that the medical evidence is "undetailed and conclusory," and that, in any event, claimant has a permanent loss of entitlement to income benefits pursuant to Section 408.146(c). Carrier also asserts error in the hearing officer's exclusion of certain offered exhibits. Carrier requests that we reverse the hearing officer's decision and render a decision that claimant is not entitled to SIBS for the 15th compensable quarter. Claimant filed a "Request for Review"; however, claimant clearly intends for it to be a response requesting affirmance of the hearing officer's decision.

DECISION

Reversed and rendered.

As procedural history, we note that, in Texas Workers' Compensation Commission Appeal No. 980722, decided May 28, 1998, a case involving this claimant's entitlement to SIBS for the 11th compensable quarter, the Appeals Panel reversed the hearing officer's decision and rendered a new decision that claimant was not entitled to SIBS for the 11th quarter because she had failed to make a good faith search for employment. In that case, we suggested that claimant get "with her treating doctor and obtain an assessment of what she can do." In Texas Workers' Compensation Commission Appeal No. 980978, decided June 22, 1998 (Unpublished), the Appeals Panel affirmed a hearing officer's decision that claimant was not entitled to SIBS for the 12th compensable quarter and that claimant was not totally unable to work. Similarly, in Texas Workers' Compensation Commission Appeal No. 981689, decided September 8, 1998 (Unpublished), the Appeals Panel affirmed a hearing officer's decision that claimant is not entitled to SIBS for the 13th compensable quarter on virtually the same evidence as the 12th quarter. In Texas Workers' Compensation Commission Appeal No. 990248, decided March 26, 1999 (Unpublished), a decision apparently not available or unknown to the parties at the time of the CCH, the Appeals Panel affirmed a hearing officer's decision that claimant was not entitled to SIBS for the 14th compensable quarter. In that case, this claimant again asserted a total inability to work, as supported by her treating doctor, Dr. M. The panel summarized that evidence as follows:

[Dr. M] indicated in notes provided in June and July 1998 and in an undated letter that claimant could not work. He discussed claimant's numbness and

weakness in the lower extremities and stated that the carrier "is not cooperating" with her treatment. He noted lumbar motion to be painful, with claimant "exquisitely tender" in the lumbar area. Dr. M also said that claimant has fibrosis in the area of her lumbar surgery which "trap the nerve roots" causing "severe" pain. Repeatedly, Dr. M said that claimant was unable to work in any capacity due to severe pain and severe limitations of movement coupled with the necessity to use narcotics for pain.

That is basically the same evidence claimant relies on in this case, where included in Claimant's Exhibit No. 2, are two identical copies of an undated letter from Dr. M, listing a "Work Status" as "Disabled" and stating that claimant "is currently receiving powerful narcotics and muscle relaxants to make her pain tolerable and allow her to function at a minimal level." Dr. M also states claimant is in no condition to drive and "is unable to perform any gainful activity at the present time or in the near future." Other undated reports and a report dated October 20, 1998 (during the filing period of August 1 through October 30, 1998) state much the same thing in addition to the fact that claimant has undergone chemotherapy and radiation treatment for an unrelated brain tumor.

Carrier offered three of the cited Appeals Panel decisions into evidence and the hearing officer sustained claimant's objection excluding the decisions, stating that she is only concerned with the 15th quarter, that each quarter stands alone, and that:

[t]he basis of my ruling is Section 408.142 wherein the criteria for entitlement to [SIBS] are enumerated--delineated. One of them is not showing that there has not been a loss of entitlement in the prior four quarters.

So, in other words--your point is well-taken. If the Act uses the word "entitled," that does raise an interesting point. But I'm analyzing whether or not she's entitled for the fifteenth quarter, and that's going to turn on her ability to meet her burden of proof to show that she can meet four criteria. That's all I've got to do, and then I can say yes, she's entitled.

We decline to rule on whether the hearing officer's exclusion of Appeals Panel decisions as exhibits amounts to error, rather noting that we routinely consider Appeals Panel decisions, case law, Texas Workers' Compensation Commission (Commission) rules, and portions of the 1989 Act that are neither admitted into evidence as exhibits, or, for that matter, even cited. Consequently, even if it was error to exclude the Appeals Panel decisions, it was harmless error and we will take cognizance of our own prior decisions in claimant's case.

Nor do we necessarily find error in the hearing officer's failure to apply Section 408.146(c) because, at the time of the CCH, the hearing officer was unaware of our decision in Appeal No. 990248, *supra*, which was the final administrative determination on that quarter's entitlement to SIBS. Section 408.146(c) provides:

- (c) Notwithstanding any other provision of this section, an employee who is not entitled to [SIBS] for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury.

Although carrier's position at the benefit review conference (BRC) was simply that claimant had not made a good faith effort to find employment commensurate with claimant's ability to work during the 15th quarter filing period, carrier made it amply clear at the CCH that it was also relying on Section 408.146(c). Although the better practice would have been for carrier to raise a separate issue of loss of entitlement under Section 408.146(c) at the BRC (which would have placed the burden of proof on carrier), we cannot ignore a provision of the 1989 Act as though it did not exist, just because it was not specifically referenced as an issue at the BRC. The determination of whether claimant has not been entitled to SIBS for 12 consecutive months and therefore has ceased to be entitled to any additional income benefits involves essentially a question of law and is subsumed in the greater issue of entitlement. We see no need to remand this case to the hearing officer to take notice of our decisions in Appeal Nos. 980722, *supra*; 980978, *supra*; 981689, *supra*; and 990248, *supra*. Being the final administrative adjudicator in the dispute resolution process of the Commission, we find that claimant, in this case, has not been entitled to SIBS for 12 consecutive months, being the 12 months from October 31, 1997, through October 30, 1998, and, pursuant to Section 408.146(c), ceases to be entitled to any additional income benefits for her compensable injury. In that regard, we find that carrier is not liable for the 15th compensable quarter of SIBS.

Having so held, we do not deem it necessary to do a critical analysis of the sufficiency of the evidence regarding claimant's total inability to work other than to note that 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. 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*.

We reverse the hearing officer's decision that claimant is entitled to SIBS for the 15th compensable quarter and render a new decision that claimant has not been entitled to SIBS for 12 consecutive months and, therefore, has ceased to be entitled to any additional income benefits for the compensable injury to include SIBS for the 15th compensable quarter.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur in the result. I write separately to state that I believe our decision should address the sufficiency of the evidence to support the challenged findings and conclusions pertaining to the 15th compensable quarter, as requested by the carrier in its appeal. Section 410.204(a) provides that "[a]n appeals panel shall issue a decision that determines each issue on which review was requested." In the event, however unlikely, that our disposition of the appeal based on Section 408.146(c) were to be disturbed upon judicial review, the carrier would still not have had its appealed issues determined by the Appeals Panel.

Philip F. O'Neill
Appeals Judge