

APPEAL NO. 990930

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 7, 1999. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fifth quarter and that she is not entitled to SIBS for the sixth quarter. In her appeal, the claimant asserts that the hearing officer erred in finding that she had some ability to work in the filing period for the sixth quarter and that she did not make a good faith effort to look for work commensurate with her ability in that period. In response to the claimant's appeal, the respondent/cross-appellant (carrier) urges affirmance. In its cross-appeal, the carrier argues that the hearing officer's determination that the claimant made a good faith effort to look for work in the filing period for the fifth quarter and that her unemployment was a direct result of her impairment are against the great weight of the evidence. In response to the carrier's appeal, the claimant urges affirmance. The parties withdrew an issue of whether the carrier timely filed its contest of the claimant's entitlement to fifth quarter SIBS.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that fifth quarter of SIBS ran from August 14 to November 12, 1998; that the sixth quarter of SIBS ran from November 13, 1998, to February 11, 1999; that during the filing period for the fifth quarter, the claimant earned no wages; and that during the filing period for the sixth quarter, the claimant did not attempt to obtain employment and did not earn any wages. The filing periods for the fifth and sixth quarters were identified as May 15 to August 13, 1998, and August 14 to November 12, 1998, respectively. The claimant testified that she worked as an information support specialist at a bank at the time of her injury. She stated that she was injured when a security door hit her directly on her left elbow. The claimant was assigned a 16% IR for her compensable injury by the designated doctor, Dr. DW, which was comprised of four percent for reflex sympathetic dystrophy (RSD) and 12% for mental-behavioral impairment.

Dr. RW became the claimant's treating doctor shortly after her injury in 1994 and has continues to serve in that capacity. In letters of July 7, 1998, August 7, 1998, and August 13, 1998, Dr. RW stated:

[Claimant] is totally and permanently disabled. [Claimant] has been unable to perform the essential duties of any occupation and is unemployable by virtue of a medically determined [RSD] and mental health.

The disability is not expected to significantly improve.

[Claimant] has impairments in strength, endurance and flexibility.

Dr. RW testified by telephone at the hearing. He stated that he had advised the claimant not to look for work during the filing periods for either the fifth or sixth quarters. In addition, he opined that the claimant did not have any ability to obtain or retain employment in those periods. Dr. RW stated that the nature of the claimant's physical and mental impairments not only prevent her from working but also have caused difficulties with the activities of daily living. He explained that the claimant could not function socially at work and that because of her impairment in thinking, concentration, focus and attention, she would not be able to appropriately adapt in a work setting. Dr. RW also noted that the claimant's medications, namely Valium, Xanax, Desyrel, Zoloft, Restoril and Vicodin, also preclude employment and "would cause difficulty in getting to and from work."

On November 6, 1998, Dr. B examined the claimant as a required medical examination (RME) doctor. In his report, Dr. B stated that he attempted to conduct a functional capacity evaluation (FCE) but that he could not do so because the claimant was uncooperative. Dr. B noted that "[o]n _____, [claimant] was hit by a swinging door on her elbow and essentially she has not been employed since that time which appears to be somewhat ludicrous." Dr. B further opined that the claimant's restrictions were related more to her mental problems than to physical symptoms and concluded that he did not "see her returning to any type of gainful employment until such time as her psychiatric problems are dealt with completely."

In a report of March 18, 1999, Dr. P opined that the claimant's "psychiatric disability does not preclude her working." He stated that "the most debilitating component of her current picture would be her panic attacks and associated agoraphobia." He stated that patients with these problems have difficulty dealing with anxiety and stress and tend to seclude themselves; however, he concluded that "[t]hese may have some limitation in her ability to work, but should not exclude her from working at all." Finally, Dr. P opined that the claimant had the ability to obtain and retain employment. At the hearing, Dr. RW stated that he disagreed with Dr. P's opinion that the claimant was able to work. And, in a letter of April 6, 1999, Dr. RW referenced a recent suicide attempt and noted that the claimant experiences pain disorder, reactive depression, debilitating panic attacks with associated agoraphobia, drowsiness and lack of alertness from medication, impairments of focus, attention, and concentration, and is socially restricted and withdrawn. Dr. RW concluded that "[d]ue to her established emotional and behavioral impairments, she could not be expected to even meet or greet people on a part-time basis without significant risk of a performance failure or aggravation of her condition. Hence, I certify [claimant] disabled."

The claimant testified that she looked for work in the filing period for the fifth quarter despite Dr. RW's recommendation that she not do so. She stated that she had five or six employment contacts that she "pursued" in the filing period. She explained that when she stated that she "pursued" those contacts, she meant that her efforts went beyond calling and included submission of an application or resume and follow-up contact to check on the status of her application. The claimant testified that in addition to those efforts, she prepared and submitted a proposal to Americorps to initiate a program. She testified that she conducted research and prepared a 12- to 15-page program proposal. She stated that her proposal was rejected because of its similarity to an existing program in the area. The

claimant testified that making five employment contacts was a lot for her because she "had to work around her pain symptoms."

As noted above, the hearing officer determined that the claimant was entitled to SIBS for the fifth quarter but that she was not entitled to those benefits in the sixth quarter. He further determined that she had the ability to do some work in the filing periods for both quarters and that her unemployment was a direct result of her impairment. The good faith and direct result issues were questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight, credibility, relevance, and materiality of the evidence. Section 410.165(a). As the fact finder, he was responsible for resolving the conflicts and inconsistencies in the evidence and for determining what facts have been established. The hearing officer determined that the claimant did not sustain her burden of proving that she had no ability to work. A review of the hearing officer's decision demonstrates that he rejected Dr. RW's opinion that the claimant had no ability to work and credited the opinions of Dr. B and Dr. P that the claimant had some ability to work. It was solely the hearing officer's province to consider those opinions and to decide which ones he believed were more persuasive. Our review of record does not demonstrate that his determination to give more weight to the opinions of Drs. B and P is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists to disturb the determination that the claimant had some ability to work in the fifth and sixth quarter filing periods. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we likewise affirm the determination that the claimant is not entitled to SIBS for the sixth quarter because the claimant acknowledged that she made no effort to look for work in the filing period for that quarter. With respect to the fifth quarter, the hearing officer stated "[w]hile she did not contact many potential employers, the substantial efforts she exerted to seek employment indicated good faith." As the fact finder, the hearing officer was free to consider the claimant's testimony as to the nature of the efforts she made to obtain employment, which included the preparation of a 12- to 15-page program proposal, and to determine that those efforts rose to the level of a good faith search. A review of the record does not reveal that that determination is so contrary to the great weight and preponderance of the evidence as to compel its reversal on appeal. Pool; Cain. The fact that another fact finder may well have drawn different inferences from the evidence, which would have supported a different result, does not provide a basis for our reversal of the decision and order on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The carrier also asserts error in the hearing officer's determination that the claimant's unemployment was a direct result of her impairment. We have previously recognized that a direct result determination may be sufficiently supported by evidence that the claimant cannot reasonably perform the duties of the job she was doing at the time of her injury. The claimant's testimony, in conjunction with the evidence from Dr. RW, provides sufficient support for the hearing officer's direct result determination. That determination is not so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust and, thus, we will not reverse it.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge