

APPEAL NO. 990944

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 8, 1999. With regard to the only issue before him, the hearing officer determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fifth compensable quarter in that claimant "was unable to perform any work at all as a direct result of his impairment."

The appellant (self-insured school district, referred to as the self-insured or carrier) appealed, contending that the medical evidence does not support a total inability to work, that claimant's treating doctor released claimant "to go to TRC [Texas Rehabilitation Commission] classes" and that claimant's efforts in making four job contacts during the filing period (which the hearing officer found not to be a good faith attempt to obtain employment) demonstrates some ability to work. Self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds that claimant "has not been released for work nor been informed of what his abilities are given his condition" and urges affirmance.

DECISION

Reversed and a new decision rendered.

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). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling 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 employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

Claimant had been employed with self-insured as an air conditioning technician for about 13 years. The parties stipulated that claimant sustained a compensable low back injury on _____, which resulted in an 18% impairment rating (IR) and that the filing period for the fifth compensable quarter was from October 25, 1998, through January 24, 1999. Claimant testified how he had been bent over at work, straightened up, and sustained his low back injury, that he had fusion surgery with instrumentation at L4-S1 in November 1996, how that surgery was unsuccessful, and that Dr. G, claimant's current treating doctor, removed the instrumentation in mid-1996. Claimant testifies that he has improved somewhat since the hardware was removed from his back.

Claimant testified that his doctor had not released him to return to work but the carrier's adjuster had told him that, to qualify for SIBS, he had to look for work. Attached to claimant's Statement of Employment Status (TWCC-52) are four job contacts, the first being made in November, two in December, and one in January 1999. The hearing officer, in his statement of the evidence, comments that two of the contacts were for cashier positions, "which were likely within [claimant's] physical ability to perform" but another as a customer service assistant and a sales clerk were "most likely beyond the Claimant's ability." The hearing officer states that those four contacts indicate "that the Claimant was going through the motions and making a few contacts to show some effort in seeking a job, but not to actually find or get a job." That comment is not seriously challenged. The hearing officer makes a finding that claimant "did not attempt in good faith to obtain employment commensurate with his ability to work." Fairly clearly, claimant was pursuing a total inability to work theory.

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*.

In this case, there are only three medical reports in evidence, all of which are after the filing period in question. Dr. G, claimant's treating doctor, in a report dated February 8, 1999, comments that claimant is having pain in his back, particularly when he does repetitive bending and stooping. Dr. G goes on to comment:

He is to walk as much as he can. [Claimant] is presently going through cross training with the TRC. He has been advised that he needs to go through a hearing so that he will make a good-faith effort to find a job. Based upon my understanding of going through cross training, this is an attempt to get the training to make himself available to do further work in the future. To go out and find work now before he finishes cross training is actually counter-productive and hurts [claimant] in the short and long term.

In a report dated March 4, 1999, Dr. G states:

While it is true that I have released him for light activity because the TRC will only help an injured worker if he has been released with restrictions. It is also true that [claimant], if he were to work in a regular job at this point in time, runs a high risk of re-injuring his lower back because he has not completed his healing. I have released [claimant] to job training because I felt that this is reasonable and it did not significantly increase his risk of re-injury. However, to be in a repetitious job it would put stress across his lower back, decreased the rate of fusion, increase his overall pain, and also not allow him to finish his cross training efforts with the TRC. (Emphasis added.)

We would comment that Dr. G's reports, particularly the March 4th report, does not constitute a total inability to work. Obviously, Dr. G is considering only claimant's preinjury or a "regular" job and has not considered a light or sedentary part-time position. Claimant need not seek a "regular" or "repetitious job" but only employment commensurate with his ability which, according to Dr. G, would be job training.

The third medical report is from Dr. W, self-insured's independent medical evaluation doctor, who in a report dated April 6, 1999, was of the opinion that:

[Claimant] is capable of doing a sedentary type job which involves no prolonged sitting, standing, or walking. He should be able to change positions frequently. He also should not be doing any repetitive bending, stooping, crawling, or climbing. Lifting should be restricted to 20 pounds only on an occasional basis.

We have frequently noted that the total inability to do any work at all will arise in only rare and unusual cases, as opposed to the fairly common situations where a seriously injured employee cannot return to the previous employment. Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997. Regrettably, an individual, such as claimant, with an 18% IR, generally cannot reasonably expect to be pain free and to be restored to the physical capabilities that he had before his injury. In this case, we simply find insufficient medical evidence of a total inability to work. Fairly clearly, claimant should avoid any activities which would involve repetitive bending, stooping, etc. as described by both Dr. G and Dr. W and should limit his job search to sedentary work which would allow him to shift positions frequently. And it may be that claimant can only work part time. In Texas Workers' Compensation Commission Appeal No. 982599, decided December 17, 1998, we noted that, while it is apparent that the claimant's ability to work is significantly limited, the statute requires that a good faith effort be made to seek or obtain employment commensurate with that ability. As was stated by Judge Kelley in Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996:

Because the job search requirement is geared to the worker's post-injury capabilities, it may be that there are only a few jobs, or only part-time jobs, that the injured worker can realistically perform. The fact that such jobs may

be few, however, does not mean that they need not be sought. To this end, injured workers must work with their doctors to solicit recommendations of what they can do, not what they are unable to do. (Emphasis in original.)

In this case, the treating doctor has released claimant to seek retraining with the TRC. Claimant should do so and seek retraining and/or employment commensurate with his ability.

We find that the hearing officer's determination that claimant "was unable to perform any work at all" to be insufficiently supported by the medical evidence and so against the great weight and preponderance of the evidence as to be clearly wrong. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse the hearing officer's determination that claimant is entitled to SIBS for the fifth compensable quarter and render a new decision that claimant is not entitled to SIBS for that quarter.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

DISSENTING OPINION:

Unable to fathom the reasoning of the majority, I am constrained to dissent. I think the best argument as to why the decision of the hearing officer should be affirmed is expressed by the hearing officer's own rationale for his decision. The hearing officer states as follows in his decision:

To support a medical conclusion that an injured worker has no ability to work at all, a doctor must affirmatively show in his or her reports that inability with detailed, specific, explanatory information about the worker's impairment and limitations, and why/how they prevent the injured worker from doing any work. [Texas Workers' Compensation Commission Appeal No. 941696, decided February 8, 1995 and Texas Workers' Compensation Commission Appeal No. 951025, decided August 10, 1995] The medical reports cannot be merely off-work slips and conclusory statements that a patient cannot work or is totally disabled. [Texas Workers' Compensation Commission

Appeal No. 941382, decided November 28, 1994] Only with such specific medical information can the credibility of the doctor in his reports be properly assessed by the hearing officer. [Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997]

Although [Dr. G] has rarely ever met this standard in his medical reports, he was extremely specific in the two that are in evidence. He articulated what the Claimant was hampered in any physical activity, and why the Claimant was in peril of re-injury. The doctor explained that the Claimant was still healing, and trying to complete rehabilitation and retraining with [the Texas Rehabilitation Commission] before he was ready to seek employment. Moreover, the Carrier's doctor, who did not see the claimant until ten weeks after the filing period ended, tended to corroborate what Dr. G was explaining. That doctor put about as many restrictions on the Claimant as the treating doctor did. The claimant was thus able to prove with these medical reports that he had no ability to work during the filing period.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

I fail to understand how the majority can purport to follow this standard and yet reverse the decision of the hearing officer. The majority parses words in an attempt to make it appear that it is not Dr. G's opinion that the claimant cannot work. I think it was up to the hearing officer to weigh the evidence. Nor do the majority's semantic gymnastics convince me that Dr. G meant other than what he said. I find the majority opinion, for want of a better word, conclusory.

I would affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge