

APPEAL NO. 990999

On April 21, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The appellant (claimant) requests that the hearing officer's decision that she is not entitled to supplemental income benefits (SIBS) for the third and fourth quarters be reversed and a decision rendered in her favor. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has an impairment rating (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. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by claimant during the filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)).

This case concerns an assertion of no ability to work. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he had no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. In Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, the Appeals Panel stressed the need for medical evidence to affirmatively show an inability to work if that was being relied on by claimant, and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, the Appeals Panel noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred."

The parties stipulated that claimant sustained compensable injuries, including at least her lower back and left knee, on \_\_\_\_\_; that she has a 28% IR; that she did not commute IIBS; that the third quarter was from May 1 to July 30, 1998, with a filing period of January 30 to April 30, 1998; and that the fourth quarter was from July 31 to October 29, 1998, with a filing period of May 1 to July 30, 1998. There is no appeal of the hearing officer's finding that claimant's unemployment during the filing periods for the third and fourth quarters was a direct result of her impairment. Although the hearing officer found in claimant's favor on the direct result criterion, in order to be entitled to SIBS claimant also had to show that she attempted in good faith to obtain employment commensurate with her

ability to work. Sections 408.142(a) and 408.143(a); Rule 130.104(a). Claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. It is undisputed that claimant was unemployed and did not seek employment during the filing periods for the third and fourth quarters.

Claimant was injured at work on \_\_\_\_\_, when she slipped and fell. She was working as a supervisor in the area of the employer's hospital where instruments are sterilized at the time of injury. In 1995, Dr. P, claimant's treating doctor, reported that an MRI showed a herniated disc at L4-5, that an EMG was positive for radiculopathy, and that claimant has an internal derangement of the knee. Dr. P performed claimant's lumbar laminectomy at L4-5 in August 1995. Dr. P noted that postoperatively, claimant continued to have lower back pain and foot drop and was placed in physical therapy and then work hardening.

Dr. P referred claimant for a functional capacity evaluation (FCE), which was done in June 1997, and the physical therapist who signed the FCE report wrote that claimant "demonstrated working in a sedentary level of work," which she said is defined as 10 pounds lifted occasionally, and that claimant's demonstrated physical capabilities do not meet the physical demands of the job she had when injured, which the therapist said was a medium level of work. The therapist noted that claimant was not cooperative, participated poorly in the evaluation process, and put forth minimal effort, but nonetheless wrote that the results of the test appeared to be valid.

Claimant was examined by Dr. K in September 1997 at carrier's request and he reported that claimant had psychosomatic complaints involving her back and left lower extremity and exhibited symptom magnification. He also noted that claimant was status post lumbar laminectomy and that she has an internal derangement of the left knee as reported on an MRI. Dr. K stated that claimant's symptoms are far more than one can find clinically on examination.

The filing period for the third quarter began on January 30, 1998. Dr. P wrote in January 1998 that claimant continued to have pain in her lower back, cervical area, and left knee; that he advised her to continue with conservative treatment; and that she continued to be disabled and unable to work. Dr. P wrote in April 1998 that claimant was in poor condition, with foot drop, severe neurological deficits, and severe pain; that the FCE revealed claimant is able to perform sedentary work; that claimant may perform duties like answering the telephone occasionally; that she cannot be in a sitting position for long periods of time due to lumbar pain; and that in his opinion claimant "is totally disabled and is only able to perform sedentary type duties." The filing period for the fourth quarter ended on July 30, 1998. Dr. P wrote in August 1998 that he saw claimant in July 1998 and that claimant continues to have pain and that she remains disabled and is not able to return to any type of gainful employment. Dr. P also wrote in August 1998 that the claimant was reevaluated that month, that she continued to have knee pain, that her condition has

worsened, and that, because of her worsening condition, she is unable to perform any type of work, including sedentary work.

Dr. P wrote in September 1998 that claimant has back pain with foot drop and severe neurological deficits and that she is totally disabled and not even able to perform sedentary duties. Dr. P wrote in October 1998 that claimant ambulates with a cane, uses an arthrosis due to foot drop, has continuing pain, and is not able to perform any type of sedentary work due to her limitations and low tolerance to prolonged activity. Dr. P noted in December 1998, that an MRI, apparently of the left knee, was positive and that an arthroscopy would be performed to relieve claimant's pain. Claimant underwent an arthroscopic surgery to her left knee in January 1999.

Claimant testified that since her injury she has had back pain that radiates down her left leg and left knee pain, that back surgery did not relieve her pain, that she cannot sit or stand for very long, that her leg swells when she walks, that before her knee surgery she used a knee brace and a cane, that after her knee surgery she is using a walker, that she takes pain medications daily, that she did not look for work during the filing periods for the third and fourth quarters because she is disabled and Dr. P told her she still cannot work, that she was unable to perform sedentary work during the filing periods, that she cannot stand for more than 10 minutes without having weakness, and that she sees Dr. P every two months.

The hearing officer found that the medical evidence did not support Dr. P's opinion that claimant was unable to work during the filing periods for the third and fourth quarters, that claimant possessed the ability to perform sedentary work during the filing periods for the third and fourth quarters, and that claimant did not make a good faith effort to seek employment commensurate with her ability to work during the filing periods for the third and fourth quarters. The hearing officer concluded that claimant is not entitled to SIBS for the third and fourth quarters. Claimant contends that the evidence shows that she is unable to work.

Whether claimant was unable to work during the filing periods in question was a fact question for the hearing officer to determine from the evidence presented. The FCE of June 1997 reflected that claimant can perform sedentary work and Dr. P seemed to agree with that assessment in April 1998, although his report is somewhat contradictory, but he then indicated in August 1998 that claimant is unable to perform any type of work, including sedentary work, due to her worsening condition. The therapist who signed the FCE report noted that claimant had given minimal effort in that evaluation and Dr. K noted symptom magnification when he examined claimant. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgement for that of

the trier of fact. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Judy L. Stephens  
Appeals Judge