

APPEAL NO. 991095

On March 22, 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 issue at the CCH was whether respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first quarter. The appellant (carrier) requests that the hearing officer's decision that claimant is entitled to SIBS for the first quarter be reversed and a decision rendered in its favor. Claimant's response 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 prior filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). Claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that on _____, claimant sustained a compensable injury (the hearing officer's decision incorrectly states that the parties stipulated that the compensable injury occurred on (incorrect date of injury)); that claimant reached maximum medical improvement with an IR of 15% or greater; that claimant did not commute IIBS; and that the first quarter was from September 29, 1998, to December 28, 1998. The filing period for the first quarter was the 90-day period preceding the beginning of the first quarter. Rules 130.101 and 130.102(b). The case was litigated based on a filing period of June 30 to September 28, 1998.

According to the January 17, 1998, report of Dr. K, the designated doctor, on _____, claimant was injured at work when he slipped and fell while working as a busboy. Dr. K noted that claimant was 66 years old at the time of the examination and that as a result of his injury, he had two surgeries of the right knee, one in December 1995 and the other in May 1997. Dr. K assigned claimant a 19% IR for impairment of the lumbar spine and right knee. Dr. K noted that he would not expect claimant to perform anything more than light-duty work.

Dr. J, claimant's treating doctor, wrote in March 1998 that claimant has lumbar radiculitis, that he was in a work hardening program, that he was taking pain medication,

that after work hardening was completed she would refer claimant to the Texas Rehabilitation Commission (TRC) for vocational rehabilitation and retraining so that claimant could return to a job where he would not aggravate his back and knee injuries, and that claimant had not been released to return to work. Dr. J wrote in May 1998 that claimant had pain in his back and both legs, that he had finished his work hardening program, that a functional capacity evaluation (FCE) would be done, and that claimant has not been able to return to work.

An FCE was performed on May 18, 1998, and Dr. G, D.C., reported that the job claimant was doing at the time of injury required him to function at a medium physical demand level, that claimant is only able to function at a light-medium physical demand level, and that claimant is unable to meet the physical demand level of the job he had when he was injured. Dr. G recommended that claimant be referred to the TRC for vocational retraining so that he might find gainful employment at his proper physical demand level.

Dr. J referred claimant to the TRC for evaluation and retraining in May 1998 and she wrote on July 28, 1998, that claimant was unable to work at that time because of his multiple injuries. On August 20, 1998, Dr. J released claimant to light-duty work. On August 26, 1998, the TRC advised claimant of an appointment for a psychological evaluation. The psychologist reported on September 2, 1998, that claimant was seen at the request of the TRC for, among other things, an evaluation of whether he is a candidate for vocational rehabilitation. The report notes that claimant does not speak English (a Spanish-speaking translator was used at the CCH), that he has a third grade education from Mexico, that he was distressed that he could not find work, that he wants TRC assistance in setting up a vending stand, that he was receptive to counseling and guidance, that he is making concerted efforts to find some level of rehabilitation, and that he had feelings of despair because of his inability to work secondary to his physical symptoms.

In a letter to claimant dated September 28, 1998, the TRC advised claimant that the Texas Workers' Compensation Commission had referred him to the TRC for possible vocational rehabilitation services and/or assisting him in returning to work and in October 1998 the TRC advised claimant that it was scheduling him for a physical examination.

Claimant testified that he looked for work prior to being released to light-duty work by Dr. J, but could not recall the employers he went to, and he testified that, after Dr. J released him to light-duty work and within the filing period, he applied for jobs at nine employers that he named. He said he mostly looked for work doing light cleaning.

The hearing officer found that claimant was taken off work by his treating doctor during the first quarter filing period; that claimant was released to return to light-duty work on August 20, 1998; that after being released to return to work, claimant attempted in good faith to obtain employment commensurate with his ability to work; and that claimant's unemployment during the first quarter filing period was a direct result of his impairment. The hearing officer concluded that claimant is entitled to SIBS for the first quarter. There is conflicting evidence in this case. 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 of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness.

Although there is conflicting evidence, Dr. J's opinion that claimant was unable to work due to his injuries prior to August 20, 1998; claimant's testimony and documentary evidence concerning his job search during the filing period; evidence of cooperation with the TRC during the filing period; and evidence that claimant sustained a serious injury with lasting effects and is unable to perform the job he had when injured due to his injuries, provide sufficient evidence to support the hearing officer's decision in favor of claimant. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge