

APPEAL NO. 991100

On April 29, 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 hearing officer resolved the disputed issues by deciding that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 10th, 11th, and 12th quarters. Claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. No response was received from carrier.

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). Claimant had the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement with an IR of 15% or more; that he did not commute IIBS; that the 10th quarter was from August 6 to November 6, 1998, with a filing period of May 7 to August 5, 1998; that the 11th quarter was from November 7, 1998, to February 5, 1999, with a filing period of August 6 to November 6, 1998; that the 12th quarter was from February 6 to May 7, 1999, with a filing period of November 7, 1998, through February 5, 1999; that claimant had no earnings during any of the relevant filing periods; and that claimant did not seek employment during any of the relevant filing periods. The hearing officer's finding in favor of claimant on the direct result criterion for SIBS is not appealed. Although the hearing officer ruled in claimant's favor on the direct result criterion for SIBS for the quarters in issue, in order to be entitled to SIBS for the quarters in issue, claimant also had to establish that during the relevant filing periods he attempted in good faith to obtain employment commensurate with his ability to work. Section 408.143.

The 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."

Claimant testified that he is 58 years of age; that he was working as a welder when he sustained a low back injury at work on _____; that Dr. G is his treating doctor; that he has not had surgery for his injury; that Dr. G is considering surgery; that he has pain in his back and legs; that his pain has gotten much worse over time; that he takes pain medications; that he uses a cane to assist him in walking; that he cannot walk than 10 minutes without severe pain; that he has had injections for pain; that Dr. G treated him during the relevant filing periods; that Dr. G has told him that he cannot work; and that he was unable to work during the relevant filing periods.

Dr. G referred claimant to Dr. J for a functional capacity evaluation (FCE) in April 1995 and Dr. J wrote that claimant was at that time functioning at a light-medium physical demand level and that claimant was unable to meet the physical demand requirements of a welder's job. Dr. X examined claimant at carrier's request and he reported in March 1997 that claimant can perform a sedentary job. Dr. X reexamined claimant at carrier's request in June 1998 and reported that claimant can return to sedentary/light-duty work. Dr. X referred claimant for an FCE which was done in December 1998 and the physical therapist reported that claimant demonstrated the ability to perform light-level work. Dr. X wrote in December 1998 that he had reviewed the FCE done that month and that he continues to be of the opinion that claimant could return to sedentary/light-duty work but that claimant may have a limited ability to work secondary to his angina and other medical problems.

Dr. G wrote in August 1998 that claimant has lumbar radiculopathy secondary to a herniated nucleus pulposus, that he suffers from unstable back syndrome, and that he is to remain off work and under his medical care. Dr. G wrote in September 1998 that claimant is to continue with his pain medications and should be off work. Dr. G wrote in October 1998 that claimant continues to suffer from unstable back syndrome, that he is in need of an invasive pain management program, that he will remain physically disabled for the next three to five years, and that he is to remain off work. Dr. G referred claimant to Dr. S, who recommended in January 1999 that claimant enter a chronic pain management program. Dr. S wrote in February 1999 that he agrees with Dr. G that claimant is unable to work in any capacity due to his reported severe low back pain that radiates to his legs.

The parties stipulated that during the relevant filing periods claimant did not seek employment. The hearing officer found that during the relevant filing periods claimant had an ability to work sedentary/light duty and that during the relevant filing periods claimant did not make a good faith effort to look for work. The hearing officer concluded that claimant is not entitled to SIBS for the 10th, 11th, and 12th quarters. The claimant contends that the

evidence shows that he had no ability to work due to his compensable injury during the relevant filing periods.

Whether claimant had no ability to work during the applicable filing periods was a fact question for the hearing officer to determine from the evidence presented. There is conflicting evidence regarding claimant's ability to work. 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. 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:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge