APPEAL NO. 991131

A contested case hearing (CCH) was originally held on January 26, 1999, with the record closing on February 26, 1999, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 990584, decided April 28, 1999, the Appeals Panel reversed the decision of the hearing officer and rendered a decision that the appellant's (claimant) impairment rating (IR) is 28%, and remanded the issue of the claimant's entitlement to supplemental income benefits (SIBS) for the first through 17th quarters. The hearing officer did not convene another hearing and rendered another decision on May 17, 1999. He determined that the claimant is not entitled to SIBS for the first through fourth quarters, and that the claimant lost entitlement to any additional income benefits at the end of the fourth quarter and is not entitled to SIBS for the fifth through 17th quarters. The claimant appeals, urging that he had no ability to work during the filing periods, that his doctor has never released him to return to work, and requests that the decision be reversed and a new decision rendered finding he is entitled to SIBS for the first through 17th quarters. The respondent (carrier) replies that the decision is correct, is supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____, as a result of lifting a sack of concrete. The claimant sought medical treatment with Dr. H. In January 1992, the claimant had a laminotomy and discectomy at L4-5. In January 1993, a repeat MRI showed no evidence of recurrent disc herniation. The claimant continued receiving conservative medical treatment with Dr. H. Dr. H's medical records indicate that the claimant continued having back pain and leg pain in 1993 and in 1994 was walking with a limp and using a cane. In May 1995, Dr. H noted increased back pain, the claimant's legs were causing him to fall, and another MRI was performed which showed evidence of narrowing at L4-5 on the right with scarring. In May 1996, the claimant had radiating pain and fusion surgery was discussed. Another MRI was performed in January 1997, which showed marked narrowing of the foramen at L4-5 on the right. On February 13, 1997, the claimant had a laminectomy, discectomy, and interbody fusion with cage at L4-5. On March 31, 1997, the claimant had surgery for a spinal fluid leak. Dr. H's records indicate that in June 1997 the claimant fell as a result of his legs giving out, injuring his right hand. The claimant sustained a fracture of his fifth metacarpal which required surgery in December 1997. The claimant testified that he had another surgery on his right hand in 1998.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage (AWW) as a direct result of the impairment; (3) not elected to commute a portion of

the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing 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 parties stipulated to the proper dates for the compensable quarters and filing periods: the first SIBS quarter began on September 25, 1994, the 17th SIBS quarter ended on October 16, 1998, and the filing periods for these quarters were from June 26, 1994, through September 19, 1998. The parties also stipulated that the claimant did not commute any portion of the IIBS and that the claimant made no job search during the filing periods for the first through 17th quarters.

We note that the hearing officer did not make a specific finding of fact regarding the direct result criteria, however, he states in the Statement of the Evidence:

> Carrier does not assert that Claimant's unemployment was not a direct result of his impairment and, in light of the medical evidence that Claimant has sustained a serious low back injury and a subsequent injury to his dominant hand and Claimant's uncontroverted testimony that he has not worked at any job since his compensable injury, the Hearing Officer finds that Claimant had no earnings during any of the filing periods in issue and that Claimant's unemployment during the filing periods was a direct result of his impairment.

From this statement, we infer a finding that during the filing periods for the first through 17th quarters, the claimant has not returned to work or has earned less than 80% of the AWW as a direct result of the impairment.

The carrier argued at the CCH that the claimant had some ability to work during the filing periods for the first through fourth quarters. Although not separately identified as an issue, the carrier argued that the claimant permanently lost entitlement to SIBS because he was not entitled to SIBS for four consecutive quarters. Pursuant to Section 408.146(c), an employee who is not entitled to SIBS for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury.

The underlying issue in this case is whether the claimant made the required good faith job search. The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. 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 work 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*.

The hearing officer, in detail, set forth a summary of the medical evidence. A report from Dr. H during the filing period for the first quarter, dated July 19, 1994, states:

> [Claimant] finds that activities of sitting, standing, walking, bending or twisting for any period of time causes (sic) increased pain in his back, hips and legs. It would appear that [claimant] has a chronic lower back condition which will be permanent in nature.
>
> It is my opinion that [claimant] would be restricted from doing work activities based upon his limited motion, painful straight leg rasing [sic] and his limited strength in the lower extremities. Activities requiring sitting, standing or walking for long durations would be restricted. He should not do activities that require climbing, crawling, stooping or twisting. [Claimant] should not lift weights that weigh more than 10 pounds on an occasional basis. The use of his lower extremities for foot controls and pedals should be avoided also. Riding in motor vehicles for any distance or time interval more than 15 to 20 minutes should result in a rest break.

On November 30, 1998, Dr. H wrote a summary of the claimant's treatment. In pertinent part he states:

> By late 1993 patient was having more numbness and tingling in his legs. Into 1994 he had continued symptoms of spasms, decreased ability to do activities with sometime his legs giving way. His symptoms were also aggravated a great deal by weather. During this time frame, it was still my medical opinion that [claimant] was unable to return to any form of gainful employment at that time because of his increasing clinical symptoms. He was also found to have moderate spasms across the lower back at times as well as difficulty with pain on straight leg rasing [sic] at 50 degrees in a sitting and lying position. With these physical findings and clinical complaints, I did not feel that [claimant] was capable of returning to work.
>
> In 1995 [claimant] had continuing symptoms. . . . Likewise, during this time, I did not feel that [claimant] was capable of returning to any form of gainful employment because of his increasing clinical symptoms which had persisted over a period of time in spite of all forms of conservative treatment. [Claimant] was then recommended for surgical treatment of his condition with discectomy and fusion.
>
> In 1996 several surgical opinions were sought and obtained. [Claimant] ultimately was advised and agreed by the second surgical opinion process to

> have surgery. Due to the length of this delay and with his symptoms, another MRI was done to verify to make sure there were no additional changes in his condition. This particular study of 1/22/97 showed marked narrowing of the foramen at L4-L5 on the right. . . .
>
> It is my medical opinion that throughout the course of evaluation and treatment of [claimant], I have always advised him against returning to any form of gainful employment.

The hearing officer considered the evidence and found that, during the filing period for the first through fourth quarters, the claimant had some ability to work and did not make a good faith effort to seek employment. Despite Dr. H's November 30, 1998, statement that the claimant was unable to return to any form of gainful employment, Dr. H's medical report dated July 19, 1994, indicated that the claimant had the ability to work with restrictions. The hearing officer considered these reports and felt Dr. H's November 30, 1998, report did not reflect that the doctor considered employment, in general, as the touchstone of his evaluation of the claimant's work ability. The hearing officer noted that Dr. H did not recommend any reduction of activity until July 27, 1995, and continued to encourage the claimant to walk, exercise, and be as active as possible, indicating an ability to work until the date of his surgery on February 13, 1997.

Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. Pursuant to Section 410.165(a), the hearing officer was the sole judge of the weight and credibility of the evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of the hearing officer that the claimant is not entitled to SIBS for the first through fourth quarters. Because we have affirmed the hearing officer's determination that the claimant is not entitled to SIBS for the first through fourth quarters, we likewise affirm the determination that he has permanently lost entitlement to SIBS under Section 408.146(c) and is not entitled to SIBS for the fifth through 17th quarters.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge