

APPEAL NO. 991177

On May 4, 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 issues at the CCH were: (1) whether the appellant/cross-respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 16th quarter; and (2) whether the claimant has permanently lost entitlement to SIBS because she was not entitled to SIBS for 12 consecutive months. The claimant requests reversal of the hearing officer's decision that, although she met the SIBS criteria for entitlement to SIBS for the 16th quarter under Section 408.142(a), she is no longer eligible for income benefits under Section 408.146(c) because she was not entitled to SIBS for 12 consecutive months. The respondent/cross-appellant (carrier) requests reversal of the hearing officer's decision that claimant met the SIBS criteria for entitlement to SIBS for the 16th quarter under Section 408.142(a) but requests that the hearing officer's decision that claimant is no longer eligible for income benefits under Section 408.146(c) be affirmed.

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). Section 408.146(c) provides that 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. Claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that on \_\_\_\_\_, claimant sustained a compensable upper and lower back injury; that claimant has an IR of 15% or more; that claimant did not commute IIBS; and that the 16th quarter was from January 30 to April 30, 1999. The filing period for the 16th quarter was from October 31, 1998, to January 29, 1999 (the filing period).

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."

In Texas Workers' Compensation Commission Appeal No. 941053, decided September 20, 1994, the Appeals Panel noted that eligibility for each quarter of SIBS is dependent upon the facts pertinent to that quarter and that a ruling on a specific quarter does not guarantee benefits for every subsequent quarter.

With regard to the direct result criteria for SIBS, the Appeals Panel has held that a claimant's unemployment or underemployment must be a direct result of the impairment, but that the impairment need not be the sole cause of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996. In Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996, the Appeals Panel noted that a finding that a claimant's unemployment or underemployment is a direct result of the impairment is "sufficiently supported by evidence that a claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury."

Claimant said that when she was injured on \_\_\_\_\_, her job was to load and unload trucks at employer's store. Claimant said that she had back surgery on February 10, 1995, and has been unable to work since that date due to back problems. Claimant said that Dr. M is her treating doctor, that she saw him about once a month during the filing period, that she discussed her work status with Dr. M during the filing period and Dr. M told her that she is not able to do any kind of work because of her back condition, that she takes prescription medications for her pain, and that she did not work or look for work during the filing period.

In a report that states a date of visit of October 20, 1998, Dr. M stated that claimant has been seeing a neurosurgeon for evaluation and management of a brain tumor and that she had undergone chemotherapy and radiation treatment; that she continued to complain of severe lumbar pain that radiates to her lower extremities; that she continued to complain of cervical pain that radiates to her upper extremities; and that examination revealed muscle spasms in her back and pain on bending of the lumbar spine. Dr. M gave an assessment of post lumbar laminectomy syndrome, severe myofascial pain syndrome, lumbar discogenic pain, bilateral sacroiliitis, bilateral lumbar facet syndrome, lumbar radiculopathy, and brain tumor.

In an undated report that was received by the Texas Workers' Compensation Commission (Commission) on February 10, 1999, Dr. M wrote that he has been claimant's physician since February 5, 1997, when Dr. H referred her to him for treatment of severe lumbar pain; that claimant underwent a discectomy and fusion with hardware on February

10, 1995; that claimant's lumbar pain with radiation to the lower extremities has persisted; that an EMG study is suggestive of chronic radiculopathy at L5-S1; that claimant's condition had gradually worsened because he had not been able to obtain authorizations for treatment after epidural steroid injections were done; that claimant is receiving medications for her pain; and that claimant has been unable to work in any capacity due to her severe pain and use of pain medication with considerable side effects. In a report that states a date of visit of February 25, 1999, Dr. M noted that, at times, claimant is unable to walk due to severe lower back pain and that she ambulates with a cane.

The hearing officer found that during the filing period claimant was unable to work and did not work as a direct result of her impairment from her injury of \_\_\_\_\_, and that during the filing period claimant acted in good faith in not seeking to obtain employment because she was unable to work and had been advised not to return to work by her treating doctor. The carrier appeals those findings and that portion of Conclusion of Law No. 3 which concludes that claimant met the criteria for entitlement to SIBS for the 16th quarter under Section 408.142(a).

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 appealed findings on the good faith and direct result criteria for SIBS and that portion of Conclusion of Law No. 3 that concludes that claimant met the criteria for entitlement to SIBS for the 16th quarter under Section 408.142(a) are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust and are, therefore, affirmed.

Appeals Panel decisions on the issues of claimant's entitlement to 11th, 12th, 13th, and 14th quarter SIBS were in evidence. In Texas Workers' Compensation Commission Appeal No. 980722, decided May 28, 1998, the Appeals Panel reversed a hearing officer's decision that claimant was entitled to SIBS for the 11th quarter and rendered a decision that claimant was not entitled to SIBS for the 11th quarter. In Texas Workers' Compensation Commission Appeal No. 980978, decided June 22, 1998 (Unpublished), the Appeals Panel affirmed a hearing officer's decision that claimant was not entitled to SIBS for the 12th quarter. In Texas Workers' Compensation Commission Appeal No. 981689, decided September 8, 1998 (Unpublished), the Appeals Panel affirmed a hearing officer's decision that claimant was not entitled to SIBS for the 13th quarter. In Texas Workers' Compensation Commission Appeal No. 990248, decided March 26, 1999 (Unpublished), the Appeals Panel affirmed a hearing officer's decision that claimant was not entitled to

SIBS for the 14th quarter. Claimant said that she has filed a lawsuit with regard to the Appeals Panel decision on the 14th quarter and submitted into evidence what appears to be part of a petition filed in a state district court with regard to some aspect of her workers' compensation claim. There is no indication that a court has acted on that petition. We note that in Texas Workers' Compensation Commission Appeal No. 990897, decided June 9, 1999, the Appeals Panel reversed a hearing officer's decision that claimant was entitled to SIBS for the 15th quarter and rendered a decision that claimant was not entitled to SIBS for the 15th quarter under Section 408.146(c) because claimant had not been entitled to SIBS for 12 consecutive months (the 11th through 14th quarters) and therefore ceased to be entitled to any additional income benefits for her compensable injury. Since Appeal No. 990897 was decided on June 9, 1999, it was not available for the hearing officer's review at the May 4, 1999, CCH.

Although claimant may have sought judicial review of the Appeals Panel decision on the 14th quarter for SIBS, Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal and Section 410.207 provides that during judicial review of an Appeals Panel decision on any disputed issue relating to a workers' compensation claim, the Commission retains jurisdiction of all other issues related to the claim. The evidence before the hearing officer shows that claimant was determined by the Appeals Panel not to be entitled to SIBS for the 11th, 12th, 13th, and 14th quarters, and while the decision on the 14th quarter may be pending before a state district court, the Appeals Panel decision on that quarter is binding during the pendency of the appeal. The hearing officer found that the Appeals Panel had ruled that claimant is not entitled to SIBS for the 11th through the 14th quarters and concluded that, while claimant met the criteria for entitlement to SIBS for the 16th quarter under Section 408.142(a), claimant is no longer eligible for income benefits under Section 408.146(c) because she was not entitled to SIBS for 12 consecutive months. We conclude that the hearing officer did not err in her finding and conclusion on the issue of permanent loss of entitlement to SIBS. Appeal No. 990897, *supra*.

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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Dorian E. Ramirez  
Appeals Judge