APPEAL NO. 991198

Following a contested case hearing held on May 19, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first compensable quarter. Claimant appeals, asserting that his treating doctor established that he had no ability to work during the filing period for the first compensable quarter and that the hearing officer erred in his legal conclusions and in three findings of fact. The respondent (carrier) asserts in response that the evidence is sufficient to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable mental stress injury; that claimant reached maximum medical improvement on May 5, 1998, with an impairment rating (IR) of 15%; that claimant did not commute any portion of the impairment income benefits (IIBS); that the filing period for the first compensable quarter (March 17 through June 15, 1999) was from December 16, 1998, through March 16, 1999; and that during the filing period, claimant had no earnings and made no job search.

Claimant testified that the injury he sustained at work for (Company) on _____, was not physical but "mental, emotional," that he was initially treated by Dr. J, a psychologist, and that in July 1998 he commenced treatment with Dr. F, a pain management specialist. He did not testify to the circumstances surrounding his injury. However, he did state that he felt he could not work during the filing period because he is "unable to concentrate on anything for any length of time," his memory has declined, and he has "weak spells."

Dr. J's Mental Heath Impairment Report referring to a May 5, 1998, visit, states that he first saw claimant on November 17, 1997; that claimant indicated that on the day of the accident, he and a coworker loaded a car to put into a large, smelting oven, that claimant assumed the coworker then went to the break room and activated the oven; and that after claimant noticed smoke, he turned the oven off and his coworker's burned body was found on top of the car; that claimant experienced suicidal ideation, significant sleep disturbance, and headaches and took various medications; that claimant had doubts from the beginning whether he would ever be able to return to work; that as his anxiety increased, claimant became more obsessive, his concentration was affected, and his energy level decreased; that the diagnostic impressions are major depression and posttraumatic stress disorder (PTSD); and that "[i]t is clear that this disorder interferes with recovery and compliance with treatment and his inability to benefit from treatment is expected to limit his ability to return to and retain employment." The report also alluded to a lawsuit having been filed by the deceased coworker's son. Dr. J further reported that regarding functional limitations,

claimant seems to handle most of the activities of daily living fairly well, for example, bathing, talking on the phone, driving a car, cooking, caring for the house and yard, and going to the store with his children; that his adaptation to stressful circumstances is very poor; that he reports almost constant head pain as well as worry about his wife working and carrying all the responsibility for supporting the household; and that he never has looked actively for employment and maintains an intense fear of being in a work place where someone could get hurt. Dr. J further stated that attempts at overcoming claimant's emotional problems have not been successful; that claimant has apparently stopped taking his prescription medication; that contact with a structured, work setting is associated with a great deal of anxiety; and that he would rate claimant's IR at 15%.

Dr. J wrote on March 4, 1998, that claimant tends to decompensate, genuinely feel a great deal of emotion, and become cognitively disoriented, when he thinks of or is confronted with any situation that might allow him to go on with his life including having a pleasurable experience or returning to work. Dr. J further stated that he thinks it important for claimant to be strongly encouraged to return to work inasmuch as the solution to his problem is going to be based on a change in his behavior as opposed to his trying to think it through any more than he already has; that Dr. J would recommend a return to work for three to four hours a day to be gradually extended by an hour each week; that if he returns to the employer, he avoid the accident scene and fellow employees be made aware of the sensitivity of the situation; and that if claimant decides he cannot return to the employer, then he recommends that claimant "find other employment as soon as possible" because, although it may seem difficult for claimant, the longer he remains withdrawn, the longer it will take for him to re-engage in any kind of normal life activity.

Also in evidence is an April 21, 1998, Treatment Report from the Clinic reflecting that claimant is released for regular work as of that date. The physician's signature is illegible.

Dr. F's Initial Medical Evaluation of July 14, 1998, states that he agrees with Dr. J's diagnosis of major depression and PTSD; that he is going to change claimant's medication; and that claimant is encouraged to continue any of his outside activities that he feels he can tolerate. Dr. F's July 14, 1998, Work Status Certificate stated that claimant is "unable to work until assessed by doctor August 4." Dr. F wrote on March 2, 1999, that claimant is not capable of returning to any meaningful employment and that he is "still severely depressed, aside from a multitude of other problems." Dr. F's March 23, 1999, report states that claimant has taken a turn for the worse and openly discusses suicide. Dr. F wrote on April 5, 1999, that claimant is currently seeing Dr. M, a psychologist, and that "we are in total disagreement with the return to work of [Dr. J]"; that "since the time he has been under our care, he is incapable of work"; and that he would like to refer claimant to Dr. W, a psychiatrist, who can confirm his inability to work and severe depression to the point of suicidal ideation.

Dr. M's report of a March 24, 1999, emergency consultation states that claimant is experiencing a major depressive disorder with suicidal ideation due, in part, to a PTSD concerning the death of a fellow worker and that a follow-up evaluation will be requested for

two hours of testing and so forth. Claimant indicated that Dr. M could not see him again until "this hearing is settled" and that he was not authorized to see Dr. W and could not afford to pay to see him.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the 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. 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 Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. 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 light duty 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*.

Several findings are not disputed including the finding that claimant's unemployment during the filing period for the first compensable quarter was a direct result of his impairment. Claimant does challenge findings that, during the filing period for the first compensable quarter, he had some ability to work even though the employment would need to be structured to avoid emotional triggers and to facilitate his emotional recovery; that claimant did not have the ability to engage in full time employment but was physically and emotionally capable of engaging in structured, part-time employment; and that because he made no effort to seek employment, claimant failed to make a good faith effort to seek employment commensurate with his ability to work.

In his discussion of the evidence, the hearing officer recognizes that although Dr. F, whose opinion on claimant's ability to work differs from Dr. J's, is the current treating doctor,

he nonetheless finds Dr. J's opinion the more credible given Dr. J's specialty and the comprehensiveness of Dr. J's report with his underlying rationale for the opinion. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge