APPEAL NO. 991214

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 7, 1999. The single issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the seventh compensable quarter. The hearing officer found that the claimant's unemployment was not a direct result of claimant's impairment and concluded the claimant was not entitled to SIBS for the seventh quarter. The claimant appeals, urging that the hearing officer's decision is so against the great weight of the evidence as to be manifestly unjust and wrong. Respondent (carrier) responds that there is sufficient evidence to support the decision of the hearing officer.

DECISION

Reversed and remanded.

Not in dispute was the fact that the claimant sustained compensable back injuries on _____, and that he reached maximum medical improvement and received an impairment rating of 15% or greater. He is seeking SIBS for the seventh compensable quarter, the filing period for which ran from September 20, 1998, to December 19, 1998. The claimant, who asserts his entitlement to SIBS on the basis of no ability to work, testified that, because of his pain, burning in his legs, and the 10 different medications he is using for his injuries, he was not able to work at all during the filing period. He states his doctor has told him he cannot work, that he is a candidate for surgery which he wants to have if it is ever approved, that he wants to go back to work, that he gave his best effort during a functional capacity evaluation (FCE), and that his doctor, Dr. J was upset when the FCE indicated some ability to perform at the "Sedentary Category I. DOT" level.

A report dated October 19, 1998, from Dr. J shows impressions of cervical and lumbar radiculopathy and cervical and lumbar herniations, states that a repeat MRI and studies are indicated, and provides claimant is to be off work. On December 7, 1998, Dr. J wrote that “[w]e do not feel the patient is able to return to any type of work at all at this time. . . .” Dr. J notes that the claimant has seen two other doctors who apparently recommended surgery. A November 23, 1998, report from Dr. J indicates a continuation of the claimant’s pain and symptoms and states that the claimant is being referred for surgical evaluation for the cervical and lumbar area, and that EMG/nerve conduction studies are being requested. In reports dated September 9, 1998, and November 21, 1998, from Dr. M , he echos the assessments of Dr. J, the need for further diagnostic studies, and rather bitingly states that the insurance carrier has denied diagnostic tests and surgical intervention and should be held responsible for any negative outcome in claimant's case.

The claimant was seen by Dr. F on October 12, 1998, for an FCE. Dr. F notes that an MRI of the cervical spine shows disc herniations, states the opinion that the claimant "did not give maximum effort in dynamic progressive lifting in cervical spine" and hand grip strength testing. He found the claimant capable of "Sedentary Category I DOT work that allows occasional lifting of negligible weight."

Although this case was clearly litigated on the theory that the claimant had no ability to work, thus satisfying the requirement that he attempt in good faith to seek employment commensurate with his ability to work (Section 408.143), the hearing officer makes no findings on this requirement in her Decision and Order. The hearing officer, rather, finds as fact that the claimant's unemployment during the filing period in issue was not a direct result of his impairment. Clearly, the great weight and preponderance of the evidence does not support this finding where there is compelling evidence that the claimant has serious cervical and lumbar disc injuries with ongoing pain, radiculopathy, and a view towards surgery. Even the FCE shows a grossly limited ability to perform physical activity (the claimant had always been a laborer). The unemployment only has to be a direct result, not the sole result, of the impairment. Texas Workers' Compensation Commission Appeal No. 960008, decided February 16, 1996. While it may be that the hearing officer found the claimant had some limited ability to work and that he did not seek employment, she then apparently relied on this to discount any direct result of unemployment caused by the impairment. The good faith attempt to seek work and a direct result of the impairment requirement are not one and the same and require a separate analysis. From our review of the evidence, including the testimony, the medical reports, the injury sustained, the FCE, and both the treatment rendered and recommended, we conclude that the determination of the hearing officer that the claimant's unemployment was not a direct result of his impairment is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we reverse this finding.

The Appeals Panel has repeatedly held that proving an inability to work (with medical evidence or irrefutable circumstances) can satisfy the requirement for attempting in good faith to seek employment commensurate with the ability to work. Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994; Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995; Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994; Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. However, we have also repeatedly held that the good faith job seeking requirement and the direct result requirement have two different criteria and that the direct result criterium is not merely intended as a second look at the job search requirements. Texas Workers' Compensation Commission Appeal No. 960721, decided July 21, 1996; Texas Workers' Compensation Commission Appeal No. 951470, decided October 13, 1995; Texas Workers' Compensation Commission Appeal No. 951019, decided August 4, 1995; Texas Workers' Compensation Commission Appeal No. 970541, decided May 8, 1997; Texas Workers' Compensation Commission Appeal No. 951730, decided November 30, 1995. It is apparent that the hearing officer applied the good faith attempt to seek employment criteria for the direct result finding she reached (and which we reverse) and has failed to make any findings regarding the theory on which the case was litigated; whether the good faith job seeking requirement was satisfied under the evidence presented. We remand for reconsideration and the making of appropriate findings and conclusions in this case.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is

received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge