

## APPEAL NO. 991252

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 21, 1999. With respect to the sole issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the third compensable quarter, January 19, 1999, through April 19, 1999. The appellant (carrier) appeals, challenging the hearing officer's determinations on direct result, good faith, and cooperation with the Texas Rehabilitation Commission (TRC). The claimant responds that there is sufficient evidence to support the hearing officer's decision and it should be affirmed.

### DECISION

Affirmed.

The parties stipulated that the claimant reached maximum medical improvement with an impairment rating (IR) of 15% or greater; that the claimant did not commute any impairment income benefits; that the filing period for the third compensable quarter was from October 20, 1998, through January 18, 1999; and that during the filing period for the third compensable quarter, the claimant did not seek employment. Not appealed is the hearing officer's finding that on July 6, 1994, the claimant sustained a neck injury as he was lifting a heavy piece of metal to feed it into a machine as part of his job duties for his employer.

The claimant speaks Vietnamese and testified through an interpreter. According to the claimant, he has a 34% IR and suffers from a herniated disc in his neck, bilateral carpal tunnel syndrome, and chronic pain syndrome. The claimant testified that during the third quarter filing period, he was unable to work in any capacity because of severe pain. According to the claimant, he suffers from drowsiness due to medication, he cannot lift or feel pain in his arm through his neck, he cannot lift anything, he can do minimal walking, he cannot bend or stoop, and he sleeps only three hours at a time. The claimant testified that his pain is excruciating and, as a result, he is depressed and discouraged because his life has changed completely.

During the filing period, Dr. M states the following:

Due to his injuries, the patient has had consistent and unrelenting cervical and lumbar pain. This pain radiates into his hands bilaterally with numbness in his left hand, left elbow and down into his left leg. Due to these symptoms and the patient's inability to lift, pull, push, or sit, stand, or stoop for extended periods of time, the patient has remained off work at my direction since he has been in treatment with me.

The carrier had the claimant examined by Dr. L on July 30, 1998, several months before the filing period. Dr. L states the following:

Given the history, physical examination and the review of the available medical records, it is my opinion that this individual can return to **full duty without any restrictions**. Though he had a recent FCE [functional capacity evaluation] that recommended light duty, it should be noted that he had 10/11 consistency tests during isometric strength measurements but had inconsistent performance on 8/14 measures of grip strength. He has a significant amount of symptom magnification and subjective complaints that are not validated with his physical examination and does not follow any physiological or anatomical basis. [Emphasis in original.]

On November 13, 1998, Dr. S, Ph.D., examined the claimant and indicated that, based on test findings, the claimant was experiencing depression, extremely high levels of stress, and psychotic-like experiences. The medical records indicate that on December 1, 1998, the claimant was admitted to a psychiatric hospital for approximately 10 days with the following diagnosis: major depression, severe, single episode, with suicidal thoughts possible secondary to chronic pain syndrome.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought 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)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "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] for any quarter claimed."

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*. 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.

In this case, the claimant contended and the hearing officer found that he had no ability to work during the third quarter filing period. There was conflicting evidence as to whether the claimant had an ability to work. The hearing officer interpreted Dr. M's reports as not conclusory, and we agree. They do not merely state that the claimant is unable to work, but explain the claimant's symptoms why he is unable to work. There are medical reports during the filing period that indicate that the claimant suffered chronic pain and depression severe enough to warrant hospitalization. The evidence is sufficient to support the hearing officer's determination that the claimant had no ability to work during the third quarter filing period.

The claimant testified that he did not contact the TRC, nor refuse the services of the TRC. There was no evidence in the record that the Texas Workers' Compensation Commission (Commission) determined the claimant should be referred to the TRC and then referred him there. See Section 408.150(a); Texas Workers' Compensation Commission Appeal No. 961344, decided August 26, 1996. There is sufficient evidence to support the hearing officer's finding that the claimant did not refuse services or refuse to cooperate with services provided after a Commission referral to the TRC.

The carrier appeals the hearing officer's finding that the claimant's decrease in earnings during the filing period for the third quarter is a direct result of his impairment. The hearing officer's direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing period, he could not reasonably perform the type of work being done at the time of the injury, that of a metal worker. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

Whether the claimant's unemployment was a direct result of his impairment and whether the claimant had no ability to work at all during the filing period for the third quarter presented the hearing officer with questions of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We will not disturb the challenged 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.

---

Dorian E. Ramirez  
Appeals Judge

CONCUR:

---

Robert W. Potts  
Appeals Judge

---

Thomas A. Knapp  
Appeals Judge