

APPEAL NO. 991298

On May 25, 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 whether appellant (claimant) is entitled to supplemental income benefits (SIBS) for the ninth and 10th quarters. Claimant requests that the hearing officer's decision that she is not entitled to SIBS for the ninth and 10th quarters be reversed and that a decision be rendered in her favor for those quarters. Respondent (carrier) requests affirmance.

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 for each potentially compensable quarter based on criteria met by claimant during the qualifying period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). Claimant had the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable injury on _____; that she has an IR of 15% or more; that she did not commute IIBS; that the ninth quarter was from February 17 to May 18, 1999, with a filing period (called a qualifying period under the new SIBS rules) of November 18, 1998, to February 16, 1999; and that the 10th quarter was from May 19 to August 17, 1999, with a qualifying period of February 3 to May 4, 1999.

The new SIBS rules were effective January 31, 1999, and since the qualifying period for the 10th quarter began on February 3, 1999, when the new SIBS rules were in effect, entitlement to SIBS for the 10th quarter is determined in accordance with the new SIBS rules. Rule 130.100. Entitlement to ninth quarter SIBS is determined under the old SIBS rules because its filing or qualifying period began prior to the effective date of the new SIBS rules. Rule 130.100. This case concerns an assertion of no ability to work. The old SIBS rules did not contain a specific provision regarding no ability to work but did provide in Rule 130.104 for continuing entitlement to SIBS for subsequent compensable quarters if the employee, during each filing period, met the direct result criterion for SIBS and made good faith efforts to obtain employment commensurate with the employee's 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." 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."

Rule 130.102(d), effective January 31, 1999 (a new SIBS rule), provides in pertinent part that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; . . ." Rule 130.102(e), effective January 31, 1999, provides in pertinent part that "[e]xcept as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts."

The hearing officer's findings in favor of claimant on the direct result criterion for SIBS for the quarters in issue are not appealed. However, in order to be entitled to SIBS for the quarters in issue, claimant also had to establish that during the relevant qualifying periods she attempted in good faith to obtain employment commensurate with her ability to work. Section 408.143.

Claimant, who is 49 years of age, testified that she was working as a collections coordinator on _____, when she was injured pushing a credenza at work. Claimant testified that, as a result of her injury, she had cervical spine surgery; that prior to her surgery she had a "nerve stroke" that paralyzed her left arm and shoulder; that after surgery she got some use of her left arm back; that she has been told by her doctors that she needs brachial plexus surgery; that that surgery has not been approved; that she has constant pain in her neck, upper back, and left shoulder; that she has weakness in her left arm; that she cannot use her left arm to do very much; that she has overused her right arm and has bursitis; that she cannot sit for long periods or use her arms repetitively due to pain; that she takes prescribed pain medication, muscle relaxers, antidepressants, and arthritis medication; that her medication makes her drowsy; that she wants to have surgery and go back to work; that she is not physically able to work; that, because of her pain, she is able to drive for only short distances; that Dr. G, her treating doctor, has told her that using her arms will worsen her condition and that she is not to return to work; and that Dr. O has told her not to return to work.

Claimant's Statements of Employment Status (TWCC-52) for the ninth and 10th quarters do not show any employment contacts for the qualifying periods for those quarters

and claimant did not testify to making any employment contacts. Claimant noted on the TWCC-52s that she did not earn any wages during the relevant qualifying periods.

Dr. T, D.C., noted in a report dated November 17, 1994, that he was the designated doctor chosen by the Texas Workers' Compensation Commission and he reported that claimant reached maximum medical improvement on November 12, 1994, with a 45% IR for impairment of the cervical spine and left upper extremity. Dr. T wrote that claimant injured her neck and left shoulder, that she had a fusion at C4-5, that Dr. K had noted the possibility of brachial plexopathy with multiple nerve root involvement, and that "employability, in my opinion, would be impossible should she have to use her left upper extremity at all."

Dr. M examined claimant at carrier's request in March 1997 and reported that he saw no reason why claimant "should be unable to return to light active work similar to that which she was doing prior to the injury in question."

Dr. O, an upper extremity surgeon, wrote in January 1998 that claimant has restrictions on use of both upper extremities due to severe left thoracic outlet problems and that those restrictions would not allow her to carry greater than three pounds, raise her arms above her head, or perform any repetitive motion, but that claimant did not have restrictions on sitting or walking and that she should be able to speak on the telephone with a headset. Dr. O clarified that claimant should be able to sit for eight hours a day as long as it is not a continuous eight-hour period and that she should be able to sit for one or two hours and then change positions to standing or lying down for 10 or 15 minutes.

Claimant underwent a functional capacity evaluation (FCE) on February 27, 1998, and the physical therapist noted that claimant did not give maximum effort, that claimant cited severe complaints of pain for her refusal to complete the FCE, and that claimant's physical demand category is in the sedentary category, with an ability to lift 10 pounds occasionally.

Dr. G wrote in March 1998 that claimant is disabled, is seeing a neurosurgeon, and is in the process of surgical evaluation. Dr. W, a neurosurgeon, wrote in March 1998 that a cervical myelogram and CT scan were essentially unremarkable and showed a solid fusion. Dr. W recommended an MRI of the brachial plexus for more documentation of brachial plexopathy. Later in March 1998, Dr. G wrote that Dr. W feels that claimant most likely has a brachio-plexopathy, that claimant needs surgery for her brachio-plexopathy, that claimant's situation has become worse, that "she cannot work at this time whatsoever," that it was tenuous in the past whether claimant could work for short periods of time, and that he recants any assumptions from a January 1998 letter that claimant could work.

Dr. C wrote in April 1998 that claimant had a negative MRI evaluation of the brachial plexus. Dr. O wrote in April 1998 that claimant cannot perform any job duties, that her left brachial plexopathy and myofascial pain syndrome is so severe that she is incapacitated

from performing any job, and that she requires surgery to correct that problem. Dr. W wrote in May 1998 that claimant's diagnosis is brachial plexopathy..

Dr. G wrote in May 1998 that claimant has been diagnosed with brachial plexopathy, a severe condition that will require surgery; that in his opinion, any type of work, sedentary or otherwise, would cause her condition to further deteriorate; that claimant was diagnosed with this condition years ago and has not been allowed to have necessary surgery; that as a result, her condition has severely deteriorated; that any use of her arm would cause additional deterioration and further damage, which may be irreversible; that, in his opinion, she has no ability to work; and that that remained his opinion after reviewing a videotape.

Dr. R wrote in June 1998 that claimant was sent to him for re-evaluation; that he had previously seen claimant in 1994; that claimant's left shoulder pain has limited her ability to work; that claimant is stronger with less pain compared to his previous examination; that different EMG studies had yielded different results, with Dr. B finding cervical radiculopathy and Dr. V commenting that his study was normal; that claimant had been seen by two orthopedic surgeons who did not think that the surgery recommended by Dr. O should be performed; that there is a dilemma in claimant's diagnosis; that he cannot rule out brachial plexopathy in the upper trunk region; that he has a high regard for Dr. O's opinion and surgical abilities; and that from a clinical standpoint, if claimant is willing to undergo the procedure (a surgical release for brachial plexopathy proposed by Dr. O), he does not have any objection. Dr. R wrote in July 1998 that he had reviewed a videotape of claimant (that videotape may have been taken in January 1997 and was not in evidence) and that "she appears to be able to tolerate activities which are not out of the ordinary in daily life." Dr. R also noted that he was not sure how to interpret the FCE.

Dr. O wrote in August 1998 that claimant continues to have entrapment at the left scalene muscle triangle and severe trapezius myofascial pain syndrome as a sequelae of her brachial plexus entrapment, that her physical examine is worsening, and that she is a candidate for brachial plexus surgery.

Dr. D examined claimant in October 1998 and wrote that she probably has long-term neurological damage, including a myofascial pain disorder causing pain in her neck and shoulder, and that she would probably respond to the nerve release procedure recommended by Dr. O, but that that had not been allowed. Dr. R noted in October 1998 that he had prescribed claimant pain medication.

The qualifying period for the ninth quarter began on November 18, 1998, and the qualifying period for the 10th quarter ended on May 4, 1999. Dr. CR did electrodiagnostic studies in February 1999 and reported that those studies showed diffuse neuropathy change throughout the left posterior shoulder and left upper extremity consistent with a brachial plexus level of involvement. Dr. G wrote in February that the repeat electrodiagnostic studies confirmed brachial plexopathy and that claimant needs immediate surgery. A document reflects that in March 1999 carrier did not authorize claimant's request for a brachioplexopathy release.

Claimant was seen for an FCE in March 1999 but the evaluator noted that the functional portion of the exam was not performed because claimant refused to sign the FCE consent form. Dr. G wrote in April 1999 that claimant had no ability to work during the period of November 19, 1998, through February 18, 1999, and that Dr. CR's studies confirmed his diagnosis and the need for emergency surgery. Dr. O wrote in April 1999 that Dr. CR had identified the problem in claimant's left brachial plexus as being consistent with Dr. O's diagnosis of brachial plexus entrapment of the thoracic outlet regions; that due to the brachial plexus entrapment and the trapezius myofascial pain syndrome, claimant "is unable to perform any job at this time"; and that claimant requires surgery to treat this problem. Carrier represented that claimant's surgery request is in the medical dispute resolution process.

In a videotape taken on December 21 and 29, 1998, claimant is shown walking, getting into and out of a pickup truck, driving the truck, carrying a travel bag with her right hand, carrying a bag and a purse with her left hand, lifting the travel bag out of the bed of the truck with both arms, opening the truck door with her left hand and with her right hand, and closing the truck door with her left hand. Claimant does not appear to have any difficulty doing the activities shown in the videotape.

The hearing officer found that during the qualifying periods for the ninth and 10th quarters claimant had some ability to work and that during those qualifying periods claimant did not attempt in good faith to obtain employment commensurate with her ability to work. The hearing officer concluded that claimant is not entitled to SIBS for the ninth and 10th quarters. In Texas Workers' Compensation Commission Appeal No. 990480, decided April 22, 1999 (Unpublished), the Appeals Panel affirmed another hearing officer's decision that claimant was entitled to SIBS for the seventh and eighth quarters, determining that the hearing officer's finding that claimant could not do any work in the filing periods for those quarters was sufficiently supported by the medical evidence. Claimant contends that the same evidence that was adduced at the CCH on the seventh and eighth quarters was adduced at the CCH on the ninth and 10th quarters and thus the claimant should be found entitled to SIBS for the ninth and 10th quarters based on a no ability to work theory. Claimant also contends that the medical evidence supports her position of no ability to work because she has brachial plexopathy that requires surgery and use of her arm prior to surgery would cause further damage. Claimant contends that under these conditions a finding of some ability to work for the qualifying periods for the ninth and 10th quarters is fundamentally unfair.

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. Thus, the fact that claimant was awarded SIBS for the seventh and eighth quarters based on a finding of no ability to work does not mean that she will necessarily be entitled to SIBS in subsequent quarters based on the same contention. The evidence in the CCH on the ninth and 10th quarters was not

the same as the evidence in the CCH on the seventh and eighth quarters. In particular, in the CCH on the seventh and eighth quarters the videotape of claimant's activities on December 21 and 29, 1998, was not admitted into evidence because of carrier's failure to timely exchange that exhibit. The hearing officer in the case currently under review specifically noted in her decision the activities the claimant was shown doing in the videotape, which was in evidence without objection. And while the February 1998 FCE was in evidence in the CCH on the seventh and eighth quarters, the hearing officer in the case under review for the ninth and 10th quarters noted that that FCE supported a sedentary ability to work. We note that in affirming the decision for the claimant on the seventh and eighth quarters, the Appeals Panel noted that the medical evidence was sufficient to support either a determination of no ability to work or some ability to work and that the Appeals Panel will only overturn a hearing officer's factual determination when it is against the great weight and preponderance of the evidence. With regard to the hearing officer's reference to Dr. R's June 1998 report, in Texas Workers' Compensation Commission Appeal No. 960901, decided June 20, 1996, the Appeals Panel noted that, while medical evidence from the filing period is clearly relevant, other medical evidence outside the period, especially that which is relatively close to the filing period, may be relevant.

Whether claimant had some ability to work during the relevant qualifying periods and whether she made a good faith effort to obtain employment commensurate with her ability to work were factual questions for the hearing officer to determine from the evidence presented. There is conflicting evidence with regard to the question of whether claimant had no ability to work during the relevant qualifying periods. 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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. Appeal No. 950084. 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. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge