

APPEAL NO. 991361

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 9, 1999, a hearing was held. She determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the seventh and eighth compensable quarters. In addition, she determined that claimant did not file his request for SIBS for the seventh quarter until January 21, 1999, although the seventh quarter began on December 2, 1998. Claimant asserts that he had no ability to work during the seventh and eighth quarters. In addition, he states that he did search for work in good faith, but points out that he took "medications that I have become addicted to." Respondent (carrier) replies that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer), on \_\_\_\_\_, when, he testified, he was carrying trash and injured his back. The parties stipulated that claimant sustained a compensable injury on \_\_\_\_\_, that he has an impairment rating of 15% or more, that he commuted no benefits, that the filing period for the seventh quarter began on September 2, 1998, and that the filing period for the eighth quarter began on December 2, 1998. The hearing officer found that claimant had no wages during either filing period and that was not appealed.

In order to qualify for payment of SIBS a claimant must attempt in good faith to find work during the filing period preceding the quarter in question and his unemployment must be a direct result of the impairment. See Section 408.143.

During the filing period for the seventh quarter claimant made 31 job contacts between October 19, 1998, and December 2, 1998. He lists no job contacts from September 2nd to October 19th. In addition, claimant testified that he looked for work because he was told "to go look for jobs." He agreed that he did not think he could do kitchen or dishwasher jobs but that is what many of his contacts were directed to.

Claimant also testified that he had back surgery twice, the last in June 1997. He said that since that surgery he feels better, but still has pain. He had a functional capacity evaluation (FCE) in July 1998 as requested by his treating doctor, Dr. G, which found that he could safely do light to light medium work. Claimant said that he agreed with that evaluation. The hearing officer asked claimant about what Dr. G told him between September 1998 and March 1999 about working, and claimant replied that Dr. G said he did not think claimant could go back to work, "but it was my choice."

Claimant made five job contacts, from December 3 to December 15, 1998, in the filing period for the eighth quarter. He testified that he "didn't like the way the insurance company was treating me. They were not paying me." He also said that his request for

SIBS for the seventh quarter was late because his lawyer was supposed to file it but did not do it timely.

Dr. G stated in a report dated August 14, 1998 (just prior to the filing period for the seventh quarter), that claimant is "totally disabled, and is not fit to consider reintegration into the work place." Medications impairing claimant's judgment were cited. (A total of 12 copies of the same first page of Dr. G's November 4, 1998, report were provided.) A report from Dr. G dated December 16, 1998, takes issue with the FCE by pointing out that claimant could not return to his prior employment and that he had pain in doing the tasks required in the FCE. He added that claimant needs work hardening of six to eight hours a day so would be unable to do any work. Dr. G did make a point, which could be given weight by a fact finder, indicating that what a patient can do during an evaluation may not be the same as what can be done "on a continued basis as a daily work having constant pain." See Texas Workers' Compensation Commission Appeal No. 972663, decided February 6, 1998, which said that a doctor may still determine that a patient should not work even though an FCE indicated some level of work was possible. On February 12, 1999, Dr. G said claimant continued to have "some discomfort" in his abdomen and considerable pain in his back. He appears to indicate that claimant could not lift more than five pounds (which means that Dr. G thought he could do some work) but appears to contradict that by saying he could not do "gainful employment." On March 3, 1999 (just beyond the filing period for the eighth quarter), Dr. G said that claimant had "ongoing symptomatology including radiating pain and abdominal discomfort" and added that his history is unchanged.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. She could choose to give weight to the FCE even though Dr. G criticized it. She could credit Dr. G's opinion that claimant could lift up to five pounds, and she could consider Dr. G's statements regarding total disability and gainful employment as of questionable meaning, especially in view of claimant's testimony that Dr. G told him whether to work or not was up to claimant. The hearing officer did not have to make a finding of fact, based on the medical evidence, stating that claimant had no ability to work in either filing period. In addition, although claimant showed many contacts made during the filing period for the seventh quarter, his testimony raised questions as to whether he attempted in good faith to find a job. The determinations that claimant did not attempt in good faith to find work in either filing period are sufficiently supported by the evidence. Finally, even if claimant's lawyer was responsible for the late filing of claimant's request for SIBS for the seventh quarter, that does not affect whether the filing was late as was found by the hearing officer. That finding of fact was also sufficiently supported by the evidence.

We are concerned that claimant states he has become addicted to prescribed medication. His treating doctor should be made aware of this assertion.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge