

APPEAL NO. 991384

On June 15, 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 issue at the CCH was whether appellant (claimant) is entitled to supplemental income benefits (SIBS) for the 14th quarter. Claimant requests that the hearing officer's decision that she is not entitled to SIBS for the 14th quarter be reversed and that findings be entered in her favor. 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 prospectively for each potentially compensable quarter based on criteria met by claimant during the prior filing period. Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). Claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

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." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. 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."

Claimant sustained a compensable injury on _____. The parties stipulated that she reached maximum medical improvement on May 12, 1994, with a 23% IR; that she did not commute IIBS; and that the filing period for the 14th quarter was from December 2, 1998, to March 2, 1999. The 14th quarter was from March 3 to June 1, 1999.

Claimant testified that she injured her back and neck lifting boxes in the employer's warehouse on _____. A report states that she has an 11th grade education and has not worked since May of 1992. She had cervical surgery in 1994 and 1997. Claimant testified that she did not look for work during December 1998 and January 1999 because Dr. V, her treating doctor, had not released her to return to work and because she was and is on medications. She said that her back hurts and that she is not able to do cleaning at home. She said that she was aware that Dr. OS, who performed a functional capacity evaluation (FCE) on her at carrier's request in July 1998, had reported that she could work. She said that she discussed Dr. O's report with Dr. V, that Dr. V did not say she could look for work, that Dr. V said that he would have an FCE done to determine what she could and could not do, and that Dr. V sent her for an FCE with Dr. G, D.C., on January 19, 1999. She said that Dr. G told her that she could possibly do sedentary work. She said that she visited with Dr. V on February 5, 1999, and at that time Dr. V told her that she could possibly do sedentary work. She said that she started to look for work after that.

Claimant said that most of her job leads came from newspaper help wanted advertisements, some job leads came from a friend, and that she asked about work at other places. Claimant listed 15 job contacts on her Statement of Employment Status (TWCC-52) for the 14th quarter. All the contacts were made between February 8 and February 29, 1999. Types of jobs listed were sales, office, and answering telephones. Claimant said that she did not fill out any job applications, that most of her contacts were made by telephone, that most of the places she contacted had positions available but not within her restrictions, and that she was not hired. She said that she did not drive to the potential employers' places of business because she is on medication and that she did not ask for applications to be mailed to her.

A counselor at the Texas Rehabilitation Commission (TRC) wrote on April 26, 1999, that claimant is a client of the TRC, that claimant has been very cooperative in meeting with the counselor to discuss future plans, and that, as soon as claimant is physically able, claimant will be participating in training and/or job placement as claimant's goal is to eventually return to work on a full-time basis. Claimant said that she was in contact with the TRC during the filing period

MH, the carrier's claims representative, testified that she was able to contact 10 of the 15 employers listed on claimant's TWCC-52 and none of those contacted had a record of an application from claimant, although a few recalled that a woman whose name they could not recall inquired about a job answering telephones.

Dr. O wrote on July 1, 1998, that he performed an FCE on claimant at carrier's request on July 1, 1998; that claimant was then 50 years of age; that claimant should be able to do any job in the sedentary, light, and medium category based on the Dictionary of Occupational Titles; that that includes a maximum lift of 50 pounds and frequent lifting of 20 pounds; that she can occasionally bend, stoop, squat, and kneel, but not frequently; that she can not climb ladders or work at unprotected heights; that she can sit or stand for at

least two hours at a time; and that, in general, she fits into the category of "sedentary light or medium job."

Dr. V wrote on September 21, 1998, that he did not think that claimant would be able to return to work because of the surgeries she had on her cervical spine and her multiple level degenerative disc disease in the lumbar spine. Dr. G performed an FCE on claimant on January 19, 1999, and he reported that claimant "is not able to return to work at this time except for a possible sedentary position." He noted that claimant's job where she was injured required her to stand, sit, lift up to 50 pounds on occasion, stoop, bend, squat, crouch, kneel, climb, reach overhead, and perform grasping activities. Handwritten notes on Dr. G's FCE report state that claimant is unable to return to her previous job and she should do sedentary work only. Dr. V wrote on February 5, 1999, that claimant continued to complain of pain in her neck, thoracolumbar area, and lumbar sacral area, that he would refer her to Dr. H for an evaluation, and that "I do feel that she could get back to sedentary duties since she had a [FCE] which showed that she could not do any type of lifting, but she could do sedentary work with no lifting if it was available." On April 8, 1999, Dr. V wrote that claimant was continuing to complain of thoracolumbar pain and that he would refer her to Dr. H to see whether he would consider doing a fusion.

The hearing officer found that during the filing period for the 14th quarter claimant had some ability to work and that she did not make a good faith effort to obtain employment commensurate with her ability to work. He also found against claimant on the direct result criterion for SIBS. The hearing officer concluded that claimant is not entitled to SIBS for the 14th quarter. The 1989 Act makes the hearing officer the sole judge 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. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not 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).

Claimant contends that the hearing officer committed prejudicial error in not admitting into evidence an FCE report dated June 14, 1999, which she states was done pursuant to an order of the Texas Workers' Compensation Commission. Carrier objected to that exhibit based on untimely exchange and relevancy. Carrier said that the exhibit was not exchanged with it until the CCH. The ombudsman stated that she received the FCE report of June 14, 1999, on June 14, 1999, which was the day before the CCH. The hearing officer ruled that the FCE report of June 14, 1999, was not timely exchanged and excluded it from evidence. He did not rule on the relevancy objection. A physical therapist wrote in the June 14, 1999, FCE report that claimant is not able to work today due to her not being able to meet the sedentary physical demands of lifting 10 pounds; however, he also noted that the overall validity of the test was equivocal and suggested sub-maximal effort, but believed that was due to an increase in pain. Claimant states that the hearing officer's refusal to admit the June 14, 1999, FCE report was prejudicial error because it is a neutral determination of no ability to work and the hearing officer did not consider a no

ability to work theory of recovery but should have done so based on the June 14, 1999, FCE.

Rule 142.13(c) sets forth requirements for exchange of evidence. It has been held that to obtain reversal of a judgment based upon an error in the admission or exclusion of evidence, the appellant must show that the evidentiary ruling was in fact error and that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio, 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Under the particular facts of this case and considering all of the evidence, we conclude that the claimant has not shown that exclusion of the June 1999 FCE report was reasonably calculated to cause and probably did cause rendition of an improper decision or that the whole case turned on the excluded exhibit and thus has not shown reversible error.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge