

APPEAL NO. 991398

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 June 15, 1999. The issues at the CCH involved whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his first nine quarters of eligibility. Contingent on the findings on those quarters was the additional issue of whether the claimant permanently lost his entitlement to SIBS under Section 408.146(c).

The hearing officer found that the claimant was not entitled to SIBS for any of the quarters in issue because he failed to make a good faith search for employment commensurate with his ability to work. The hearing officer rejected the claimant's assertion that he had the complete inability to work for the filing periods of the quarters in issue. Accordingly, the hearing officer further found that the claimant lost entitlement to SIBS permanently because of 12 consecutive months of nonentitlement.

The claimant has appealed. He argues that he has medical evidence proving that the degree of his pain was such that he was unable to work at all. He pointed out that he was offered light-duty work that he could not do. He asserted that he was not properly treated for his injury prior to 1998. He indicates that the Texas Workers' Compensation Commission (Commission) was negligent and he asks the Appeals Panel to allow him to sue. The carrier responds by reciting facts from the record that it believes support the hearing officer's decision, which include statements of various doctors during some of the filing periods in issue that the claimant could return to some restricted work. The carrier asks that the decision be affirmed.

DECISION

Affirmed.

The claimant said he injured his back while employed as a truck driver by (employer). He said that the truck cab bounced as it went into a dip, on _____, and as he braced himself with his arms against the steering wheel this caused an apparent shock to his arms, neck and thoracic spine. Claimant felt that his medical treatment prior to changing doctors to Dr. R in mid-1998 had been inadequate. The claimant applied for the first quarter of SIBS on January 12, 1999, and for the remaining eight quarters on February 20, 1999, because, he said, he was not aware of the existence of SIBS prior to that time. However, it further appears that the matter of any impairment rating (IR) was not resolved finally until November 16, 1998, at which time he was given a 21% IR, with statutory maximum medical improvement being found to have been reached on October 22, 1995. (Claimant appears to have disputed an earlier- assessed five percent IR.)

He said that he can remain upright no more than three hours without having to lie down for an hour. The claimant said he could drive, and he had renewed his commercial drivers' license in 1996 because he had not given up on being able to return to work. He

had not sought employment during the filing periods, and stated that he did not believe he would be able to perform any type of work.

The medical evidence indicates that the claimant has been treated for chronic pain and depression. He was treated by Dr. W for about a year beginning in mid 1997. To greatly summarize the evidence, Dr. W's reports indicate that the claimant had a probable thoracic disc disruption; he stated that if the claimant had been diagnosed earlier with lumbosacral strain, it would have been an erroneous diagnosis. An MRI of his thoracic spine done on April 29, 1997, was normal with no degenerative conditions or cord compression.

A report from Dr. R dated May 15, 1998, summarizes previous treatment as involving the claimant's lumbar spine, and notes that he began treating with Dr. W after he stepped in soft mud in _____ and felt a "shock" in his thoracic area. On examination, Dr. R found no tenderness to palpation in claimant's entire spine. Muscle strength was normal. Claimant's gait was normal. There was some hypesthesia in the right C6 and C7 dermatome. Dr. R's impression was thoracic and interscapular pain, and some right cervical and lumbar radiculopathy. Dr. R recommended a complete myelogram. The myelogram was done on August 10, 1998, and showed degenerative discs at C5-6 and C6-7. Claimant had cervical surgery on September 25, 1998 (near the end of the disputed filing periods). Dr. R has completed statements on prescription slips for each of the quarters in question which simply state that the claimant was unable to work during the pertinent time period. Dr. R also wrote on March 22, 1999, that claimant was unable to work secondary to his pain and the effects of his medication. Dr. R said that he was unable to do his "normal" work as a result. However, claimant underwent a functional capacity evaluation (FCE) which concluded that he had the physical capability to work at the medium work level.

One of the doctors who claimant felt did not give adequate treatment was Dr. B, who was treating the claimant in 1994. Dr. B, who assisted claimant with pain management, advised claimant in November 1994 that he should be able to perform some type of light-duty work and should avoid heavy lifting. Dr. B's treatment was largely concentrated on the claimant's low to mid back.

The claimant agreed that he turned down an offer of light duty from the employer which would have entailed sitting in his car as a security guard. The claimant maintained that he refused it because he would be unable to sit for more than three hours. The medical records at the time do not reflect this as a stated restriction, however.

The case was greatly complicated by the fact that the IR was not resolved until well into the ultimate SIBS period, and it could be argued that claimant would not have been aware of the need to search for employment at a time when it was not clear he was within a SIBS period. Nevertheless, until there is a statutory provision to the contrary, the Commission is required to evaluate the facts for each quarter with reference to the ending of the impairment income benefits period and the subsequent SIBS periods, even if application for those benefits is not placed until much later.

At the outset, we note that the Appeals Panel is not charged with opining about negligence actions. These are matters to be discussed with counsel as they do not involve questions pertaining to benefits under the 1989 Act.

There are four eligibility criteria that must be met to qualify for SIBS, set out in Section 408.142(a): that the employee "(1) has an impairment rating of fifteen percent or more . . . ;(2) has not returned to work or has returned to work earning less than eighty percent of the employee's average weekly wage as a direct result of the employee's impairment; (3) has not elected to commute a portion of the impairment income benefit . . . ; and (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work." Similar provisions with respect to "direct result" and job search are effective for continuing SIBS entitlement. Section 408.143(a).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all, 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. We have held that the burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and that a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. See *also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. 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. Full-time employment is not required, but there was no evidence of the claimant's seeking even a part-time job within his stated ability to sit for three hours at a time with a rest break.

The medical evidence in this case is in conflict; along with objective problems in his neck, there are indications that the claimant's mid back pain is not as closely correlated with objective findings of injury. The hearing officer could also choose to believe the results of the FCE in ascertaining that there was some capability to work. In reviewing the record, we cannot agree that the hearing officer's decision has no support, and it is not against the great weight and preponderance of the evidence so as to be manifestly unfair

or unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.- San Antonio 1983, writ ref'd n.r.e.). Once the claimant was found not entitled to 12 consecutive months of SIBS, a determination that the claimant has permanently lost entitlement is directed by the 1989 Act. Section 408.146(c). Accordingly, we affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge