APPEAL NO. 991440

On June 17, 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 12th quarters. Claimant requests that the hearing officer's decision that she is not entitled to SIBS for the ninth and 12th quarters be reversed and that a decision be rendered that she is entitled to SIBS for those quarters. Respondent (self-insured) 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). Claimant has 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 reached maximum medical improvement with an IR of 15% or more; that she did not commute IIBS; that the filing period for the ninth quarter was from February 9 to May 10, 1998; and that the filing period for the 12th quarter was from November 9, 1998, to February 7, 1999. The ninth quarter was from May 11 to August 9, 1998, and the 12th quarter was from February 8 to May 9, 1999.

This case concerns, in part, an assertion of no 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." 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, who is 55 years of age, testified that she was working as a custodian in self-insured's school on _____, when she lifted a heavy trash can full of books and felt something snap in her back. She said her duties included cleaning, sweeping, mopping, vacuuming, and taking out the trash. She said she has not worked since her injury and that her pain has gotten worse over the last few years. Claimant said that she has never done anything other than cooking and cleaning and that she would have to be retrained for other types of work. She said that she would like to go to school to work with computers but has done nothing toward that. Claimant said that she is unable to work due to her constant back pain. She said that Dr. S, who was her treating doctor before she saw Dr. B in March 1999, told her that she is not able to work. She said Dr. B has not released her to return to any type of work. She did not list any job contacts on her Statement of Employment Status (TWCC-52) for the ninth quarter and testified that she did not remember whether she did not look for jobs during the filing period for that quarter.

Claimant said that she was not able to work during the filing period for the 12th quarter but was told that she had to look for work. She listed a total of 30 job contacts on her TWCC-52 and supplemental document for the 12th quarter and attached copies of job applications for 16 of those contacts to her TWCC-52. One application is to the Texas Workforce Commission. She said that she left her applications with the employers she contacted and that she really wanted to find work. She said she looked for jobs in the newspaper and contacted job leads sent to her by CW, the job developer hired by self-insured. Claimant's TWCC-52 and supplement for the 12th quarter reflects that the type of jobs applied for were cook, cook's helper, cleaning, cashier, salesperson, and nurse's aide. Claimant said that she can no longer do cleaning work, that she does not believe that she can do the job of a cook because of constant pain and inability to stand on her feet for very long, and that she feels that she can do a sales job if she is allowed to sit down for a couple of hours a day and work three hours a day.

CW testified that claimant's custodial job was a medium-duty job and that claimant would not be able to do that job if she had the ability to do only light-duty work, but that the functional capacity evaluation (FCE), while reflecting the ability to do light-duty work, also noted that claimant did not give maximal effort. CW's testimony and report reflects that claimant failed to respond to a request for an interview from one of the employer's claimant applied at during the filing period for the 12th quarter. Claimant said that she did talk to that employer. CW's report reflects that, with regard to employers claimant listed as having contacted in the filing period for the 12th quarter, she was able to confirm that claimant applied with several of those employers, that others told her that they had no application from claimant, and that others were unable to confirm or deny whether claimant had applied.

Claimant said that she has a herniated disc and that Dr. L, who she saw at carrier's request, told her that she needs surgery and that Dr. B told her that she needs surgery. She said that she has not had surgery because self-insured has denied surgery. There is no medical report in evidence that recommends surgery nor is there any document in evidence that states that self-insured denied surgery.

Claimant underwent an FCE in May 1998 and the lab technician wrote that claimant demonstrated the ability to perform light work, allowing for occasional lifting of up to 20 pounds, frequent lifting of up to 10 pounds, and negligible constant lifting, but that claimant did not give maximal effort so that the FCE is an underestimate of what claimant can really do. Dr. L examined claimant in May 1998 and stated a diagnosis of degenerative disc disease without radiculopathy. Dr. L wrote that claimant displayed marked symptom magnification and that claimant demonstrated, with documented minimal effort, the ability to work at the light-duty level. Dr. L also wrote that he believed that, with normal motivation, claimant could work at the medium-duty level and that claimant's "work status is now consistent with a medium duty job release, meaning occasional lifting of 50 pounds, frequent lifting of 20 pounds, and constant lifting of 10 pounds." Dr. L does not state in his report that claimant needs surgery.

Dr. S wrote on August 5, 1998, that claimant will be considered fit to work within the limitations outlined in the FCE and that he felt that claimant should be "integrated into the work force with the outlined restrictions from the FCE." He also noted that claimant continued to complain of chronic back pain and that she should have chronic pain management and possibly psychological intervention. Dr. S diagnosed claimant as having chronic low back pain syndrome and degenerative disease of the lumbar spine. Dr. S also wrote on August 5, 1998, that surgery is not recommended. However, on September 30, 1998, Dr. S wrote that "chronic pain management is required prior to her release to work since she cannot engage in work due to her chronic pain" and on December 9, 1998, Dr. S wrote that in his opinion claimant "is not fit to work because of chronic disabling pain." Dr. S also wrote on December 9, 1998, that claimant has a lot of chronic pain behavior; that she is in need of chronic pain management, including psychiatric or psychological intervention; that there is little that he can do for her from an orthopedic standpoint; that he had been unsuccessful in obtaining authorization for requested treatments; and that he has no expectation for her returning to work under current conditions. Dr. S wrote in March 1999 that claimant should use a TENS unit to alleviate pain.

On March 11, 1999, Dr. B saw claimant and wrote that he had last seen her in January 1996, that she had been treated since then by Dr. S, that she complained of persistent low back and bilateral leg pain, that she had worsening pain over the last few years, that x-rays show facet arthropathy and foraminal narrowing at L4-5 and L5-S1, and that she would be placed on medications, evaluated for pain management, and started on therapy. Dr. B put a negative sign inside a circle after the word "work." Dr. B noted on April 8, 1999, that therapy had been denied and that on that day claimant underwent a lumbar epidural injection for back and leg pain.

The hearing officer found that during the filing periods for the ninth and 12th quarters, claimant had some ability to work; that during the filing period for the ninth quarter, claimant made no effort to secure employment; that there was insufficient evidence of a good faith job search during the filing period for the 12th quarter; that claimant did not make a good faith effort to secure employment commensurate with her ability to work during the filing periods for the ninth and 12th quarters; and that claimant's unemployment

during the filing periods for the ninth and 12th quarters was not a direct result of the impairment from the compensable injury. The hearing officer concluded that claimant is not entitled to SIBS for the ninth and 12th quarters. Whether claimant had some ability to work during the relevant filing periods, whether she made a good faith effort to obtain employment commensurate with her ability to work during those filing periods, and whether her unemployment during those filing periods was a direct result of her impairment were fact questions for the hearing officer to resolve as the trier of fact.

The hearing officer's finding of some ability to work is supported by the FCE, Dr. L's opinion, and the August 1998 opinion of Dr. S, although Dr. S later wrote that claimant is unfit to work due to pain. The hearing officer's finding that claimant made no effort to look for work during the filing period for the ninth quarter is supported by the lack of any job contacts on the TWCC-52 for that quarter and the absence of testimony about a job search during that filing period. Although it appears that claimant did apply with potential employers during the filing period for the 12th quarter, the Appeals Panel has stated that in determining whether a claimant has made a good faith effort to obtain employment commensurate with the claimant's ability to work, a fact finder must sometimes assess whether job contacts constituted a true search to re-enter employment or were done instead to meet, on paper, eligibility requirements for SIBS. Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996. In that regard, the hearing officer wrote that she viewed the evidence as showing that claimant was engaged in a process of making a showing of a job-search effort rather than actually searching for employment in good faith.

With regard to the direct result criterion for SIBS, the Appeals Panel has held that a claimant's unemployment or underemployment must be a direct result of the impairment, but that the impairment need not be the sole cause of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996. And in Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996, the Appeals Panel noted that a finding that a claimant's unemployment or underemployment is a direct result of the impairment is "sufficiently supported by evidence that a claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury." The hearing officer found against the claimant on the direct result criterion for both quarters in issue. The hearing officer noted that some medical records reflected that claimant has the ability to perform medium-duty work and that, as a whole, the medical records tended to cast doubt on whether claimant's unemployment was a direct result of her impairment.

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 trier 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. 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. Appeal No. 950084. We conclude that the hearing office's findings, conclusions, and decision are supported by sufficient evidence and are 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).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge