

APPEAL NO. 991514

On March 4, 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 respondent (claimant) is entitled to supplemental income benefits (SIBS) for the sixth, seventh, and eighth quarters. Claimant appealed the hearing officer's decision that she was not entitled to SIBS for the eighth quarter and appellant (carrier) appealed the hearing officer's decision that claimant was entitled to SIBS for the sixth and seventh quarters. In Texas Workers' Compensation Commission Appeal No. 990635, decided May 11, 1999, the Appeals Panel reversed the hearing officer's decision on all quarters in issue and remanded the case to the hearing officer for further consideration and development of the evidence on the good faith SIBS criterion for all quarters in issue. On June 17, 1999, a CCH on remand was held. Carrier appeals the hearing officer's decision on remand that the claimant is entitled to SIBS for the sixth, seventh, and eighth quarters. Claimant requests affirmance.

DECISION

Affirmed.

The filing period for the sixth quarter was from November 28, 1997, to February 26, 1998; the filing period for the seventh quarter was from February 27 to May 28, 1998; and the filing period for the eighth quarter was from May 29 to August 27, 1998. Dr. Y, the designated doctor, reported that claimant reached maximum medical improvement on July 25, 1995, with a 29% impairment rating (IR). The IR assigned by Dr. Y was for impairment of claimant's lower extremities due to bilateral hip impairment, including bilateral avascular necrosis (BAN) of her hips.

The following is a summary of what was held in Appeal No. 990635. The Appeals Panel held that the hearing officer's finding that during the filing periods for the sixth and seventh quarters claimant's unemployment was a direct result of her impairment was supported by sufficient evidence and that it was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The Appeals Panel noted that there was no appeal of the hearing officer's finding that during the filing period for the eighth quarter claimant's unemployment was a direct result of her impairment. The Appeals Panel reversed the hearing officer's finding that claimant had no ability to work during the filing periods for the sixth and seventh quarters and his decision that claimant is entitled to SIBS for the sixth and seventh quarters and remanded the case to the hearing officer for further consideration and development of the evidence on the good faith SIBS criterion for the sixth and seventh quarters. The Appeals Panel noted that there was testimony that claimant was attending school full time during the filing periods, but that the hearing officer had made no mention of that testimony and that very little evidence had been developed on claimant's school attendance. The Appeals Panel reversed the hearing officer's finding that during the filing period for the eighth quarter claimant did not attempt in good faith to obtain employment commensurate with her ability to work and his decision that claimant is not

entitled to SIBS for the eighth quarter and remanded the case to the hearing officer to make findings on the good faith criterion for SIBS for the eighth quarter and for further consideration and development of the evidence on the good faith SIBS criterion for the eighth quarter. The hearing officer had mistakenly used the time period of the eighth quarter itself instead of the filing period for the eighth quarter in ruling that claimant had not attempted in good faith to obtain employment commensurate with her ability to work.

The evidence developed at the initial CCH and pertinent sections of the 1989 Act, rules of the Texas Workers' Compensation Commission, and Appeals Panel decisions are set out in Appeal No. 990635. At the CCH on remand, claimant testified that by the end of July 1997 she was unable to continue working as a computer technician trainee because of her hip pain; that she looked for work during the filing period for the sixth quarter; that her hip pain became worse; that in January 1998 she began taking three courses at a junior college under the sponsorship of the Texas Rehabilitation Commission (TRC); that TRC paid for her tuition and books for retraining at the junior college; that she was unable to take more than three courses because of her pain; that school continued until the end of April 1998; that during breaks in classes she had to lay down because of her hip pain; that she had to use her cane to walk, and walking, standing, and sitting was and is painful; that she was physically unable to do more than attend her classes because of her hip pain; that she had absences from classes because of hip pain; that her current treating doctor, Dr. R, told her that she is unable to work and needs hip replacement surgery; that surgery has recently been approved and scheduled; that she had her baby on July 27, 1998; that her inability to work was due to her work injury and not due to her pregnancy; that she was not physically able to continue to go to school after her first semester ended in April 1998 because of her pain, which was causing her to have absences; and that Dr. R has told her that she cannot work.

Dr. R began treating claimant in November 1997 and continues to treat her. Dr. R's reports and the reports of Dr. K, claimant's former treating doctor, are summarized in Appeal No. 990635. While Dr. K wrote in August 1997 that claimant could perform sedentary-type work, Dr. R wrote in February, May, and August 1998 that claimant is unable to work. Dr. R attributed claimant's inability to work to her BAN of her hips and her need for bilateral hip replacements. It was not until October 1998, after the end of the relevant filing periods, that Dr. R wrote that he thought that claimant could be released to work in a sedentary desk job.

In his decision on remand, the hearing officer found that during the filing periods for the sixth, seventh, and eighth quarters claimant's unemployment was a direct result of her impairment; that during the filing period for the sixth quarter claimant attempted in good faith to obtain employment commensurate with her ability to work and began junior college under a TRC program; that during the time the claimant attended classes under the TRC program, which was from January through April 1998, claimant had no additional physical capacity to work; that after claimant's classes ended under the TRC program in April 1998, she had no ability to work due in part to the effects of her compensable injury and impairment; and that during the relevant filing periods claimant attempted in good faith to

obtain employment commensurate with her ability to work. The hearing officer concluded that claimant is entitled to SIBS for the sixth, seventh, and eighth quarters. Carrier contends that claimant's compensable injury did not prevent her from working, that claimant could work during the relevant filing periods, and that claimant made an insufficient job search.

Whether claimant had some ability to work, whether she made a good faith attempt to obtain employment commensurate with her ability to work, and whether her unemployment was a direct result of her impairment from her compensable injury, were fact questions for the hearing officer to determine from the evidence presented. 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. We conclude that the hearing officer's decision on remand that the claimant is entitled to SIBS for the sixth, seventh, and eighth quarters is supported by sufficient evidence and 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).

The hearing officer's decision and order on remand are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge