

APPEAL NO. 991516

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 22, 1999. The issue at the CCH involved whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for the seventh compensable quarter, which ran from March 24, 1999, through June 22, 1999.

The hearing officer found that the claimant's underemployment was not the direct result of his impairment and that he had not made a job search commensurate with his ability to work. As a result, he was found not entitled to SIBS.

The claimant has appealed, arguing that the medical evidence overwhelmingly shows that he has no ability to work. The self-insured respondent (carrier) argues that the decision must be affirmed.

DECISION

Affirmed.

The filing period for the quarter of SIBS in issue ran from December 23, 1998, through March 23, 1999. The claimant was injured on _____, while employed by (referred to herein as employer or carrier, depending upon the context of the reference). He had been employed since July 1994 at the juvenile detention center for the employer. He was injured while playing basketball with some of the detainees, when he collided with another player whose knee came down into his left calf muscles. The claimant said his left knee was hurt. He ultimately had an anterior cruciate ligament reconstruction in October 1996. The claimant said he had a total of three surgeries.

The claimant said he was currently at the point where he might need a total knee replacement. During the filing period, claimant's treating doctor was Dr. B, whom he said he saw twice during the filing period. The claimant contended that Dr. B told him not to go back to work, or look for work, because he had problems with swelling in his knee due to walking up and down stairs and getting up into buses. The claimant said that he was in a lot of pain, and his mobility was limited, during the filing period. He said that walking around looking for employment in earlier periods had contributed to the deterioration of his knee. The claimant agreed he had not searched for employment during the filing period for the quarter in dispute. The testimony brought out that he also had some problems with depression.

The claimant agreed in redirect testimony that Dr. B felt he was of the opinion that claimant could work, but had not released him. Claimant agreed that Dr. B had given him an October 1, 1998, light-duty release but that he worsened after that and Dr. B then opined he should not look for work. Dr. B wrote on October 1, 1998, that claimant had restriction in his flexion, although full extension, in his left knee. Dr. B advised sedentary

work, restricted to 10 pounds occasional and maximum lifting. He advised that in an eight-hour workday, the claimant should stand or walk less than an hour. He also advised limited driving to one hour per day. Because of claimant's psychological status, Dr. B advised an avoidance of a stressful position. On May 10, 1999, Dr. B wrote that claimant should be considered permanently disabled and he did not envision a future time when he would be able to work.

The legislature has imposed upon applicants for SIBS the requirement that work be sought, in good faith, "commensurate" with the ability to work. Section 408.143(a)(3). The statute itself does not provide for exceptions to this requirement. However, 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.

Where, as here, it is clear that the injured worker has limitations, it is important to emphasize that "commensurate" with ability to work does not mean ability to return to full-time work. The fact that a claimant can only work part time, and that there are limitations on what he can do, might indeed limit the scope of available jobs; however, the fact that such jobs may be few does not mean that they need not be sought, with the possibility of identifying a position that could start an injured worker on the road toward reentering the workplace. As we review the record, we cannot agree that the hearing officer's decision is without support.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the

overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this was the case here, and affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge