APPEAL NO. 991525

Following a contested case hearing (CCH) held on June 18, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fourth compensable quarter. Claimant has appealed, contending that the report of his treating doctor established that he had no ability to work during the filing period. The respondent (self-insured employer) urges in response the sufficiency of the evidence to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury; that he reached maximum medical improvement with an impairment rating of 15% or greater and did not commute any portion of his impairment income benefits; and that the filing period for the fourth compensable quarter was from January 26 through April 26, 1999.

Claimant testified that he is 62 years of age; that on _____, his right arm was injured at the wrist area while at work for the self-insured employer; that he is right hand dominant; that he has pain in his right arm and cannot do such things with that arm as writing and buttoning because he has lost grip strength; that he has developed a depression since his injury which has adversely affected his ability to concentrate and his memory; that he "can't keep anything on [his] mind"; that he has had suicidal ideation; that both his pain and his depression prevent him from working; that if he did try to work he would not be able to concentrate or remember; that he is married and if he were not he would not even be able to pay his bills; and that he drives very little. Claimant further testified that his treating doctor is Dr. D, a family doctor; that Dr. D has him on three medications and he understands one treats his depression; that the self-insured employer had him seen by Dr. SK; that Dr. D referred him to a clinical psychologist, Dr. DK; and that in April 1999 he commenced therapy sessions with another clinical psychologist, Dr. C, and has had six sessions, and understands additional sessions have been authorized.

Claimant's Statement of Employment Status (TWCC-52) signed on April 26, 1999, reflects that he sought no employment and earned no wages during the fourth quarter filing period. The form also states the following: "Totally disabled due to severe depression caused by right arm."

Dr. SK's report of his September 22, 1998, psychiatric examination of claimant is undated but bears a date stamp showing receipt by a third party administrator on October 7, 1998. The report includes diagnoses of major depression severe with psychotic features, injury to right arm, and legally blind. Dr. SK states that claimant is not able to deal

with vocational training because of his right arm, blindness, and age; that claimant is totally disabled and unable to work at this time; and that claimant needs treatment for his depression.

Dr. DK's April 21, 1999, report to Dr. D states the diagnostic impressions as major depression, recurrent, moderate; alcohol abuse in remission; dysthymic disorder; legally blind; and injury to right arm. Dr. DK's recommendations include "continue disability status," individual and marital therapy, and medication by Dr. D.

Dr. C wrote on May 12, 1999, that in her opinion claimant's dysthymia and depressed mood are related to the right arm injury and the impact it has had on his career, financial status, and self-esteem, and that his perceived losses are exacerbated by his loss of function.

Dr. D wrote identically worded letters on August 17, 1998, and on January 7, 1999, stating that claimant "is still totally disabled as result of an accident he suffered on July 23, [sic] 1996, and resulting improper care of his right arm" and that he has deep, acute depression directly resulting from the loss of function of his right arm. Dr. D wrote on February 19, 1999, that claimant is totally and permanently disabled from the _____, accident "which has left him totally disabled from obtaining or retaining any form of job in the labor market place." Dr. D further stated that claimant was declared legally blind two years before the accident of _____, but that the blindness was in no way related to the accident. A handwritten note from Dr. D written on a prescription pad on May 17, 1999, states the following: "[Claimant], you are totally & permanently disabled due to rt arm injury and resultant depression." Dr. D wrote on May 21, 1999, that claimant is totally and permanently disabled due to his right arm injury; that he has deep, acute depression directly resulting from this loss of function of his right arm; and that his mental depression is reasonably presumed to be permanent.

Dr. D wrote on June 7, 1999, that emergency room surgery on claimant's injured right forearm on the day of the injury was improper and when an orthopedic surgeon operated on the arm in February 1997, he found that his operation would not be successful because of the atrophy of the muscles and nerves from disuse for more than six months; that the loss of arm function cannot be recovered; that claimant has lost some nerve control; and that the absence of nerve and muscle function in the right arm is the etiology of the pain and loss of use of the arm. Dr. D further stated that claimant became very depressed and this has been aggravated by the fact that he realizes that he has lost the permanent function of his right arm; that claimant's disability and pain from the arm will totally and permanently prevent him from going back to work; and that "one is the direct result of the other."

Dr. SK wrote on June 14, 1999, that he feels claimant's condition is not permanent, that the depression is treatable, and that with proper treatment claimant's condition will improve. In his discussion of the evidence, the hearing officer appears to concede that the carrier's objection to Dr. SK's June 14, 1999, letter, based on the contention of its untimely

exchange with claimant and summarily overruled by the hearing officer with no explanation of the ruling or mention of good cause, may have had merit and he appears to disregard the letter given the remoteness in time of Dr. SK's examination.

Not disputed is the finding that during the filing period for the fourth compensable quarter, claimant was unemployed and made no effort to seek employment. Together with the dispositive conclusion, claimant challenges findings that there is insufficient evidence to show that he was totally disabled for any type of work during the fourth quarter filing period; that he had some ability to work during that period; that neither his depression nor the impairment therefrom is reasonably presumed to be permanent; and that his unemployment is not a direct result of the impairment from the compensable injury which was assessed based on the injury to his right arm.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to [SIBS] for any quarter claimed." Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The Appeals Panel held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, 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." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. 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 a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." 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 the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to light duty does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*.

Claimant had the burden of meeting the "good faith attempt" criterion by proving, as he contended, that he had no ability to do any type of work during the filing period. The hearing officer's discussion of the evidence makes clear that he did not find the several similarly phrased writings by Dr. D, a family practitioner, persuasive. In this regard, he

could consider the global and conclusive phraseology used repeatedly by Dr. D and the absence of any discussion concerning why claimant could not, for instance, work at employment not requiring the use of his right arm. As for the "direct result" criterion, the hearing officer observed that neither Dr. SK nor Dr. C opine that claimant's depression, which they began treating in April 1999, is expected to be permanent (*see* Section 401.011(23) for the definition of impairment). He further states that claimant's medical evidence "fails to sufficiently explain and prove the relationship of the observed impairment to the asserted total inability to seek and perform any type of work." In short, the hearing officer, even setting aside the carrier's exhibits, was not persuaded by claimant's evidence. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). That another fact finder may have found different inferences from the evidence does not afford us a basis to disturb the hearing officer's findings.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge