

## APPEAL NO. 991549

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 July 7, 1999. The issues at the CCH were whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 17th and 18th and 20th quarters. The hearing officer determined that the claimant is entitled to SIBS for the 17th and 18th quarters and is not entitled to SIBS for the 20th quarter. The appellant (self-insured) appeals, challenging the hearing officer's determinations on direct result and good faith. Concerning the 17th and 18th quarters the appeals file contains no response from the claimant. The determination that the claimant is not entitled to SIBS for the 20th quarter has not been appealed and has become final under Section 410.169.

### DECISION

Affirmed in part, reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on Alleged injury, with an impairment rating (IR) of 15% or greater; that the claimant did not commute any impairment income benefits; that the filing period for the 17th quarter was from April 5, 1998, through July 4, 1998; and that the filing period for the 18th quarter was from July 5, 1998, through October 3, 1998. The claimant testified that she sustained an injury to her lower back and shoulders on Injury 1, received a 16% IR as a result of the injury, and has had three surgeries on her wrist for carpal tunnel syndrome. The claimant testified that during the 17th and 18th quarter filing periods she was unable to work because of severe back pain and pain from a keloid scar on her wrist; that her treating doctor, Dr. T, has said that it was impossible for her to work; that she was taking pain medication; that she was seeing her treating doctor every two or three weeks; that she was unable to do any activities, even cleaning and cooking; and that, although she was unable to work, she searched for employment on occasion as reflected on her Statement of Employment Status (TWCC-52) forms. On April 20, 1998, during the 17th quarter filing period, Dr. T states:

[The claimant's] present condition includes severe, chronic lumbosacral syndrome with myofascitis and probable lumbar neuropathy. Her left forearm is quite painful and she has occasional neck pain, but the numbness and pain in the lower back is what makes her unable to work at this time. She would be unable to sit, stand or walk for more than a few minutes at a time, without having pain severe enough to distract her and interfere with her concentrating on a job. She would also need to be taking pain pills, which are not advisable to take either while driving, or while working.

The self-insured asserts that the claimant had the ability to work during both the 17th and 18th quarter filing periods and did not make a good faith effort to obtain employment. The self-insured presented three doctor's opinions and one physical therapist's opinion indicating that the claimant had an ability to work. On October 20, 1997, the claimant had a

functional capacity evaluation (FCE) performed and, based on the FCE, a physical therapist states that the claimant could perform work at a light physical demand level. On November 5, 1997, Dr. RDB, a carrier-selected doctor, indicates that there is no objective evidence that the claimant cannot return to work full time and there is no objective evidence of any need for restrictions. Dr. T referred the claimant to Dr. C for a neurologic evaluation. On May 22, 1998, Dr. C states that the claimant had no obvious distress, was observed sitting for more than 15 minutes, and had exaggerated response to any sensory stimuli. The self-insured had the claimant examined by Dr. O, who performed an FCE. On October 16, 1998, Dr. O states that, based upon the FCE, the claimant can return to sedentary, light, borderline medium work with a maximum lift of 36 pounds, frequently lift 16 pounds, and sit or stand at least two hours at a time.

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, and amount of, [SIBS] for any quarter claimed."

The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. 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 work 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*. We have frequently noted that the total inability to do any work at all will arise in only rare and unusual cases, as opposed to the fairly common situation where a seriously injured employee cannot return to the previous employment. Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997.

In this case, the claimant contended and the hearing officer found that she had no ability to work during the 17th and 18th quarter filing periods. The hearing officer found the medical records of Dr. T persuasive, although the self-insured presented medical evidence both prior to and after the 17th and 18th quarter filing periods indicating that the claimant had an ability to work. Dr. T's report of April 20, 1998, during the 17th quarter filing period, does not merely state that the claimant is unable to work, but explains the claimant's

symptoms and why she is unable to work. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The evidence is sufficient to support the hearing officer's determinations that the claimant had no ability to work during the 17th quarter filing period, that the claimant made a good faith effort to seek employment during the 17th quarter filing period, and that the claimant is entitled to SIBS for the 17th compensable quarter.

The claimant presented four medical records from Dr. T during the 18th quarter filing period to support her position that she was unable to work. The records indicate that the claimant was referred to Dr. C, that she had spasms in her lumbar and left trapezius muscles, and that her motions were limited and painful. However, the records make no mention of the claimant's ability to perform work. We simply find insufficient medical evidence of a total inability to work during the 18th quarter filing period. The claimant's TWCC-52 for the 18th quarter filing period reflects that she made 28 contacts during the filing period, but only four of these contacts were made during the filing period. One contact was made on September 28, 1999, and three contacts were made on September 29, 1999, during the last six days of the filing period. The claimant testified that all four contacts were made by telephone; that one of the contacts was for a registered nurse recovery room position, but she is not a registered nurse; and that one of the positions was for a stock room position, but she was not capable of performing stock room duties. The Appeals Panel has specifically held that the requirement to seek employment generally spans the entire filing period and has reversed when a job search was undertaken only during a portion of the filing period. See, e.g., Texas Workers' Compensation Commission Appeal No. 971184, decided August 1, 1997. The claimant's four job searches in the last six days of the filing period, two of which she testified she could not perform, were not sufficient to meet the requirements of the statute that the claimant attempted in good faith to obtain or seek employment commensurate with her ability to work.

The self-insured appeals the hearing officer's finding that during the filing periods for the 17th and 18th quarters the claimant was unemployed or underemployed as a direct result of her impairment, but does not indicate the basis of its appeal. The hearing officer's direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing periods, she could not reasonably perform the type of work being done at the time of the injury, that of a typist clerk. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

We find that the hearing officer's determination that during the 18th quarter filing period the claimant had no ability to work to be insufficiently supported by the medical evidence, and we find that the hearing officer's determination that during the 18th quarter

filing period the claimant attempted in good faith to obtain employment commensurate with her ability to work because she had no ability to work to be so against the great weight and preponderance of the evidence as to be clearly wrong. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse, in part, Findings of Fact Nos. 3 and 4, Conclusion of Law No. 3, and the decision, and we render a new decision that claimant is not entitled to SIBS for the 18th quarter. We affirm the decision and order of the hearing officer that the claimant is entitled to SIBS for the 17th quarter.

---

Dorian E. Ramirez  
Appeals Judge

CONCUR

---

Tommy W. Lueders  
Appeals Judge

---

Alan C. Ernst  
Appeals Judge