

APPEAL NO. 991558

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 2, 1999. The issue at the CCH involved whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for the second compensable quarter, which ran from May 2 through July 31, 1999.

The hearing officer found that the claimant's underemployment was the direct result of his impairment but 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 he was enrolled as a full-time student under the auspices of the Texas Rehabilitation Commission (TRC) and because of medication due to his injury was unable to continue as planned, but that he withdrew effective April 1, 1999. He argues that he earned no income from his wife's business, denies that he was the person shown doing some activities on a videotape, and he argues that he made searches for employment. Finally, he asserts that he has continuing problems affecting his ability to hold gainful employment. The accuracy of the hearing officer's recounting of the facts is assailed. The respondent (carrier) responds that some of the statements made in the appeal are not borne out by the record. The carrier notes that it was undisputed at the CCH that the claimant's last day in college was February 19, 1999, and that he made no job search during the quarter. The carrier responds that the decision is supported in all aspects and should be affirmed.

DECISION

Affirmed.

The period for the quarter of SIBS in issue ran from May 2 through July 31, 1999; the filing period was the immediately preceding quarter.¹ Claimant was injured on _____, while employed by Longwood Industries, Inc. (employer). The claimant said a hydraulic valve exploded, spewing hot fluid in one ear, knocking his head against a hydraulic press, and rendering him unconscious. He had injuries to his head and back. The claimant said he had a closed-head injury. He was assigned a 30% impairment rating. He contended he was bothered with syncope episodes. Claimant had underlying cardiac problems and said that while he believed a myocardial infarction he had in February 1997 was related to his accident, he did not have the medical evidence to prove it. He agreed that some limitations on his ability to work were due to his heart problems; however, he

¹ Although the filing period appears to begin on January 31, 1999, a period of time which would bring claimant under the "new" SIBS rules, there is some question about the manner in which the period was calculated. A press release from the Texas Workers' Compensation Commission, which is in evidence, indicates that because of the manner in which the qualifying period is supposed to be calculated, a quarter beginning on or before May 14, 1999, is considered under the "old" SIBS rules. The new rules provide for a two-week "gap" between the qualifying period and the beginning of the quarter which has not been accounted for here. Because the new rules would not change the outcome in this case, we will evaluate this case for sufficiency of the evidence to support the hearing officer's findings.

believed that his headaches and syncope episodes were the primary limitations on his ability to work. Claimant said that his doctor, Dr. O, had taken him entirely off work in May 1999 and recommended that he request a restricted driver's license. He said that he had not done so as of yet and still had a full driver's license.

Claimant said he was enrolled through the auspices of TRC (but at his own expense) at College starting January 19, 1999. He said that he took 10-12 hours of classes per week, beginning usually at 8:00 in the morning, and his driving time round trip was one and one-half hours a day. Claimant said that he studied three to four hours a day. However, he began taking a medication prescribed by a neurologist, Dr. N, and had an allergic reaction within two weeks, leaving him violently ill. He said he was sick from about February 26th to 27th until the second week in April. Claimant said he began to recover around the third or fourth week of March. Claimant clearly testified that he made no job search at all in April and May. His position was that he had fulfilled the requirement for SIBS because he was enrolled full time as a student. Claimant agreed that his last day of actually attending classes was February 19th and he subsequently made the determination to drop out because he felt his illness and lack of attendance would affect his grades. He did not participate as a full-time student after this date.

Because claimant now contends he sought employment during the filing period, it is important to emphasize that the only job hunting-related activities that claimant contended, at the CCH, that he did was to read the want ads in the newspaper two or three times a week. There was no evidence that his efforts went beyond this review.

Claimant's wife operated a diner and meal cart called "the Lunch Box" which was a source of controversy during the CCH. The claimant contended that although he would help out when requested by standing behind the cash register or straightening up, he was not employed and received no payment. He agreed that on one occasion, when he was going home, he dropped off a sandwich order to a friend.

The claimant was videotaped on two days during the last week of April and one day early in May. He was seen performing a variety of activities including starting a generator by bending over and pulling on the rope, helping to transfer some carpet rolls, mowing the lawn, and being present at the Lunch Box cart. He did not contend, during the CCH, that the tape (which he said he had reviewed) showed someone other than himself. Claimant agreed that when he filled out his Statement of Employment Status (TWCC-52) in late April 1999 and returned it to the carrier, he was no longer a full-time student.

The TWCC-52 in evidence, date-stamped by the carrier on April 21, 1999, shows that claimant stated he was a full-time student. A statement from College showed that claimant was enrolled for the term of January 19 through May 14, 1999, but withdrew by April 1, 1999.

On February 23, March 23, and April 20, 1999, Dr. O wrote in his Specific and Subsequent Medical Reports (TWCC-64) that claimant's psychological evaluations were

normal and showed no cognitive deficits that would affect his ability to work. He had right shoulder pain and low back pain caused by lumbar disc bulges. He was referred to Dr. N for treatment of headaches and claimed seizures. Dr. O stated that the claimant could perform at a light work classification. The videotape in question is, we agree, not of high quality; however, it shows a man mowing the lawn with no difficulty and starting a generator at one point.

Medical records from Dr. N indicate he treated claimant briefly in 1997 and then saw him again on February 22, 1999, for treatment of headache pains. Dr. N stated that his impression was vascular tension headaches and he prescribed Depakote. On June 1, 1999, Dr. N stated that claimant's EEG was unremarkable and no cause could be found for contended syncope. On March 2, 1999, claimant went to his family doctor, Dr. D, who, after consulting with Dr. N, stopped Depakote due to side effects and increased claimant's Inderol dosage.

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. Where efforts are made, a finder of fact may consider whether they continue throughout the quarter in a manner that appears consistent with "good faith" efforts to obtain employment. (To the extent that the new SIBS rules have codified a provision that full-time student status could be considered to fulfill this job search requirement, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)) indicates that it is not only enrollment, but satisfactory participation in a program that is relevant).

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.). The claimant contends that the statement of the hearing officer that he used the attendance at College as a subterfuge is false; we believe that the hearing officer made this statement with reference to the fact that on the date claimant completed his TWCC-52, he contended that he was a full-time student throughout the quarter in review, although he had not attended class for the previous two months at the time the form was filled out, which finding is supported by the record. We cannot agree that the findings and conclusions of the hearing officer are so against the great weight and preponderance of the evidence that a reversal is in order and we affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge