APPEAL NO. 991616

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 12, 1999. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fourth quarter, but that she is not entitled to SIBS for the second and third quarters. Claimant appeals the denial of SIBS for the second and third quarters, and respondent/cross-appellant (carrier) appeals the award of SIBS for the fourth quarter. The file does not contain a response from either party regarding the other's appeal.

DECISION

We affirm in part and reverse and render in part.

Claimant contends the hearing officer erred in determining that she had some ability to work and that she is not entitled to SIBS for the second and third quarters. Claimant asserts that no doctor unequivocally stated that she could work and that the totality of the evidence shows that she had no ability to work during the filing periods in question. We note that the new SIBS rules do not apply regarding the second and third SIBS quarters.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant had an impairment rating (IR) of 15% or greater; and (3) claimant did not commute any of her impairment income benefits (IIBS). The filing period for the second quarter was from August 25 to November 23, 1998. The filing period for the third quarter was from November 24, 1998, to February 22, 1999.

Claimant testified that she was working as a driver and that she sustained a compensable injury while pushing on a section of a tire, injuring her low back and shoulder. Claimant said she asked to see a doctor the next day and that she has not been back to work since that time. Claimant said she has spasms in her back and legs, that she walks with a cane, and that she begins to feel pain after 30 minutes of sitting. Claimant testified that she does not think she can work. She mentioned her cast and the fact that her hand "is not acting right." Claimant said she thought "in time" she would "be able to go to work," but said she will never be able to drive a bus and that she could not raise the hood on a bus. She also indicated that she could not work because of her back injury.

In a February 1997 report, Dr. S stated that he did not think claimant was a surgical candidate and that she "should be able to return to light-duty status as long as she is able to change her position from sitting to standing and perform some form of stretching exercises . . . with a limitation in lifting of no more than 20 pounds and avoiding frequent bending or stooping." In a July 1998 report, Dr. S stated that claimant should be able to do at least light-duty work with limitations on lifting, bending, and twisting. Dr. S said he recommended a functional capacity evaluation (FCE) to quantify claimant's "exact" functional status, but said that, "based on current physical findings, she should be able to

perform at least at the light-duty [level]." In a July 13, 1998, report, Dr. R stated under "impression," "right lumbar radiculopathy," "lumbar disc disease with disc protrusion L4-5 and degenerative stenosis L5-S1 based on MRI scan report dated 3/12/96." In an April 1999 report, written after the filing periods for the second and third quarters had ended, Dr. PO noted that claimant's wrist was casted and that she had undergone surgery on her hand. Other medical records indicate that this surgery took place on April 13, 1999. Dr. PO stated that claimant was unable to undergo FCE testing because of the cast on her arm. He noted that: (1) claimant is able to take care of herself, cook, and do some housekeeping; (2) claimant does not drive; and (3) on the basis of her medical history and "current presentation," claimant is "at this point in time only able to work in a very limited, light-duty capacity with primarily sedentary work, with no lifting, with the ability to change position, and not to exceed 2 hours a day." Dr. PO noted that it would be very difficult for claimant to find such a position and that "for all purposes," she is totally disabled. Dr. PO then said, "This may change somewhat once she has recovered from her recent left upper extremity surgery."

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The Appeals Panel has held that if an employee established that he has no ability to work at all, then he 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*. The claimant has the burden to prove there is no ability to work because of the compensable injury. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. When a claimant alleges a total inability to do any work, that contention generally must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994.

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 great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, claimant had the burden to prove she had no ability to work. Appeal No. 950582, *supra*. The hearing officer was the sole judge of the credibility of the medical evidence and determined whether the medical evidence showed that claimant had no ability to work. The hearing officer determined that claimant was capable of doing some work during the filing periods for the second and third quarters, that she did not look for work, and she did not meet the good faith requirement. There was evidence created during and soon after these filing periods ended that claimant was "totally and permanently disabled" and that she remained "unable to work." However, the hearing officer decided what weight to give to this evidence and made his determinations regarding good faith and ability to work for these two quarters based on the evidence before him. Because the hearing officer's determinations regarding these quarters are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for his. Cain. We note that the direct result determinations regarding these two quarters were in claimant's favor and were not appealed.

Claimant contends that, even if the hearing officer found that she had an ability to work two hours per day, as stated by carrier's doctor, Dr. PO, then her benefits should be reduced accordingly rather than completely denied. However, there are no provisions in the statute or the rules for this kind of partial entitlement for SIBS where a claimant is not working, nor is there any provision for such a "mitigation of damages," to the extent that workers' compensation benefits can be considered to be "damages." Pursuant to the hearing officer's findings of fact, he correctly concluded that claimant is not entitled to SIBS for the second and third quarters. We perceive no error.

In its cross-appeal, carrier contends the hearing officer erred in determining that claimant is entitled to SIBS for the fourth quarter. Carrier notes that Dr. PO said that claimant had some ability to work and that, therefore, under the new SIBS rules, because she did not look for work, she is not entitled to SIBS. Carrier also asserts that the hearing officer stated that the reason why claimant was unable to work was because of an unrelated wrist injury and that, therefore, she cannot meet the direct result requirement.

The new SIBS rules apply in this case because they were in effect when the filing period for the fourth quarter began on February 8, 1999. At the CCH, the hearing officer acknowledged the new SIBS rules. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) of the new SIBS rules, effective January 31, 1999, states, in pertinent part:

> (d) Good faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:

(3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how *the injury* causes a total inability to work, and no other records show that the injured employee is able to return to work; . . . . [Emphasis added.]

In this case, the hearing officer stated in the decision and order that:

> During the qualifying period for the 4th quarter, claimant was pending surgery, then recovering from surgery on her left wrist, and was unable to work at all for a time.

The parties did not contend that claimant's wrist condition is part of the compensable injury of _____.

Rule 130.102(d)(3) indicates that a claimant who is asserting that he acted in good faith and who is totally unable to work must prove this by narrative report that explains "how the injury causes a total inability to work." Under Rule 130.102(d)(3), the compensable injury must be at least a cause of the claimant's total inability to work.

In this case, the hearing officer found that claimant had no ability to work and that she acted in good faith. However, he also stated that the cause of the inability to work was something other than the compensable injury: an unrelated wrist injury. Therefore, the hearing officer erred in determining that, during the filing period for the fourth quarter, claimant attempted in good faith to obtain employment commensurate with her ability to work. We reverse Finding of Fact No. 3 and render a determination that claimant did not make a good faith effort to obtain employment commensurate with her ability to work.

Carrier next contends that the hearing officer erred in determining that claimant did not return to work as a direct result of the impairment from the compensable injury. Rule 130.102(c) states at follows:

> Direct Result. An injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings.

In this case, the hearing officer determined that during the filing period for the fourth quarter, "claimant was unemployed or underemployed as a direct result of claimant's impairment." In the discussion portion of the decision and order, the hearing officer stated that "the impairment from the compensable injury prevents [claimant] from returning to her prior job and the 'direct result' test is met."

In this case, the hearing officer could find from the evidence that claimant's unemployment is at least a direct result of her impairment. We affirm the hearing officer's determination regarding direct result. However, because we have reversed regarding good

faith, we conclude that the hearing officer erred in determining that claimant is entitled to SIBS for the fourth quarter.

We affirm that part of the hearing officer's decision that determines that claimant is not entitled to SIBS for the second and third quarters. We reverse that part of the hearing officer's decision that determines that she is entitled to SIBS for the fourth quarter and render a decision that claimant is not entitled to SIBS for the fourth quarter.

Judy Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCURRING IN PART AND DISSENTING IN PART:

I concur in the majority opinion to affirm the hearing officer's decision that claimant is not entitled to supplemental income benefits (SIBS) for the second and third quarters.

I respectfully dissent to the majority opinion to render a decision that claimant is not entitled to SIBS for the fourth quarter. I would remand the case to the hearing officer on the issue of entitlement to fourth quarter SIBS. In light of the hearing officer's finding that claimant's unemployment during the filing period for the fourth quarter was a direct result of her impairment from her compensable injury, I am not convinced that his finding that claimant had no ability to work during the filing period was necessarily predicated solely upon an inability to work due to a noncompensable hand injury, although comments in his decision could support that inference. I would remand the case to the hearing officer to make further findings of fact with regard to whether claimant made a good faith effort to obtain employment commensurate with her ability to work during the filing period for the fourth quarter and in particular would ask for findings of fact that address Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3), effective January 31, 1999, with regard to claimant's assertion of no ability to work.

Robert W. Potts
Appeals Judge