

APPEAL NO. 991621

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 30, 1999. The issue at the CCH involved whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for the third compensable quarter, which ran from March 12, 1999, through June 10, 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. He says he was unemployed as a direct result of his injuries. The respondent (carrier) argues that the decision must be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

The filing period for the quarter of SIBS in issue ran from December 11, 1998, through March 11, 1999. The claimant was injured in a forklift accident on _____, while employed by (employer). He had two cervical surgeries (the most recent in April 1997), and contended that he still suffered from headaches and considerable cervical pain, and an inability to sleep. The claimant said he took a medication called Hydrocone four times a day, and one pill at midnight, which made him drowsy. He agreed that the Hydrocone did not affect his ability to drive.

The claimant's treating doctor was Dr. G, who referred him to Dr. C for pain control. He asserted that both doctors told him he could not work, and that they had not released him. Dr. G wrote on June 4, 1999, that the claimant had a considerable amount of pain due to pseudoarthritis and because of this he was to refrain from any employment during December 1998 through October 1999. However, two months earlier, on April 14, 1999, Dr. G had written that the claimant was disabled from performing employment that would require physical exertion.

Dr. C wrote on June 4, 1999, that the claimant could not return to his former job, but that he could not give an opinion as to whether the claimant was unable to do any kind of work. The claimant was examined by Dr. W, on behalf of the carrier, on January 26, 1999, and referred for a functional capacity evaluation (FCE). The claimant said he made no attempts to contact anyone about the results of the FCE. The FCE was conducted February 8, 1999, and found three out of six indicators for inappropriate behavior were positive. The claimant was found to have significant deconditioning. The examiner stated that it was difficult to determine an accurate work level, but that the claimant demonstrated capability within the lower end of the medium work category.

Dr. C referred the claimant to a chiropractor for an FCE. The report of this doctor found the claimant to be within the sedentary to light category. The claimant was 57 years old at the time of his evaluations.

A report from the claimant's treating psychologist, Dr. S, dated May 26, 1999, opined that the claimant was unable to work for the filing period, due in part to sleep disturbance and pain.

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.

(We should emphasize that effective for the claimant's fourth SIBS quarter, there are new administrative rules that will affect contentions that there is a complete inability to work as a threshold for entitlement to SIBS. These rules also require detailed statements from physicians for those who continue to assert such inability. The claimant should contact the Texas Workers' Compensation Commission to understand the impact of these rules on his future entitlement to SIBS. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100, *et seq.*)

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 necessarily 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 on the job search criterion.

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.).

However, the "direct result" provision is not a second tier method of evaluation of job search efforts. A finding that an impairment has resulted from a serious injury, with lasting effects, and that the claimant has been left with the inability to return to his former job, can support the direct result provision of SIBS entitlement. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. The impairment need only be a cause, not the sole cause, of unemployment or underemployment. See Texas Workers' Compensation Commission Appeal No. 961981, decided November 18, 1996. As stated succinctly in Texas Workers' Compensation Commission Appeal No. 950849, decided July 7, 1995:

We do not believe that the "direct result" criteria was merely an alternative way to evaluate the job search. Although the Appeals Panel has quoted Sen. JM observation that economic conditions, rather than impairment, are an example of something other than the injury that could be the direct cause of unemployment, we believe this refers to situations where the general economic conditions in the area impact all workers, rather than the fact that some of the prospective employers contacted by one person had no current openings.

Because the hearing officer in this case found that there was no evidence other than the failure to search to explain claimant's unemployment, we believe he has done the incorrect analysis as to the direct result criterion. Given the overwhelming evidence of the continued physical effects of the injury, a finding that the claimant's unemployment was not a direct result of his impairment is against the great weight and preponderance of the evidence, and although the ultimate result is not changed, we reverse and render the decision that the direct result criterion for SIBS was met, and that the claimant's unemployment was the direct result of his impairment.

For the reasons stated, we affirm in part, and reverse and render in part.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge