APPEAL NO. 991634

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 5, 1999. With respect to the sole issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 10th compensable quarter, from April 19 to July 18, 1999. The appellant (carrier) appeals, challenging the hearing officer's determinations on direct result and good faith. The claimant responds that there is sufficient evidence to support the hearing officer's decision and it should be affirmed.

DECISION

Affirmed.

The parties stipulated that the carrier accepted liability for an _____, injury to the claimant; that the claimant had an impairment rating (IR) of 15% or greater; that the claimant did not commute any impairment income benefits; and that the 10th compensable quarter is from April 19 to July 18, 1999. The claimant testified that on _____, he was employed as a tool and cutter grinder at an aircraft plant when he sustained an injury to his neck at C3-7. The claimant had neck surgery in December 1993 and received a 25% IR. The claimant testified that his condition is worse after the surgery; he suffers from burning pain and intermittent numbness in his left arm, numbness in his left leg, and constant "shocking sensations" down both arms if he turns his head quickly. According to the claimant, he visits his treating doctor, Dr. F, at least once a quarter and Dr. F has indicated that claimant is going to have to have another surgery with hardware inserted to support his neck. The claimant testified that he currently takes 17 different medications daily for his injury.

The claimant testified that Dr. F has told him not to work because of his neck condition and the possibility of total paralysis. Based on this recommendation, the claimant did not seek employment during the 10th quarter filing period, from January 19 until April 18, 1999. In August 1998, the claimant was examined by Dr. T at the carrier's request. Dr. T opined that the claimant could not return to any type of gainful employment and indicated that a functional capacity evaluation (FCE) could be completed. On November 6, 1998, the claimant had an FCE which indicated that he was capable of functioning at a medium physical demand level, lifting 50 pounds infrequently and 25 pounds or less frequently. The claimant testified that after undergoing the FCE, he was "flat on his back" for approximately three days. On November 17, 1998, Dr. T reviewed the FCE results and indicated that he was in agreement with its recommendation.

Dr. F reviewed the FCE and responded to its assessment in several letters. On April 6, 1999, Dr. F states that the claimant is not able to work due to the increasing paralysis and incapacitation of pain. In a letter dated May 4, 1999, Dr. F states in pertinent part:

> [The claimant] is now several years post cervical laminectomies without stabilization performed in the usual neurosurgical fashion. This has destabilized his cervical spine in such a manner as to [present] the very real possibility of instant death from minor trauma; as the brainstem is essentially exposed without protection from the usual boney posterior elements.
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> The above consideration is the "big picture." The symptoms of the multiple compressions and contortion of the brain stem and spinal cord are chronic pain, [radiculopathy], with some sympathetically mediated component, loss of reflexes and discrete muscle weaknesses all as documented on my exam of January 1999. He manages to "get by" with soma and vicodin. However, I [doubt] that it would be safe to work under the influence of these medications. Also, driving back and forth to work entails the risks of instant death from a minor [rear-end] type MVA [motor vehicle accident].
>
> The fact that he was able to lift 50 pounds once during an FCE is immaterial to the situation I'm concerned about. The real issue is instant death or respirator dependant [quadriplegic] from a minor event such as a slip and fall, rear end MVA or even repetitively lifting in such a manner as to fatigue the cervical musculature allowing compression or transection of the brainstem or cord.

On June 21, 1999, Dr. T responded to Dr. F's opinion, stating that the claimant's situation is not as precarious as Dr. F indicates and that a sedentary occupation requiring approximately 70% sitting down would involve no more risk than the claimant would receive during the normal course of his day.

The carrier asserts that the FCE and Dr. T's report constitutes some evidence that the claimant had some ability to work during the qualifying period for the 10th quarter and that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) (a new SIBS rule), the claimant was required to look for work commensurate with his ability every week of the qualifying period. Rule 130.102(e) became effective on January 31, 1999. Pursuant to Rule 130.100, effective January 31, 1999, entitlement or nonentitlement to SIBS is determined in accordance with the rules in effect on the date a qualifying period begins. A qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. Rule 130.101(4), effective January 31, 1999. The new SIBS rules apply to quarters beginning on or after May 15, 1999, because the qualifying period for a quarter beginning May 15, 1999, would be from January 31 through May 1, 1999. In this case, the 10th quarter is from April 19 to July 18, 1999, and the new SIBS rules do not apply.

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 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." 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. 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.

In this case, the claimant contended and the hearing officer found that he had no ability to work during the 10th quarter filing period. There was conflicting evidence as to whether the claimant had an ability to work. The hearing officer found that the claimant was disqualified from employment generally based on the reports of Dr. F. The carrier asserts that Dr. F only indicates that the claimant is unable to work because there is a fear of re-injury which is insufficient to establish no ability to work. The carrier relies on Texas Workers' Compensation Commission Appeal No. 970475, decided April 28, 1997, which states "[w]e do not believe that a general prediction of future injury upon a return to work establishes no ability to work." In Appeal No. 970475, the Appeals Panel reversed a hearing officer's determination that the claimant had no ability to work and rendered a decision that the claimant was required to make a good faith effort to obtain employment commensurate with his ability to work. The facts of that case reveal no medical evidence provided an affirmative opinion that the claimant was unable to perform any work; numerous reports reflected behavior at the examination that was inconsistent with the clinical examination; where an opinion was given as to ability to work, that opinion was in favor of sedentary work; and the claimant told a doctor that he was unable to work and would likely injure himself further if he returned to work. What distinguishes the facts of this case from Appeal No. 970475, is that in this case Dr. F not only indicates that the claimant is unable to work because of the possibility of paralysis or quadriplegia if he returns to work, but indicates that the claimant is unable to work because of increasing paralysis and incapacitation of pain.

The carrier appeals the hearing officer's finding that the claimant's unemployment during the 10th quarter filing period was a direct result of his impairment. 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 period, he could not reasonably perform the type of work being done at the time of the injury, that of a tool and cutter grinder. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

Whether the claimant's unemployment was a direct result of his impairment and whether the claimant had no ability to work at all during the filing period for the 10th quarter presented the hearing officer with questions of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust 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).

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I write separately to point out that Texas Workers' Compensation Commission Appeal No. 970475, decided April 28, 1997, addressed the possibility of a claimant injuring himself, not from the standpoint of medical evidence, but only from lay evidence of the claimant. Even though I concurred in Appeal No. 970475, I would not reverse a decision of a fact finder that said there was no ability to work based on a medical opinion that paralysis or quadriplegia is a "very real possibility" if the patient attempted to do any work.

_____
Joe Sebesta
Appeals Judge