APPEAL NO. 991662

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 6, 1999. The issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 11th compensable quarter. The hearing officer determined that claimant, whom he found to have no ability to work, was entitled to SIBS. The appellant (carrier) requests our review, asserting the insufficiency of the evidence. Claimant filed a response urging the sufficiency of the evidence to support the challenged findings.

DECISION

Affirmed.

The hearing officer's decision and order states (as Finding of Fact No. 1D) that the parties stipulated that claimant suffered an injury in the course and scope of his employment on _____, for which he received a 17% whole body impairment rating. While we do not know what, if anything, transpired at a pre-CCH hearing, assuming one was held, the parties made no express stipulations on the record at the hearing. The hearing officer did introduce Hearing Officer's Exhibit No. 2 entitled "Stipulations for [SIBS]," a document apparently prepared at or following the benefit review conference, which recites certain stipulations to be proposed at the CCH. That document does not contain the above stipulation. The Appeals Panel has previously emphasized the importance of the hearing record accurately reflecting the stipulations of facts. However, since neither party complains of this matter on appeal, we need not take any action in the matter. Hearing Officer's Exhibit No. 2 does reflect a proposed stipulation that the "Qualifying Period For the 11th SIB's Quarter" began on "1-21-99" and ended on "4-21-99" and that the "SIB's Quarter" began on "4-22-99" and ended on "7-21-99."

Claimant testified that following his compensable back injury on _____, he never returned to work; that he had back surgery followed by multiple injections; that he has been given numerous prescribed medications for pain control as well as for the control of seizures; that the side effects of some of these medications have had serious and debilitating effects on him; and that in the past he has had some problems with overdosing on some of these medications. In evidence is a record of his hospitalization from October 28 to November 3, 1998, for polysubstance dependence. Claimant said he no longer drives, has no transportation of his own, and has to rely on his ill father to take him to (city) to see his treating doctor, Dr. VS. Claimant testified in detail to numerous prescribed medications he has either taken at some time in the past or took during the filing period including Oxycontin (for pain), Neurontin (for seizures), Prozac, Prilosec, Baclofen, Ansaid, and Oxy IR. He said these medications make him "goofy," "blow [him] away," and cause memory lapses and the inability to concentrate, and that he cannot do any job while on these medications. Claimant said he took his medications, as prescribed, before the hearing and it was apparent that he had difficulty focusing on the questions asked of him.

Claimant's Statement of Employment Status (TWCC-52) reflected that he made no employment contacts during the filing period.

Dr. E reported on January 14, 1999, that he was asked by the local field office of the Texas Workers' Compensation Commission to see and evaluate claimant and address his ability to work as well as the matters of his apparent drug dependency and his pain management treatment. Dr. E wrote that "unfortunately, [Dr. H] did a two level fusion surgery by an anterior approach," that claimant reports that the surgery clearly made his pain worse, and that he, Dr. E, "believe[s] it is tragic that surgery was done on the patient as it has been of no significant benefit." Dr. E further stated that claimant clearly has significant, chronic pain behavior; that he has twice overdosed and takes "an incredible amount of medications which presumably explains his slow responses"; that his life revolves around pain; and that he could perform only limited job activities and should not operate any kind of equipment. Dr. E's diagnoses include low back injury, failed back surgery, chronic pain behavior, depression, and drug dependence.

Claimant indicated that he had trouble obtaining authorization to see a psychologist in the city but that in late February 1999, he commenced seeing a psychologist weekly. A company. (managed care company) report for the period "03/04/99 through 04/09/99" reflects that claimant saw Dr. B and that Dr. VS feels that claimant needs weekly psychotherapy, and perhaps detoxification, before he is released for work. In his report of his February 22, 1999, consultation and testing, Dr. B stated that claimant has a major depression, a complicated bereavement (sister-in-law), panic attacks, and anxiety disorder and that he recommends psychotherapy.

Dr. VS wrote on April 16, 1999, that claimant came to the pain clinic in December 1998 upon referral and was interested in pain relief and being able to function at a higher level; that claimant is being treated for Chronic Intractable Back Pain with Baclofen, Oxycontin, and Oxy IR and states he is getting good pain relief; and that claimant will need to see an orthopedist or neurologist for further evaluation of his disability.

Dr. SS, an orthopedic specialist, wrote on June 16, 1999, that claimant, 50 years of age, is "a very complicated patient" whose two-level lumbar discectomy apparently did not improve his situation; that claimant reports having continued severe low back pain on a daily basis and being unable to engage in any activity; that the diagnosis is low back pain secondary to intervertebral degeneration and questionable pseudoarthrosis; and that the only thing that can be offered is to go in and look at the fusion to see if it is solid.

Ms. M, a counselor with the Texas Rehabilitation Commission (TRC), wrote on July 5, 1999, that claimant has been a TRC client since May 8, 1997; that the initial plan was to provide him with vocational training commensurate with his physical limitation from his back; that due to continued medical problems, now exacerbated by high doses of medication, vocational planning "has come to a screeching halt"; and that "it is clearly evident in talking with [claimant], as well as [Dr. SS's] letter of 6/16/99, that employment, of any kind, is the last thing claimant can currently achieve, much less even attempt to

achieve." Ms. M concluded that "any employer that would hire claimant in his present condition, I would say, needs a psychiatric evaluation."

Dr. D wrote on October 20, 1998, that claimant has been a long-term patient of the (Health Center); that regarding claimant's functional capacity for work, he reviewed the chart as of May 8, 1998, and the evaluation by Dr. H and that claimant is incapable of lifting and carrying more than 25 pounds; that repetitive bending should be avoided and all twisting; that claimant cannot work above shoulder level and is restricted from elevated heights, ladders or stools; and that his sitting and standing tolerance cannot be expected to exceed 30 minutes and walking tolerance is 45 to 60 minutes.

Not appealed are findings that claimant's medications during the filing period were Oxycontin, Baclofen, Ansaid, Neurontin, and Prilosec; that claimant has a limited ability to sleep due to the pain he experiences from failed back surgery; and that his inability to obtain employment during the filing period was a direct result of the impairment from the compensable injury. The carrier does appeal findings that claimant has severe back pain which prevents him from returning to any form of manual labor; that claimant was able to attend doctor appointments only by not taking his medications and would be unable to get out of bed the following day; that claimant had no ability to work; and that claimant made a good faith effort to obtain employment commensurate with his ability to work during the filing period for the 11th compensable quarter.

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, 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. 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 a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." 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 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*. 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.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual 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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge