APPEAL NO. 991710

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in on July 19, 1999. Because of the delay in determining the appellant's (claimant) impairment rating (IR), issues related to whether the claimant is entitled to supplemental income benefits (SIBS) for the first through the ninth quarters were before the hearing officer. The claimant and the respondent (carrier) stipulated that the claimant sustained a compensable injury on _____, and that he reached maximum medical improvement (MMI) on May 18, 1996, with a 15% IR. They also stipulated to the beginning and ending dates of the filing periods and of the quarters for SIBS for the first through the ninth quarters and that the claimant timely filed Statement of Employment Status (TWCC-52) forms for the first through the sixth quarters. The filing period for the first quarter began on December 28, 1996, and the filing period for the ninth quarter ended on March 27, 1999. At some unspecified time, the claimant worked for his brother for about two or three hours on two days. It is undisputed that other than the work he performed on those two days, the claimant did not work during the filing periods for the first through the ninth quarters. The claimant appealed the following findings of fact made by the hearing officer.

FINDINGS OF FACT

31. As of August 3, 1994, Claimant had some ability to work, albeit with restrictions.

32. As of November 17, 1997, Claimant was capable of performing light duty.

33. Claimant's inability to return to work during 1998 was due to multiple non-work related medical problems including "end stage cirrhosis" of the liver secondary to long-term alcoholism.

34. Claimant's not returning to work was not a direct result of his impairment.

35. Claimant's job seeking efforts during the corresponding filing periods were "extremely limited" and consisted only of making approximately 2 to 3 phone calls per month.

36. Claimant did not attempt in good faith to obtain employment commensurate with his ability to work.

The hearing officer concluded that the claimant is not entitled to SIBS for the first through the ninth quarters, and the claimant appealed those conclusions of law. The claimant contended that he was not able to work during the filing periods; that even though he had other health problems, his unemployment was a direct result of his impairment from the

compensable injury; that he made calls looking for work every week; that he did not document the calls because his doctor had told him not to look for work; and that he did make a good faith effort to obtain employment commensurate with his ability to work. The claimant requested that documents attached to his appeal be considered and that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for the first through the ninth quarters. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed. The carrier's response was filed in time to be an appeal. In its response, the carrier contended that the hearing officer erred in determining that the claimant timely filed the TWCC-52s for the seventh, eighth, and ninth quarters; but did not appeal those determinations.

DECISION

We affirm.

On _____, the claimant fell from the top of the tank of a tanker truck and injured his back, kidney, and head. A functional capacity evaluation was performed on August 3, 1994, and the report indicated that the claimant could perform light to moderate work. The claimant's treating doctor released the claimant to return to work with restrictions of no prolonged standing or walking and no lifting over 35 pounds. In September 1997, the claimant had kidney stones removed. In a Report of Medical Evaluation (TWCC-69) dated December 16, 1997, Dr. D, the designated doctor, certified that the claimant reached MMI on December 16, 1997, with a 15% IR. As stipulated, the claimant had reached MMI by operation of law on May 18, 1996. In a narrative attached to the TWCC-69, Dr. D stated that the claimant had "[n]on-work related injuries including hepatomegaly and ascites with chronic sequelae, hypertension, renal lithiasis, jaundice and a history of situational depression." Dr. D also noted that the claimant denied use of alcohol since 1997, but that he had a significant history prior to that. Dr. D reported that the claimant had a 21% impairment of the lumbar spine that he reduced to 10% because the spondylosthesis and some of the loss of range of motion were clearly preexisting nonwork-related problems and that he had a 10% impairment under Chapter 14 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association for central nervous system impairment due to traumatic brain injury and reduced it to five percent because that impairment was at least 50% caused by his hepatorenal disease. Apparently, the claimant was assigned a 15% IR based on the report of Dr. D. In a letter dated June 23, 1998, Dr. R stated that she examined the claimant several months ago, that he was not able to work at that time due to his multiple medical problems, and that she had written a report that documented his multiple medical problems. A radiology report dated October 12, 1998, states that the claimant has compression fractures of T7 and T8 that did not appear on the last lateral view of the spine done in June. The report of a bone scan dated October 23, 1998, states that the claimant may have compression fractures at T7, T11, and L3; that numerous areas of abnormal uptake were identified; that they could be secondary to diffuse osteoporosis and/or resorption/insufficiency fractures; that hyperparathyroidism may be a consideration;

that they could represent multiple foci of bony metastatic disease; and that clinical correlation was recommended. A consultation report from Dr. HC comments on the work-related and nonwork-related medical problems of the claimant. A report from Dr. CC dated February 17, 1999, states that the claimant had a history of liver disease due to cirrhosis; that he had a liver transplant on February 4, 1999; and that plain films showed possibly old multiple thoracic compression fractures, fractures at T12 and L1, and a possibly new fracture at L4 bordering on a burst fracture. A June 2, 1999, report from Dr. HC states that the claimant has been unable to work since the date of his injury and that he has old back pain from the injury and new back pain since a February incident after the liver transplant.

The claimant testified that he started using a walker in June 1995 and that until May 1999 he used either a walker or crutches. He said that he is 63 years old and performed exercises at home. He stated that during the filing periods he sought employment even though he had not been released to return to work and in some filing periods doctors told him that he was unable to work, that he was released to return to work at light duty last week, that he looked in the newspaper for jobs, that he made at least two or three inquires a month by telephone, that doctors told him that he could not go back to driving trucks, and that he thought that he could do some of the jobs that he called about.

All but one of the documents attached to the claimant's appeal are in the record of the hearing. That document is a medical report dated July 6, 1999. As a general rule, the Appeals Panel does not consider documents not offered into evidence at the hearing. Section 410.203(a). We will not consider the medical report that was not offered into evidence.

We first address the question of whether the claimant had some ability to work during the filing periods for the first through the ninth quarters. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is firmly on the claimant and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be judged against employment generally, not just the previous job where the injury occurred. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated that the claimant's inability to do any work must be supported by medical evidence. In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally. In Texas Workers' Compensation Commission Appeal No. 980773, decided May 22, 1998, the Appeals Panel stated that, in determining whether a claimant had ability to work during the filing period, the hearing officer must consider the claimant's overall medical condition and not just the impairment from the compensable injury. In the case before us, the hearing officer made findings of fact that "[a]s of August 3,

1994, claimant had some ability to work, albeit with restrictions" and "[a]s of November 17, 1997, claimant was capable of performing light duty." The hearing officer did not make findings of fact concerning the ability of the claimant to work during each of the filing periods in question. Medical reports indicate that he sustained new fractures of vertebras, had kidney stones removed, and had a liver transplant during the filing periods in question. In addition, it appears that in making Findings of Fact Nos. 31 and 32, the hearing officer considered only the impairment from the compensable injury. Concerning the ability of the claimant to work during the filing periods for the first through the ninth quarters, the hearing officer did not apply the proper standard and did not make the necessary findings. With the limited job searches made by the claimant during the filing periods, findings concerning the ability of the claimant to work during each of the filing periods take on special significance.

We next address the question of whether the claimant's unemployment during the filing periods was a direct result of his impairment from the compensable injury. The hearing officer found "[c]laimant's not returning to work was not a direct result of his impairment." From that finding of fact, it can be inferred or implied that the hearing officer found that the claimant's unemployment during the filing periods in question was not a direct result of his impairment from the compensable injury. In Texas Workers' Compensation Commission Appeal No. 981878, decided September 18, 1998, the Appeals Panel wrote:

> While the Appeals Panel has stated that there was evidence sufficient to uphold a hearing officer's implicit determination on direct result where the evidence shows the "claimant suffered a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of injury" (Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993), we have not held that an inability to return to a "preinjury occupation," per force, proves the direct result requirement. See Texas Workers' Compensation Commission Appeal No. 960165, decided March 7, 1996, for a discussion of cases concerning direct result. While the inability to return to a "preinjury occupation" may well be a significant factor in a given case in determining direct result, standing alone it does not prove direct result to the exclusion of any other evidence on the issue.

The evidence indicates that the claimant suffered a serious injury with lasting effects and was told by doctors that he could not return to work driving trucks, but he also has significant medical problems not related to the compensable injury. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding

medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Finding of Fact No. 34 that the "[c]laimant's not returning to work was not a direct result of his impairment" is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The claimant's failing to prove that his unemployment during the filing periods for the first through the ninth quarters was a direct result of his impairment from the compensable injury alone precludes him from being entitled to SIBS for those quarters. Section 410.204 provides that the Appeals Panel shall issue a decision that determines each issue on which review was requested. The appealed issues were entitlement to SIBS for the first through the ninth quarters. Under the circumstances of the case before us, we do not reverse and remand for the hearing officer to make findings of fact related to the questions of whether the claimant had some ability to work and in good faith sought employment commensurate with his ability to work during each of the filing periods in question.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge