

APPEAL NO. 991762

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 9, 1999. The single issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the seventh compensable quarter which ran from May 22 to August 20, 1999. The hearing officer determined that the claimant was not entitled to SIBS for the seventh compensable quarter, and claimant has now appealed.

Initially, claimant states that Finding of Fact No. 4 is wrong because of a possible clerical error. Secondly, claimant appeals the hearing officer's finding of fact that the claimant did not establish that he was "totally unable to work" during the qualifying period and the conclusion of law that he was not entitled to SIBS for the seventh compensable quarter, urging that the medical records established the inability to work. Respondent (carrier) responds that sufficient evidence supports the finding and conclusion on appeal and asks that the decision be affirmed. Carrier agrees that a clerical error appears in Finding of Fact No. 4 and that "employment" should be "unemployment." No appeal is made to the finding of the hearing officer that the unemployment of the claimant was a direct result of the impairment from his compensable injury.

DECISION

Affirmed, as modified.

Not in dispute was the fact that the claimant sustained a serious injury to his neck and right shoulder on _____; that he had unsuccessful surgery on two occasions with a probable third surgery sometime in the future; and that he has not worked or sought any employment since. The seventh compensable quarter began on May 22, 1999, and thus the case falls under the new SIBS rules. *Tex. W.C. Comm'n*, 28 TEX. ADMIN. CODE § 130.101 *et seq.* (Rule 130.101 *et seq.*). The claimant bases his entitlement to SIBS for the seventh compensable quarter on the basis of no ability to work, thus satisfying the good faith job search requirements under Rule 130.102(d)(3). That provision of the rule provides that a good faith effort has been made if the employee

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.

The case for the total inability to work is based principally on the testimony of the claimant and two medical reports. The claimant stated he was on various medications; that his shoulder went out easily; that he was not capable of doing much physical activity; that he did not believe he had any ability to work at all; that he finished eighth grade; and that he had not done anything yet about a GED, but that his brother was supposed to get him a book. The two medical reports, one from the treating doctor, Dr. F, and the second from a

doctor the carrier requested to examine the claimant, Dr. M, reflect opinions on the claimant's ability to work. In pertinent part, Dr. F stated in his June 25, 1999, letter that:

His ability to seek and obtain gainful employment, in my opinion, is significantly restricted secondary to the fact that his right shoulder dislocates very readily and with only slight provocation. Consequently his range of motion of the shoulder is significantly reduced.

In his report dated November 18, 1998, Dr. M states:

In regard to the examinee's problems, I do not feel that this examinee is able to return to any type of work that he is qualified to do. If he returned to work, it would need to be a very sedentary type job. He probably does not possess the skills to qualify for a very sedentary type of job. He has considerable disability with his shoulder and neck, and is not able to do heavy labor or work that he could previously. I feel that this examinee should be evaluated by some type of rehabilitation service and be given some additional training or educational benefits that he could carry out to qualify him to return to the work force in some type of sedentary type of job.

Based on this evidence, the hearing officer, considering the new SIBS regulatory provisions, found that the claimant did not establish that he was totally unable to work during the qualifying period. Whether or not a claimant has any ability to work is generally a factual issue based on the evidence before the hearing officer and applying the regulatory provisions. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994; Texas Workers' Compensation Commission Appeal No. 961333, decided August 19, 1996. The burden of proof to establish an entitlement to SIBS is on the claimant. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. In this case, the hearing officer, considering the medical evidence before him, found that a total inability to work had not been established. Both of the medical reports make it clear the claimant is not able to return to heavy labor or the type of work he had done (oilfield roughneck and cutting and hauling trees); however, both mention restrictions and suggestions of ability to perform sedentary-type employment. We cannot conclude that the hearing officer's reading of the reports was an unsupported reading, nor can we conclude that his finding and conclusion were so against the great

weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). We also cannot find any misapplication of the law in this case. Accordingly, the decision and order are affirmed with the modification of Finding of Fact No. 4, which is changed to read "unemployment" rather than "employment."

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge