

APPEAL NO. 991770

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 28, 1999. With respect to the issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 11th compensable quarter, which ran from May 6 to August 12, 1999. In its appeal, the appellant (self-insured) argues that the hearing officer's SIBS determination is against the great weight of the evidence. In her response to the self-insured's appeal, the claimant urges affirmance.

DECISION

Affirmed.

At the outset, we note that the new SIBS rules did not apply in this case because the compensable quarter began before May 15, 1999. Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999. The parties stipulated that the claimant sustained a compensable injury on _____; that she has received benefits, including SIBS for prior quarters; that the filing period for the 11th quarter of SIBS ran from February 4 to May 5, 1999; and that the claimant did not seek work during the filing period. The claimant has been diagnosed with failed back syndrome. Her treating doctor is Dr. S. The claimant testified that during the filing period, she was taking various medications on a trial basis in an attempt to control her pain. She stated that she took morphine, methadone, and Dilaudid both through an intrathecal pump and orally. She stated that the medications helped in relieving her pain; however, she had a severe allergic reaction to each medication, which caused her to break out in hives. She stated that, in addition, the medication had a strong sedative effect, such that she "slept all the time" and no longer drives. The claimant also testified that in March or April 1999, Dr. S recommended additional surgery and referred her to Dr. J for a second opinion. She stated that she could not get an appointment with Dr. J until June 1999. On cross-examination, the claimant stated that she is still able to type and that she has a home computer; that she composed her Exhibit No. 4 on her computer; and that she does not do any chores around the house. In response to questioning from the hearing officer, the claimant stated that during the filing period she did not get out of bed to do anything other than go to the bathroom and that she lost 30 pounds because she did not eat.

The claimant is treating with Dr. M for pain management. In a progress report of December 1, 1998, Dr. M noted that the claimant had substantial pain relief from an intrathecal morphine trial but that she had an allergic reaction to the morphine that caused severe itching. In a progress note of January 28, 1999, Dr. M stated that the claimant was going to be tried on a trial of intrathecal Dilaudid. Dr. M's February 22, 1999, progress notes stated that the claimant was going to try oral Dilaudid. On March 4, 1999, Dr. M stated that the claimant "is having sedation with the medication but has had the best pain relief that she has had in a long time." In a progress report of April 2, 1999, Dr. M noted

that the narcotics (morphine and Dilaudid) were effective for relieving the claimant's pain to some degree but that she had allergic reactions (severe itching) to both medications. Dr. M stated that he would try her on oral methadone. In a "To Whom it May Concern" letter of April 13, 1999, Dr. M stated:

[T]he patient is probably going to require long term use of oral medications and/or intrathecal medications and at this point is unable at this time to begin retraining or return to work. I feel that once that control of her pain is obtained, then a functional restorative chronic pain program would be in the best interest of the patient so that we can maximize her everyday activities.

In office notes from an April 7, 1999, visit, Dr. S stated that he was "concerned about the amount of sedation that she is experiencing" with her medication; that he had discussed the prospect of "redo surgery with fusion" with the claimant; and that "[i]n my opinion she is unable to pursue any type of work for the foreseeable future." In a "To Whom it May Concern" letter of May 19, 1999, Dr. S stated:

[Claimant] is under my care for a lumbar condition related to an on-the-job injury. Her symptoms have not responded to additional conservative measures and she retains mechanical low back pain and radiculopathy that has become intolerable to her. Because of this, we will be proceeding with re-do lumbar surgery in the form of re-do decompression, fusion, and probable internal fixation. I do not believe that she will be able to return to any type of work for the foreseeable future.

Finally, in a letter of June 2, 1999, Dr. S stated:

Her restrictions in the past as well as the foreseeable future include very limited periods of sitting, standing, walking, twisting, stooping and crouching. I have advised [claimant] that she would be a danger to herself and others if she were to drive because of her slowed responses and impaired mental processes from these narcotics. Also it would not be prudent for her to drive due to the fact that she would be doing the very things from which she is restricted, i.e. sitting, turning, twisting, etc. all of which significantly exacerbate her pain.

On June 16, 1999, Dr. J examined the claimant and recommended that the claimant undergo a four-level decompression and fusion surgery from L2 to S1 based upon the failure of "exhaustive conservative measures." In an off-duty slip dated June 18, 1999, Dr. J stated that the claimant was to "remain off work indefinte[ly]. Patient is pending surgery."

The self-insured introduced two reports from Dr. C, who examined the claimant at its request. In his May 21, 1998, report, Dr. C stated that there was "not much chance" that

the claimant would "return to any kind of productive work activity." He noted that "[s]tatistically speaking, there is less than a 2% chance that she will return to work" because she had been out of work for almost three years. However, he further noted that "with the continued complaints of pain, discomfort, and inability to get around even using a wheelchair, etc., these strongly indicate that there is not much chance that she will return to constructive work activities." In his report of February 15, 1999, Dr. C opined that the claimant "can go back to a light duty type job in a situation where she could stand up, sit down, and move about, to keep herself as comfortable as is reasonable." Dr. C further noted that she should start out on a part-time basis and gradually increase her work hours as tolerated. Dr. C also stated that she should not be required to do multiple bending, twisting, pushing or pulling activities and that she should not be required to lift things from the floor and put them on shelves.

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. Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, states that an assertion of inability to work must be judged against employment generally, not just the job where the injury occurred. In addition, we have noted that an assertion of no ability to work must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995. 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 decides the weight to assign to the evidence before her and resolves conflicts and inconsistencies in the testimony and evidence. 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. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant sustained her burden of proving that she had no ability to work in the filing period for the 11th quarter. There was conflicting evidence on that question. Specifically, the hearing officer found that during the filing period "the Claimant was heavily sedated with morphine, methadone, or dilaudid, all of which severely affected her ability to accomplish essential tasks of daily living" and that "the preponderance of the medical evidence presented shows or otherwise establishes that the Claimant was totally unable to work during the filing period for the [11th] compensable quarter." It was the hearing officer's responsibility as the fact finder to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. She did so by giving more weight to the opinions of Dr. S, Dr. J and Dr. M that the claimant had no ability to work than to the opinion of Dr. C that the claimant could return to part-time,

light-duty work. She was acting within her province as the sole judge of the weight and credibility of the evidence in so finding. Our review of the record does not demonstrate that the hearing officer's determination that the claimant had no ability to work in the filing period for the 11th quarter is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that determination, or the determination that the claimant is entitled to 11th quarter SIBS, on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge