

APPEAL NO. 991802

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 26, 1999. With regard to the issues before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the fifth and sixth compensable quarters not having made a good faith effort to seek employment commensurate with his ability to work and that, because claimant was not entitled to SIBS for 12 consecutive months from the second through fifth compensable quarters, claimant has "lost entitlement to additional income benefits." The hearing officer's findings of direct result were not appealed and will only briefly be discussed in regard to claimant's appeal.

Claimant appeals, contending that "inconsistencies" were due to his carpal tunnel syndrome (CTS) operation and that Dr. R, his treating doctor, "has shown [his] inability to return to work." Although the hearing officer's findings on direct result were in claimant's favor, claimant reiterates that "any impairment/disability is a direct result of the inability to work." Claimant also contends that his permanent loss of entitlement to income benefits, based on nonentitlement to SIBS for the fifth (and sixth) compensable quarters, has not yet been adjudicated. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

First, to put this case somewhat in perspective, Claimant's Exhibit No. 8 is another hearing officer's decision and order regarding extent of the compensable injury and entitlement to SIBS for the second, third, and fourth compensable quarters (in addition to another issue). The hearing officer, in that case, found the compensable injury included right-hand CTS (but not carpal metacarpal arthritis) and that claimant was not entitled to SIBS for the second, third, and fourth compensable quarters. Claimant appealed that decision (and carrier appealed another portion of the decision) to the Appeals Panel, which resulted in Texas Workers' Compensation Commission Appeal No. 983043, decided February 16, 1999, where the Appeals Panel affirmed the hearing officer's decision that the compensable injury included the CTS and that claimant was not entitled to SIBS for the second, third, and fourth compensable quarters. This Appeals Panel remanded a portion of the case dealing with addition of an issue on timely contest of compensability by the carrier. Apparently (based on comments by the parties at the CCH), a hearing on remand was held but this case was not involving the remand in Appeal No. 983043.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.104 (Rule 130.104). 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." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that carrier "accepted liability for the _____ injury"; that claimant has "an IR [impairment rating] of 15% or greater"; and that impairment income benefits were not commuted. The hearing officer found that the filing period for the fifth compensable quarter was "from about September 20, 1998 through December 18, 1998" and that the filing period for the sixth compensable quarter was from December 19, 1998, to March 19, 1999. It is undisputed that claimant earned no wages during the applicable filing periods.

Claimant's testimony established that he had been a construction superintendent at the time of the injury and had sustained injuries to his right hand, shoulder, neck, and back when a door closed on his hand. Claimant testified that after it was determined that the CTS was part of the compensable injury, he had a carpal tunnel release in June 1999. Claimant attributes much of his inability to work, and that Dr. R has not released him to return to work, to the compensable CTS. Claimant testified that he has a small construction company and that he had bid on some jobs but did not get those jobs because he was underbid with cheaper alien labor and because he did not have money to post a bond (presumably a performance bond). Claimant testified that he would go to the café and talk with other contractors and help them with their bids.

It is not entirely clear whether claimant is contending that he had a total inability to work during the applicable filing periods because of his compensable CTS and Dr. R's failure to return him to work or whether claimant's efforts at self-employment bidding for jobs was a good faith effort to seek employment commensurate with his ability to work. 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. 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.

In evidence is a functional capacity evaluation (FCE) performed on August 14, 1998, which indicates that claimant is 58 years old, is 5'6" tall, and weighs 290 pounds. The FCE concluded:

Due to the multiple complaints and inconsistencies noted through testing, it is difficult to determine an accurate work level at this time. Based on his performance during the [FCE], [claimant] at least demonstrated the ability to lift up to 20 lbs. occasionally, 10 lbs. frequently, 4 lbs. constantly and carry 38 lbs. According to the DOT, this places him at the lower end of the medium level work category; exerting force from 20 lbs. to 50 lbs. on an occasional basis.

Based on the inconsistencies and complaints, patient effort level was questionable during testing, and results are suspect.

Claimant contends that the FCE should not be considered because it does not address his subsequently determined compensable CTS. Claimant was examined by Dr. N on August 12, 1998, and in a report dated August 13, 1998, Dr. N makes reference to the FCE "completed on August 14, 1998," recites claimant's ability to lift up to 20 pounds occasionally, 10 pounds frequently, four pounds constantly, and carry 38 pounds. Dr. N opines this places claimant "in the lower end of the medium level work category" and that claimant's "problems are primarily those of age and obesity and for the most part, are not related to the finger injury." In evidence are a series of office progress notes from Dr. R. A note dated December 16, 1998, indicates claimant "was given another off work slip as it is doubtful he will be able to return to work" because of the CTS. A January 20, 1999, note states that claimant is still totally disabled because of spinal stenosis of the lumbar spine and foraminal stenosis of the cervical spine on the right." A handwritten prescription pad note dated March 31, 1999, states, "Has been unable to work since his accident of _____ He has not been allowed to return to work yet."

The hearing officer references both Dr. N's report and Dr. R's notes, and finds that Dr. R has not released claimant to return to work pending surgery for right CTS and cervical stenosis but those "reports do not disqualify Claimant from employment generally."

Finding of Fact No. 4. The hearing officer recited claimant's efforts at self-employment and bidding on jobs, but found that:

FINDING OF FACT

8. During the filing period for the fifth compensable quarter Claimant did not make any job search for outside employment, and his self-employment was of a very limited nature. Claimant was physically capable of working part time in a medium duty capacity during the

filing period for the fifth compensable quarter. Claimant did not make good faith efforts to seek employment commensurate with his ability to work during the filing period for the fifth compensable quarter.

The hearing officer made an identical finding in Finding of Fact No. 12 for the sixth compensable quarter. Claimant appears to be saying, in his appeal, that the compensable CTS made him totally unable to work. As noted above, an assertion of total inability to work must be supported by medical evidence where the doctor explains how the compensable impairment precludes claimant from doing any work whatsoever. The hearing officer found that Dr. N and the August 1998 FCE showed claimant had the ability to do medium level work and nothing in Dr. R's progress notes persuaded the hearing officer differently. We find the hearing officer's decision that claimant is not entitled to SIBS supported by the evidence.

Claimant also appeals the hearing officer's determination of permanent loss of entitlement to income benefits. Section 408.146(c) provides that an employee who is not entitled to SIBS for 12 consecutive months "ceases to be entitled to any additional income benefits for the compensable injury." We note this does not affect the payment of all reasonable required health care (which is a medical benefit, not an income benefit) for the compensable injury as and when needed as provided in Section 408.021. In that we have previously affirmed claimant's nonentitlement to SIBS for the second, third, and fourth compensable quarters in Appeal No. 983043, *supra*, and are affirming the nonentitlement to SIBS for the fifth and sixth quarters in this decision, we hold that Section 408.146(c) is applicable and affirm the hearing officer's decision that claimant has lost entitlement to additional income benefits for this compensable injury.

In passing, we note that claimant also asserted that "the H.O. was partial to the insurance." Carrier, in its response, asserts several times that there was no "evidence of impartiality [sic]" by the hearing officer. See Section C on page 5 of carrier's response. The record does not indicate that the hearing officer was not impartial.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge