

APPEAL NO. 991853

On July 26, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the CCH was whether appellant (claimant) is entitled to supplemental income benefits (SIBS) for the third quarter. Claimant requests that the hearing officer's decision that he is not entitled to SIBS for the third quarter be reversed and that a decision be rendered in his favor. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the claimant during the prior filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)).

An employee initially determined by the Texas Workers' Compensation Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period: (1) has been unemployed, or underemployed as defined by Rule 130.101, as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. Rule 130.104(a). Claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

This case concerns an assertion of no ability to work. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he had no ability to work at all during the filing period, 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. In Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, the Appeals Panel stressed the need for medical evidence to affirmatively show an inability to work if that was being relied on by the claimant, and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, the Appeals Panel noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred."

Claimant testified that on _____, he was working as an electrician's helper when he received an electrical shock while on a ladder and fell eight feet onto concrete on his left side. Claimant had cervical surgery in 1996. The parties stipulated that on _____, claimant sustained a compensable neck, left arm, and left shoulder injury; that he has a 27% IR; that he did not commute IIBS; that the third quarter was from April 23 to July 22, 1999; and that the filing period for the third quarter was from January 22 to April 22, 1999 (the filing period). The new SIBS rules effective for qualifying periods beginning on or after January 31, 1999, do not apply to this case. See new SIBS Rule 130.100(a), effective January 31, 1999. There is no appeal of the hearing officer's finding that claimant's unemployment during the filing period was a direct result of his impairment from his compensable injury. Claimant noted on his Statement of Employment Status (TWCC-52) that he earned no wages during the filing period. It is undisputed that claimant did not look for employment during the filing period.

Claimant, who is 37 years of age and right handed, testified that during the filing period he had pain in his neck, left shoulder, and left arm; that he had limited use of his left arm; that he took pain medications prescribed by his doctors; that he saw his treating doctor, Dr. P, D.C., three times; and that Dr. P had him on an off-work status.

Claimant underwent a functional capacity evaluation (FCE) in February 1999 and the evaluator wrote on one page that claimant should not be considered a candidate for return to work in any capacity, and on another page wrote that claimant qualifies for the light/sedentary work category with restrictions. On March 5, 1999, Dr. P wrote that claimant is not able to utilize his left upper extremity to any significant degree and that claimant is totally disabled and unable to work. Dr. P referred claimant to Dr. S, who wrote on March 10, 1999, that, without aggressive intervention, claimant will continue to deteriorate and that his ability to return to any form of employment will be severely limited. Dr. P referred claimant to Dr. A, who wrote in March 1999 that claimant is still unable to work. On April 5, 1999, Dr. P wrote that, while claimant can do some sedentary level of work, it is very restricted and extremely limited and that, in his opinion, claimant is totally disabled. Dr. P noted on work status forms in May 1999 that claimant may not return to work.

Dr. L examined claimant at carrier's request on March 25, 1999, and Dr. L wrote that claimant's examination reflected significant functional overlay and that claimant is not in need of any further treatment. Dr. L noted that his therapist, who apparently performed range of motion testing, informed him that claimant had voluntary restriction of motion. A surveillance videotape was taken of claimant on March 25, 1999, which shows claimant walking, driving a pickup truck, and loading groceries into the truck. Claimant is seen rotating his neck to the left and right and using both arms. Dr. L wrote on June 18, 1999, that he reviewed the videotape and that he does not feel that claimant is disabled and that it appeared to him that claimant is capable of working as an electrician's helper based on claimant's appearance in the videotape and on his examination of claimant. Claimant testified that the only reason he was able to perform the activities shown in the videotape was because he was on medications.

The hearing officer found that during the filing period claimant had some limited ability to work and that he did not make a good faith effort to find work commensurate with his ability to work. The hearing officer concluded that claimant is not entitled to SIBS for the third quarter. Claimant contends that the evidence shows that he had no ability to work during the filing period and that the hearing officer's finding that he had some ability to work is against the great weight and preponderance of the evidence.

There is conflicting evidence regarding the question of claimant's ability to work during the filing period. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence. An appellate level body is not a fact finder and does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge