APPEAL NO. 991990

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 August 18, 1999, with a hearing officer. The issue involved whether the respondent, _____, who is the claimant, was entitled to his 11th compensable quarter of supplemental income benefits (SIBS).

The hearing officer held that the claimant had no ability to work during the applicable filing period and therefore was "excused" from any attempt to find work. He further found that the claimant was unable to perform work at all as a direct result of his impairment. (Thus, he was unemployed as a direct result of his impairment.) He found that the claimant was entitled to SIBS.

The appellant (carrier) appeals, arguing that there is no more than a mere scintilla of medical evidence establishing that the claimant had no ability to work. It argues that the test is whether there is any "capacity" to work, not whether he is unemployable. The carrier argues that the decision goes against a previous decision in which the scope of the injury was limited, and that he has based his decision on ailments that were not part of the compensable injury. It argues that the claimant had the "capacity" to perform "very sedentary and/or light work" during the period under review. The carrier further argues error to the extent that the hearing officer was influenced by the prescriptions taken by the claimant, some of which were not for the compensable injury. The claimant responds that the decision is supported by sufficient evidence.

DECISION

Affirmed.

The claimant, a gentleman in his mid-50s at the time of the CCH, was employed as an ironworker on _____, by (employer). On that day, he fell down some stairs to the next landing. In an earlier hearing, the decision for which was written on March 16, 1995, the hearing officer held that "on" _____, claimant sustained a low back injury, and injury to the left side of his neck from behind his left ear to his shoulder, and on down his left arm. The hearing officer found that "on" the date of injury, the claimant did not injure his cervical or thoracic spine. This decision was appealed and affirmed by the Appeals Panel. Texas Workers' Compensation Commission Appeal No. 950540, decided May 22, 1995. Claimant's medical records indicate he has had carpal tunnel surgery on both hands, as well as shoulder surgery.

The testimony at the CCH was brief, and came from the claimant's wife, who testified to claimant's debilitating pain and effects of his pain medication. She indicated that his current medication, Fentanol, made him almost "drunk" for a couple of hours when he awoke. She testified that he had gone from someone who did many home chores and other activities, to someone who did little or nothing due to continual pain, which was

relieved, but not eliminated, by his medication. The claimant's wife testified that he received Fentanol, in patch form, beginning in March 1999 (after the period of time in question). However, he had earlier had a pump implanted that administered this medication. Although she testified that the pump was removed in the emergency room, there was no medical record showing when this occurred.

It was stipulated that the period of time for which claimant's entitlement was being reviewed began on November 18, 1998. While the ending date was not stipulated, the filing period would have ended on February 16, 1999. During that period, claimant was treated by Dr. M, for chronic pain throughout his neck, shoulders, and arms. He was noted as having a daily headache, and possible fibromyalgia or rheumatological syndrome.

The claimant's impairment rating (IR) included his cervical and lumbar areas. The IR was certified at the end of February 1996. Medical records also indicate subsequent treatment for depression.

A record of an intraspinal narcotic trial dated November 6, 1998, may indicate implantation of the "pump" about which the claimant's wife testified. On December 15, 1998, Dr. M signed off on a letter that detailed restrictions and asked for his check-marked response. This form indicated that claimant could stand or walk a maximum of one hour in an eight-hour workday, that he could sit two hours, and that he could drive one hour. He could use both hands for simple grasping, could not climb at all, and could occasionally bend, squat, kneel, reach, twist, rotate, and crawl. The doctor indicated that claimant was involved with medication that would affect his ability to work, although this is not listed on the form. Office visit notes of December 22nd identify the problems claimant is having as likely systemic. Claimant was treated with injections for pain relief. However, Dr. M wrote on May 21, 1999, that he had seen claimant five times during calendar year 1999, and that he had significant problems with prolonged activity. He said that claimant had pain even with rest and/or mild activity. Dr. M opined that claimant could neither gain nor maintain meaningful employment.

A vocation appraiser wrote on November 11, 1998, that the claimant had a significant set of disabilities which caused him to be vocationally handicapped. He stated that claimant would in all probability not return to the labor market, and his future loss of earning capacity would be around $338,600.00.

Dr. M answered interrogatories for the carrier. He said that claimant could stand less than two hours before being forced to rest, walk no more than one hour (then forced to rest), and sit no more than two hours. He said that claimant could not use his hands for fine manipulation. He noted that claimant could not climb, reach over head, kneel, or twist. Other motions were limited to maybe once per hour. Dr. M was not asked in these interrogatories whether he believed that the claimant could work. Cross questions propounded to Dr. M by the claimant were answered that Dr. M did not intend his answers to carrier's questions to consist of a release to work, and that he did not release him. He stated that claimant was not released either for full or part-time work.

We first observe that this case was considered under the "old" SIBS rules and the outcome could well be different under the new rules. A claimant for SIBS is required to search for employment commensurate with the ability to work. Section 408.143(a)(3). Although the hearing officer erroneously indicates that there is an excuse from this requirement, there is not; rather, the Appeals Panel has held that there may be those circumstances where the ability to work is nonexistent, and therefore no search fulfills the requirement of good faith. Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. We have held that 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 that 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 injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. 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. Although inartful, the hearing officer's reference to an "excuse" is not reversible error and we believe the proper analysis was applied to the facts of the case.

Second, we cannot agree that the hearing officer went against the previous hearing's decision in any way. That hearing officer was asked to determine what was injured on the day of injury. This does not preclude the development of an injury, by natural progression, into other regions of the body. We would further note that the earlier hearings decision did not, as carrier argues, rule out all injury to the neck, as part of the neck was determined to have been injured on the date of injury. The fact that claimant's chronic pain may manifest beyond his arms and the side of his neck does not mandate a finding against him on direct result. There appears to be no dispute that his chronic pain is related to his compensable injury.

In this case, Dr. M produced a few opinions which appear to contradict each other when taken in isolation. However, it was the responsibility of the finder of fact to weigh these opinions and attempt to integrate them into a complete picture of the claimant's work ability during the filing period under review. He evidently determined that ability to move did not translate into ability to work. We cannot agree that this opinion, reading all of the claimant's medical records as a whole, is so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. Accordingly, we affirm his decision and order, and emphasize again that this decision will not bind future fact finders who must evaluate the evidence in accordance with the new SIBS rules.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge