

APPEAL NO. 992002

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 11, 1999. The issues at the CCH were whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the first quarter, and whether the respondent (carrier) is relieved of liability for SIBS because of the claimant's failure to timely file a Statement of Employment Status (TWCC-52) for the first quarter. The hearing officer determined that the claimant is not entitled to SIBS for the first quarter, and that the carrier is relieved of liability for SIBS because of the claimant's failure to timely file a TWCC-52 for the first quarter, from April 20, 1999, through April 26, 1999. The claimant appeals the hearing officer's findings that her job searches were not premised on finding a job, that two functional capacity evaluations (FCE) indicated an ability to work, that she did not put forth a good faith effort to find employment commensurate with her ability to work, and that she worked part time during the filing period; she also appeals the hearing officer's conclusions and the hearing officer's admission of Carrier's Exhibit Nos. 7, 9, and 11 through 16. The carrier replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement with an impairment rating (IR) of 15% or greater; that the claimant did not elect to commute any portion of her impairment income benefits (IIBS); that the claimant's first quarter of SIBS was April 20, 1999, through July 19, 1999; and that the filing period for the first SIBS quarter was January 19, 1999, through April 19, 1999. The claimant testified that she injured her low back when she leaned over into an oversized box. The claimant had back surgery in October 1997, and still suffers symptoms which include chronic low back pain with muscle spasms in her back, left leg, foot and toes.

The claimant asserted that during the filing period she was unable to work as indicated by her treating doctor, Dr. P, but that they agreed that she should make an effort to see what types of jobs were available in the current job market. The claimant registered with the Texas Rehabilitation Commission (TRC) in June 1998 and stated that during the filing period she started looking for employment to see what jobs were available and what would be the most beneficial for her in obtaining marketable skills through the TRC. The claimant testified that she has a bachelor of science degree in organizational behavior, but believes that her skills as an assistant administrator/secretary are obsolete in light of the fact that she has been out of the workforce for three years due to her injury. The claimant began training as a personal computer specialist through the TRC after the filing period.

The claimant testified that although she was unable to work during the filing period, she sought employment at 18 places as reflected on her TWCC-52, but was not offered a job. According to the claimant, she obtained job leads from the newspaper, an employment guide, and a job fair, and a majority of her searches consisted of mailing resumes and applications. The title of the jobs applied for included clerk, buyer, sales associate, and customer service representative. The claimant stated that during the filing period, she earned \$44.06 working at (employer) and \$225.00 selling Mary Kay cosmetics.

The carrier asserted that the claimant had some ability to work during the first quarter filing period and did not make a good faith effort to obtain employment commensurate with her ability to work. The carrier argued that the claimant only looked for approximately 16 to 18 jobs during the filing period; that as many as half of the job contacts came from one contact, a job fair; and that the claimant has experience working in a children's library and has taken classes in elementary education, but did not apply for jobs as a substitute teacher, a teacher's aide, or in a library. The carrier had the claimant examined by Dr. S. On May 4, 1999, Dr. S issued a report indicating that based upon an FCE of April 14, 1999, the claimant had the ability to perform light work: occasional lifting of up to 20 pounds, frequent lifting of up to 10 pounds, and negligible constant lifting. Dr. S noted that inconsistencies demonstrated during testing indicated that the claimant gave less than maximal effort during testing, and it was likely that she might be capable of greater work performance. An FCE performed on January 19, 1999, indicated that the claimant had the ability to work at a medium level without restrictions.

The claimant relied on Dr. P's report of April 26, 1999, to support her position that she was totally unable to work during the filing period. Dr. P states in pertinent part:

The purpose of this letter is to inform you that it is my opinion that the patient has been unable to work from the period of 01/26/99 until 04/26/99. The patient does have some very significant restrictions which have not allowed her to become gainfully employed. I feel that she is extremely limited in what she can do [sic]. I also feel that she has been giving a good faith effort in finding in [sic] a job, from what she has told me.

Dr. P also states that the claimant is improving, and Dr. A is working with the claimant on medications and pain management.

The claimant asserts that the hearing officer erred in admitting into evidence Carrier's Exhibit Nos. 7, 9, and 11 through 16. Review of the record indicates that Carrier's Exhibit Nos. 7, 9, 11, 12, and 16 were admitted without objection. Whatever objection claimant may have had was not preserved for appeal and we decline to consider the matter now. The claimant did object to the admission of Carrier's Exhibit Nos. 13, 14, and 15. The carrier sought to admit Carrier's Exhibit No. 13, an FCE performed on January 19, 1999, as rebuttal or impeachment evidence, after the claimant testified on direct examination that she could perform work with restrictions, and on cross-examination testified that she was contending that she was totally unable to work during the filing period.

The claimant objected to the admission of Carrier's Exhibit No. 13 on the basis that it had not been exchanged and was not signed. In response, the carrier sought to admit Carrier's Exhibit Nos. 14 and 15, signed reports of Dr. P, to authenticate Carrier's Exhibit No. 13. Before admitting Carrier's Exhibits No. 13, 14, and 15, the hearing officer stated:

I believe that, based on my short review of the exhibits, that they do in fact provide explanation of [Carrier's Exhibit No. 13] and that the document that's been offered-[Carrier's Exhibit No. 13] is being offered based on the substantive content. So I believe that it makes [Carrier's Exhibit Nos. 14 and 15] relevant, not just in authenticating [Carrier's Exhibit No. 13], but in explaining it as well. And so I'm going to admit [Carrier's Exhibit Nos. 13, 14, and 15] in their entirety based on Claimant's objection to them being admitted solely for the purposing [sic] of authenticating the author of [Carrier's Exhibit No. 13].

To obtain reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Section 410.161 permits introduction of documents not exchanged only if good cause is shown for not having disclosed the documents. Conformity to legal rules of evidence is not necessary. See Section 410.165(a). The determination of good cause is within the sound discretion of the hearing officer and that determination can only be set aside if that discretion was abused. See *Morrow v. H.E.B.*, 714 S.W.2d 297 (Tex. 1986). Section 410.160 of the 1989 Act and Tex. W.C. Comm'n, TEX. ADMIN. CODE § 142.13 (Rule 142.13) require the exchange of information, and to avoid surprise, the better practice is to exchange all information that may be used at a hearing. However, even if the hearing officer had erred in admitting Carrier's Exhibit Nos. 13, 14, or 15, it would not have been reversible error because there is no showing that such error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Appeal No. 92241, *supra*. Carrier's Exhibit No. 13 was cumulative of other medical evidence indicating that the claimant had an ability to work, specifically the FCE of April 14, 1999.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the IBS period, the employee: has an 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 IBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Rule 130.102(b), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing 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 Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. 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*. We have frequently noted that the total inability to do any work at all will arise in only rare and unusual cases, as opposed to the fairly common situation where a seriously injured employee cannot return to the previous employment. Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997.

Whether the claimant had no ability to work at all during the filing period for the first quarter, or whether the claimant had some ability to work and made a good faith effort to seek employment commensurate with his ability to work presented the hearing officer with questions of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The hearing officer found the medical evidence insufficient to establish by a preponderance of the evidence that the claimant had no ability to perform any type of work during the filing period. The hearing officer noted that the claimant's job search was not premised on finding a job and found that the claimant did not attempt in good faith to obtain employment commensurate with her ability to work during the filing period. We will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We next consider the claimant's challenge to the hearing officer's Conclusion of Law No. 4 which states "Carrier is relieved of liability for [SIBS] because of Claimant's failure to timely file a [TWCC-52] for the first quarter, from April 20, 1999, through April 26, 1999." The hearing officer based Conclusion of Law No. 4 on a finding that the claimant filed her TWCC-52 for the first quarter on April 26, 1999. The claimant did not dispute that she filed her TWCC-52 on April 26, 1999; however, she argued that she was confused about the dates of the quarter and the date that the TWCC-52 should be submitted to the Texas Workers' Compensation Commission. We note that by its plain language, Section 408.143(c), which provides that the claimant's failure to timely file a TWCC-52 relieves the carrier of liability for the period during which the statement is not filed, does not apply to the first quarter. Therefore, the hearing officer improperly determined that the carrier would be relieved of liability for a portion of the first quarter because of the claimant's late filing. Although it does not change the outcome of this case, we reverse Conclusion of Law No. 4 and the decision section and render a new decision that the carrier is not relieved of liability for SIBS because of the claimant's failure to timely file a TWCC-52 for the first quarter.

We affirm the hearing officer's decision that the claimant is not entitled to SIBS for the first quarter because claimant did not meet the good faith job search requirement. We reverse the hearing officer's decision that the carrier is relieved of liability because of the claimant's failure to timely file a TWCC-52 for the first quarter, from April 20, 1999, through April 26, 1999, and render a new decision that carrier is not relieved of liability for SIBS because of the claimant's failure to timely file a TWCC-52 for the first quarter.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge