

APPEAL NO. 992047

Following a contested case hearing (CCH) held on August 16, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the sole disputed issue by finding that during the filing period for the third compensable quarter, the appellant (claimant) had some ability to work, that she did not seek employment, and that she did not make a good faith effort to seek employment commensurate with her ability to work, and by concluding that she is not entitled to supplemental income benefits (SIBS) for the third compensable quarter. Claimant requests our review, asserting that the evidence is insufficient to support the findings that she had some ability to work and that she failed to make a good faith effort to seek employment commensurate with her ability to work. Claimant asserts that the hearing officer failed to give appropriate weight to the medical evidence showing the extent of her impairment from her mental condition which, albeit preexisting the work-related injury, was aggravated by that injury. The respondent (self-insured) responded, urging the sufficiency of the evidence to support the challenged findings and conclusion.

DECISION

Affirmed as reformed.

We observe at the outset that, as claimant points out in her appeal, the hearing officer's findings of fact in the Decision and Order include two which are numbered "4." We reform the Decision and Order to renumber the second Finding of Fact No. 4 as No. 5 and to renumber Findings of Fact Nos. 5 and 6 as 6 and 7.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached statutory maximum medical improvement (MMI) on September 13, 1997, with an impairment rating (IR) of 19%; that the filing period for the third compensable quarter was from January 17 through April 17, 1999; and that the third compensable quarter was from April 18 through July 17, 1999.

Claimant testified that on _____, she was injured while working as an LVN at a state health facility when she slipped and fell on a wet floor, landing on her back and banging her head; that she fractured her right elbow and also hurt her neck but kept working; that she later underwent surgical repair of her elbow; that surgery on her cervical spine is being considered; that during the filing period at issue, she could not return to her former work because she could not do the heavy lifting involved, such as in-patient transfers, and could not dispense medications given the side effects of the various medications she takes. Further, claimant indicated that she cannot work at all because she has severe neck pain which radiates into her arms along with numbness, a seizure disorder which requires medication, reflex sympathetic dystrophy, posttraumatic stress disorder (PTSD) and severe depression, and flashbacks, and that all of these maladies are being

treated with various medications which in themselves, along with her inability to lift even 10 pounds, renders her unable to work at all. As she put it, "I have a problem with my whole body period." She indicated that the seizures began in December 1996 when she was working at a (W company) and that she had four or five during the filing period. Claimant said she can do very little house work, no yard work, and very little driving; that sometime in May 1999, she attempted to work for about two weeks in a grocery store but could not do the work and was let go. She also stated that both because "workers' comp" pressured her into looking for work and because she felt she could do some light work, "[she] made hundreds of phone calls" during the filing period looking for work; that many were to doctors offices because she wanted to remain in the health care field; that she was truthful with these potential employers and told them she was "on workers' comp"; and that she was not offered an interview or a job. Claimant's Statement of Employment Status (TWCC-52) in evidence does not reflect any employment contacts during the filing period and claimant also denied that the writing of her name on that form was her signature.

Claimant acknowledged that a functional capacity evaluation (FCE) administered on January 13, 1999, determined that she could work at the "light" work level and that another FCE administered on June 8, 1999, determined that she could work at the "sedentary" level. However, claimant said that the demands of these tests had her laid up in bed for several days thereafter. Dr. P May 27, 1999, letter also discussed the debilitating effects of the FCE on claimant. Claimant also said that she did wash her truck in February 1999, as depicted in the carrier's surveillance videotape, but, as with the FCEs, that she "paid dearly for it." She also stated that the videotape was of poor quality, had gaps, and failed to show she wore both wrist and elbow splints and took breaks to go into the house to recover from her pain.

Claimant further testified that Dr. P, a chiropractor and her current treating doctor, feels her seizures are related to her compensable injury and has indicated that she cannot work, and that Dr. T, a psychiatrist, told her she will never work again due to her mental stress. Claimant acknowledged having been the victim of sexual abuse and rape, as documented in Dr. T's records; to having been hospitalized in 1998 for acute psychiatric care; and to experiencing marital discord. However, she maintained that after her release, she had no further mental health problems until after her compensable injury of _____. She also acknowledged Dr. T's impression that her marital problems were the primary reason for her depression.

The Report of Medical Evaluation (TWCC-69) signed by Dr. Bu, the designated doctor, on February 23, 1998, certified that claimant's IR is 19%. According to Dr. Bu's accompanying narrative report, the IR was assigned for claimant's neck and elbow injuries. The report also noted that in 1997, claimant began to complain of increasing cervical discomfort and began having a real problem with depression.

Dr. G, a neurologist who examined claimant on June 17, 1998, reported that claimant has a seizure disorder "by history"; that it is quite possible claimant sustained the

disorder as a result of her fall on _____; and that an appropriate combination of anticonvulsants "will be attainable so as to give this individual virtually complete relief."

The (hospital) records reflect that claimant was admitted on September 14, 1998, for active suicidal ideation and that her diagnoses included major depression, recurrent and severe; marital problems, severe; and chronic cervical neck pain.

Dr. P wrote on February 9, 1999, that he felt the seizures were in all likelihood related to the head trauma claimant suffered in the fall on _____, or were secondary to the medication necessary to treat her injury.

Dr. Bl, a neurosurgeon, reported on February 18, 1999, that claimant's myelogram/CT scan of the cervical spine is normal, that she does not have myelopathy or radiculopathy, and that he does not believe she would benefit from cervical spine surgery.

Dr. P wrote on February 25, 1999, that it is his opinion that claimant "is totally disabled at this time" and should be considered "for Social Security type disability or something of that nature"; that she has residual difficulties following her right upper extremity surgery; and that cervical spine surgery should be performed. A March 2, 1999, report from Dr. C states that claimant has seen Dr. Bl and Dr. Ba, who have recommended cervical spine surgery, but that neither of them are surgeons and that with a total atypical neurologic examination, he is not convinced that surgery is yet required.

Dr. T's letter of April 23, 1999, states that claimant has been under his care since December 17, 1997; that her diagnosis is PTSD and Major Depressive Disorder, recurrent severe; and that "[d]ue to this severe mental condition, she is permanently disabled, and will never be able to return to work." Dr. T's treatment note of March 4, 1999, reflects that claimant indicated she is still pending cervical surgery but is realistic about it; that her mood has been stable; and that she is still unable to work. Dr. T also noted that claimant is emotionally stable without marked liability and that she is negative for delusions and hallucinations.

Claimant had the burden to prove by a preponderance of the evidence that she is entitled to SIBS for the third compensable quarter. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her 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." 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 or "be so obvious as to be irrefutable." 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 light duty 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*.

Claimant contended that it was not necessary for her PTSD and depression to have been included in the IR in order for the hearing officer to find that her inability to work results from the impairment from both her physical injuries as well as her mental injuries. She contends on appeal that the hearing officer virtually ignored her evidence in this regard. However, in her discussion of the evidence, the hearing officer makes clear and explains in some detail why she did not find credible claimant's evidence of a total inability to work. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual 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).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge