

APPEAL NO. 992947

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 November 22, 1999. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the 17th compensable quarter and the 18th compensable quarter. The hearing officer determined that he was not and the claimant has appealed. Claimant disagrees with findings of fact that he has failed to prove a total inability to work during the qualifying periods, that he considered himself retired and did not intend to work during the qualifying periods, and that he did not seek work commensurate with his ability to work as he was not able to work at all. He asks that he be awarded SIBS for the two quarters in issue. Respondent (carrier) urges that there is sufficient evidence to support the findings and conclusions of the hearing officer and asks that the decision be affirmed.

DECISION

Affirmed.

The claimant, a 66-year-old gentleman, sustained a cervical injury on _____, subsequently had surgery in 1993, has continued to have limitations on his physical activity, has had pain requiring medication, has not worked since his injury, and did not seek any employment during the qualifying periods for the 17th compensable quarter (June 27, 1999, to September 25, 1999) and the 18th compensable quarter (September 26, 1999, to December 25, 1999). Claimant maintained that he had never been released to work by his doctors, that he could not work at all, that he was on pain medication that made him drowsy, and that he was told that no one would hire him. Two letters from his current treating doctor, Dr. P, state that the claimant is unable to perform physical activities of bending, lifting, climbing stairs, and pulling or pushing. A September 3, 1999, required medical exam (RME) and functional capacity evaluation (FCE) notes that videos of claimant had been viewed showing usual daily activities which contrasted greatly with what the claimant demonstrated during the examination, and that claimant "attempts to portray an individual with severe physical limitations" but that "on actual examination, there were inconsistencies noted on such objectively measured parameters as ROM [range of motion] and strength performance." The report concludes that the claimant's "abilities and functioning appear to be equal to that of a person of his stated age and there is no actual significant impairment" although there is no guarantee against any reinjury from certain types of activity.

The claimant stated that "no way" did he feel he could go back to work, that he considered himself completely retired, and that he did not have any plans to return to work. Video surveillance on three occasions shows the claimant in some normal daily activity such as driving, walking, carrying packages, and moving his neck without apparent difficulty.

On the focal issue of ability to work (the lack of any work search by the claimant not in dispute), the hearing officer found that the claimant failed to prove by a preponderance of the evidence that he had a total inability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). Although it was claimant's opinion that he could not work at all, contrary evidence supports the hearing officer's determination that the claimant failed to prove a total inability to work. In this regard even Dr. P's reports, which state significant physical restriction, do not establish no ability to work at all. However, in addition to this, the carrier presented videos inconsistent with the claimant's testimony, and cited the RME/FCE report which showed an ability to work and noted inconsistent physical behavior of the claimant from the examination and other objective data. We conclude that there is sufficient evidence to support the hearing officer's findings and conclusion that during the qualifying periods, the claimant did not attempt in good faith to seek employment commensurate with his ability to work.

The hearing officer also found that the claimant considered himself retired and did not intend to return to work and that his inability to return to work was not a direct result of his impairment. It is apparent that the hearing officer was convinced that the claimant's retirement and intention not to return to work was the real reason he was not working as opposed to not being able to work because of the impairment. Section 408.143(a)(1) lists one of the requirements for SIBS as earning less than 80% of the average weekly wage "as a direct result of the employee's impairment." Rule 130.102(c) states the requirement to be "if the impairment from the compensable injury is a cause of the reduced earnings." Given the affirmance of the hearing officer's finding and conclusion that an attempt in good faith to seek employment commensurate with the ability to work had not been shown, thus failing to establish one of the requirements for SIBS, we do not believe it necessary here to resolve whether there is some conflict or different standard reflected in the statute and the rule. However, the Appeals Panel has stated that retired status does not necessarily foreclose an entitlement to SIBS, but has also stated that it is a factor that can be considered on a direct result issue, and particularly so where the evidence shows an intention not to seek work even commensurate with an ability to work. Texas Workers' Compensation Commission Appeal No. 982897, decided January 20, 1999; Texas Workers' Compensation Commission Appeal No. 971322, decided August 28, 1997. See also Texas Workers' Compensation Commission Appeal No. 990660, decided May 13, 1999 (Unpublished). Compare Texas Workers' Compensation Commission Appeal No. 990284, decided March 29, 1999 (Unpublished). The hearing officer interpreted the claimant's testimony, together with the other evidence, to show a volitional retirement status and no intention of seeking work commensurate with the ability to work. We cannot conclude this is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, particularly with the determinations that an attempt in good faith to seek employment commensurate with the ability to work had not been shown. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ).

The decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge