

APPEAL NO. 000018

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 6, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the 10th quarter for supplemental income benefits (SIBS) ran from July 8, 1999, through October 6, 1999, and that the 11th quarter ran from October 7, 1999, through January 5, 2000. Under the facts presented, whether the claimant was entitled to SIBS for those quarters depended on whether during the qualifying periods for those quarters the claimant was "unable to perform any type of work in any capacity" as set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). The hearing officer found that during those qualifying periods, except between September 17 and 22, 1999, the claimant had some ability to work and did not in good faith seek employment commensurate with her ability to work and concluded that the claimant is not entitled to SIBS for the 10th and 11th quarters. The claimant appealed, stated that her treating doctor had not released her to return to work, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBS for the 10th and 11th quarters. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The SIBS rules that became effective January 31, 1999, apply to this case. In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, the Appeals Panel emphasized that the burden of establishing no ability to work is firmly on the claimant. 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. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated that the claimant's inability to do any work must be supported by medical evidence. Rule 130.102(d)(3) requires a narrative report from a doctor which specifically explains how the injury causes a total inability to work. The absence of a doctor's release to return to work does not in itself relieve an injured worker of the good faith requirement to look for work and may be subject to varying inferences. Texas Workers' Compensation Commission Appeal No. 961520, decided September 18, 1996.

A report of a functional capacity evaluation (FCE) performed on March 31, 1999, contains the results of numerous tests and the summary that at that time the claimant could only do sedentary-type labor and had a lifting restriction of 15 pounds "at minimal times with light duties." In a report of an independent medical examination dated May 4, 1999, Dr. C said that he agreed with the report of the FCE; that the claimant was totally incapable of performing gainful employment now and in the future; that he can conceive of no further

invasive diagnostic or therapeutic procedures which should be considered to rectify the results of her work-related injury; and that all therapeutic efforts at this time should be related to relieving her pain, per se, or at least making her life tolerable in the most general sense.

In a letter dated May 5, 1999, Dr. R wrote:

I do believe that [claimant] is capable of returning to some type of sedentary duty such as a sit down job, however, it would be within the limits of her functional capacity. In [sic] stated in the FCE, it appears that frequent treatment and therapy are necessary to restore strength and balance to the lumbar region.

On August 9, 1999, Dr. R wrote:

To clarify my letter to you dated May 5, 1999 regarding work status of the above patient, I feel that the patient will be able to do sedentary duty such as a sit down job, however, not right now. Patient is currently seeing [Dr. H] for pain management. We need to get her pain under control then at that time she can perhaps work.

In a letter dated August 18, 1999, Dr. R wrote:

[Claimant] has been unable to work from the period of March to June 1999. She still has ongoing pain and numbness and weakness in her left lower extremity. We had requested that she go see a pain management specialist. She is now in the process of doing that. Therefore, she was not allowed to work during that period of time and was given an off work slip during that period of time. She was also under the influence of narcotics for pain relief and was not able to work. At the present time, it is unknown whether or not the patient will be able to return to any type of gainful employment secondary to the chronic pain that she has and the weakness that she has in the left lower extremity. An FCE had been done which suggested that she could return to sedentary work. I did agree with that report, however, I did not allow her to return to work.

The claimant had orthrosopic surgery on her right knee on September 17, 1999.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5,

1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

In the case before us, the affirmed determinations that during the qualifying periods in question the claimant had some ability to work are sufficient to affirm the determinations that the claimant is not entitled to SIBS for the 10th and 11th quarters. However, Rule 130.102(d)(3) has three requirements for entitlement to SIBS when a claimant contends that he or she had no ability to work during the qualifying period. Hearing officers should make findings of fact on each of the requirements. See Texas Workers' Compensation Commission Appeal No. 992147, decided November 12, 1999, for a case involving a remand because a finding was not made on each of the requirements.

We affirm the decision of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Dorian E. Ramirez
Appeals Judge