

APPEAL NO. 000279

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was opened on July 21, 1999, and reconvened on December 14, 1999. The issue in the case was whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 13th and 14th compensable quarters. For the convenience of the parties, this hearing was held in conjunction with Docket No. _____ involving the claimant's entitlement to SIBS for the 15th, 16th, and 17th compensable quarters which is the subject of Texas Workers' Compensation Commission Appeal No. 000199, decided this same date. The hearing officer determined that the claimant was entitled to SIBS for the 13th and 14th compensable quarters. The appellant (carrier) appeals, urging that during the filing period the claimant's wages were greater than 80% of her preinjury wages, thus she was not entitled to SIBS and that she had some ability to work during the latter part of the 13th and 14th quarters and failed to make a good faith effort to obtain employment commensurate with her ability to work. Carrier also disputes the finding that the underemployment/unemployment was a direct result of the impairment. The claimant responds that there is sufficient evidence to support the findings and conclusions of the hearing officer and that her decision was not against the great weight and preponderance of the evidence.

DECISION

Affirmed.

The claimant testified that she sustained injuries to her neck, back, and left side of her head when a computer fell on her on _____. She has remained under treatment, reached maximum medical improvement, and was assessed an impairment rating in excess of 15%. The parties agreed, and it is not in issue, that the claimant was not entitled to SIBS for the three quarters preceding the 13th quarter. The filing periods for the 13th and 14th quarters ran from June 11, 1998, through December 10, 1998. During the period from June 11, 1998, to early July 1998 (and earlier), the claimant was self-employed selling cellular telephones. She testified that during that period she sold some 16 phones at about \$199.00 each and that each phone cost her about \$129.00. The claimant testified that her condition had significantly deteriorated; that she experienced intractable, radiating pain in her neck and back; and that she was not able to work after the early part of July 1998. The claimant went to an emergency room because of her condition on June 21, 1998. She states that she saw her doctor, Dr. A, and was taken off work. She also stated that the medications she was placed on made it impossible to work because of drowsiness. Medical records from Dr. A tend to document the claimant's deteriorating condition in a report dated June 16, 1998. Subsequently, Dr. A took the claimant off work and the claimant underwent surgical cervical and lumbar root blocks on July 17, 1998. Dr. A's subsequent medical records into December 1998 show his opinion that the claimant was not able to work.

Regarding the claimant's earnings during the June to early July 1998 period, the claimant testified that in addition to the cost of the phones to her that she sold, she had other general overhead expenses that resulted in earnings of only about \$27.00 per phone. The parties agreed that the claimant's average weekly wage (AWW) was \$253.65.

The hearing officer determined that after early July 1998, the claimant was not able to work and remained unable to work during the remainder of the filing periods for the 13th and 14th quarters. From our review of the evidence, we conclude that her determination was not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We have stated that the matter of no ability to work requires medical evidence and that the burden of proof on the issue is firmly on the claimant. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994; Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. Upon review of all the medical records in evidence and the totality of the ongoing medical reports of Dr. A, we conclude there is at least a minimally sufficient evidentiary basis to support the findings and conclusions of the hearing officer. Texas Workers' Compensation Commission Appeal No. 991990, decided October 25, 1999 (Unpublished). In this regard, we note that this case falls under the "old" SIBS rules in effect prior to January 31, 1999. Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished).

Carrier urges that the claimant has not shown underemployment (Section 408.143(a)(1)) as her earnings or wages were more than 80% of her AWW, as a direct result of her impairment. Carrier's position is that it is the gross sales figure that should be used in arriving at the earnings or wages, without any deduction for expenses or cost of goods sold. The hearing officer, in making her determination that the claimant was underemployed, did not allow for the generalized expenses mentioned by the claimant but did subtract the cost of the phones to the claimant which she resold. The evidence indicated that the phones were sold for \$199.00 and cost the claimant \$129.00. Thus, the difference between the cost of the phone and the amount the phone sold for was multiplied by the number sold to arrive at the earnings or wages for the period. We do not find error in the hearing officer's determination to ascertain the wages or earnings for the period to be based on the difference between what the phones cost the claimant and what the phones were sold for. Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997; Texas Workers' Compensation Commission Appeal No. 970919, decided June 20, 1997.

Concluding that the findings and conclusions of the hearing officer were not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, we affirm the decision and order.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge