

APPEAL NO. 000335

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 January 20, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the claimant reached maximum medical improvement on June 24, 1998, with a 15% impairment rating; that she did not commute any impairment income benefits; that the filing period for the first quarter for supplemental income benefits (SIBS) began on January 21, 1999, and ended on April 22, 1999; and that the filing period for the second quarter began on April 23, 1999, and ended on July 21, 1999. The hearing officer found that during the filing periods for the first and second quarters the claimant had a sedentary to light-duty release to return to work, that she did not make a good faith effort to seek employment commensurate with her ability to work, that her unemployment was not a direct result of the impairment from her compensable injury; and concluded that the claimant is not entitled to SIBS for the first and second quarters. The claimant appealed the determinations concerning her nonentitlement to SIBS for the second quarter, contending that she was unable to work during the qualifying period for the second quarter. The carrier responded, urged that the evidence is sufficient to support the determination that the claimant is not entitled to SIBS for the second quarter, and requested that the Appeals Panel affirm the decision of the hearing officer. The determinations concerning the first quarter have not been appealed and have become final under the provisions of Section 410.169.

DECISION

We affirm.

The claimant attached to her appeal a letter from Dr. G, her treating doctor, dated August 6, 1999. The letter is in the record and states:

Please be advised that [claimant] remains under medical treatment for her status post cervical fusion at the C5-6 level, as well as her C4-5 HNP [herniated nucleus pulposis] with radiculopathy. [Claimant] remains under the Workman's [sic] compensation process of a second surgical opinion for spinal surgery. [Claimant] is unable to return to any preinjury work duties due to her above condition. [Claimant] is to be considered totally and medically disabled. She is unable to obtain or seek gainful employment.

Again, [claimant] is to be considered medically and totally disabled due to her C4-5 HNP and status post C5-6 fusion.

In a follow-up office visit note dated March 5, 1999, Dr. G stated that he felt that the claimant was symptomatic from a C6-7 level HNP and that she remained on light duty. In a note dated April 19, 1999, Dr. G stated that the claimant continued to be symptomatic from a C6-7 HNP, that they discussed options, that the claimant wished to consider surgical

intervention, that he recommended additional tests, and that she remained on light duty. A report of a discogram dated May 5, 1999, states that the impression is abnormal appearance concordantly symptomatic discogram at C4-5 and normal appearance discogram with atypical pain provocation at C6-7. In a follow-up office visit note dated May 14, 1999, Dr. G reported that the claimant wished to proceed with a C4-5 anterior decompression and fusion with exploration of her previous C5-6 fusion and possible removal of hardware and that the claimant remained on sedentary to light duties. On June 30, 1999, Dr. T, a second opinion spinal surgery doctor, suggested that the claimant obtain EMG and nerve conduction studies of the upper extremities to assess radiculopathy and neuropathy. The studies were performed and Dr. G sent the reports to Dr. T with a letter dated August 6, 1999. In a letter dated August 10, 1999, Dr. P concurred with an anterior discectomy and fusion at C4-5. In a letter dated December 23, 1999, Dr. G said that the claimant had a fusion at C4-5 on October 20, 1999.

The SIBS rules that became effective January 31, 1999, apply to entitlement to SIBS for the second quarter. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(4) (Rule 130.101(4)) defines qualifying period as:

A period of time for which the employee's activities and wages are reviewed to determine eligibility for [SIBS]. The qualifying period ends on the fourteenth day before the beginning date of the quarter and consists of the 13 previous consecutive weeks.

The parties stipulated that the qualifying period for the second quarter began on April 23, 1999, and ended on July 21, 1999. The letter from Dr. G that states that the claimant is unable to obtain or seek gainful employment and is totally disabled is dated August 6, 1999, about 16 days after the last day of the qualifying period for the second quarter.

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). She considered the evidence, including a follow-up office visit note from Dr. G dated May 14, 1999, stating that the claimant remains on sedentary to light duty and the letter from Dr. G dated August 6, 1999, stating that she is unable to obtain or seek gainful employment and is totally disabled, and determined that during the qualifying period for the second quarter the claimant had a release to sedentary to light duty. From that finding of fact, it can be inferred that the hearing officer determined that the claimant had some ability to work during the qualifying period. The finding of fact and the inferred finding of fact 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). The hearing officer also determined that during the qualifying period for the second quarter the claimant did not seek employment and did not make a good faith effort to seek employment commensurate with her ability to work and that she is not entitled to SIBS for the second quarter. Those determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are affirmed.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Dorian E. Ramirez
Appeals Judge