

APPEAL NO. 000396

Following a contested case hearing held on February 7, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the seventh, eighth, and ninth quarters. Claimant has filed a request for review of the hearing officer's determinations concerning the seventh and eighth quarters which we will treat as request for review of the sufficiency of the evidence. The respondent (carrier) has filed a reply, asserting the sufficiency of the evidence to support the seventh and eighth quarter determinations.

DECISION

Reversed and remanded.

Claimant's request for review specifically states that he is not appealing the determination that he is not entitled to SIBS for the ninth quarter. Accordingly, that determination has become final by operation of law. Section 410.169.

The parties stipulated that on _____, claimant sustained a compensable injury; that he reached maximum medical improvement on September 6, 1994, with an impairment rating (IR) of 51% and did not commute any portion of the impairment income benefits (IIBS); that the seventh compensable quarter of SIBS was from February 10 through May 11, 1999; that the filing period for the seventh compensable quarter of SIBS was from November 11, 1998, through February 9, 1999; that the eighth quarter for SIBS was from May 12 through August 10, 1999; that the qualifying period for the eighth quarter for SIBS was from January 27 through April 27, 1999; and that during the filing period for the seventh quarter and the qualifying period for the eighth quarter, claimant had no earnings.

At the outset of his statement of the evidence, the hearing officer states that the seventh quarter of SIBS is subject to the rules of the Texas Workers' Compensation Commission (Commission) in effect for filing periods prior to January 31, 1999, and that the remaining quarters are subject to the new and amended rules. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100(a) (Rule 130.100(a)) provides that entitlement or nonentitlement to SIBS shall be determined in accordance with the rules in effect on the date a qualifying period begins. However, as noted above, the parties stipulated that the eighth quarter began on May 12, 1999, and that the qualifying period for the eighth quarter was from January 27 through April 27, 1999. In Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished), the Appeals Panel stated that "[t]he new SIBS rules apply to quarters beginning on or after May 15, 1999, because the qualifying period for a quarter beginning May 15, 1999, would be from January 31 through May 1, 1999." See Rule 130.101(4) which defines "qualifying period." We note that even if the "new" SIBS rules did apply to the eighth quarter, the beginning date of the qualifying period would be January 28, 1999, not January 27, 1999.

Because the hearing officer clearly states that he considered the issue of claimant's entitlement to SIBS for the eighth quarter under the "new" SIBS rules, which did not apply to that quarter, we must necessarily reverse the determination that claimant is not entitled to SIBS for the eighth quarter and remand for reconsideration of the evidence under the applicable rules and for such additional findings and conclusions as may be appropriate.

Claimant testified that he sustained a toxic fumes inhalation injury with an injury date of _____, while employed as a welder; that he sustained some brain damage from his injury and has memory problems; that the right side of his face is paralyzed; that he has some numbness on the left side of his body; and that he has some double vision and had to have surgery on his right eye. He further stated that he underwent open heart surgery on October 31, 1994, apparently unrelated to his compensable injury, and that on December 4, 1998, he underwent knee ligament surgery, having stepped on a gopher tunnel which collapsed. We note that the hearing officer refers to the heart surgery in Findings of Fact Nos. 3 and 4 and in the recitation of the evidence refers to the heart surgery as having occurred in December 1998. Because the effect of the heart surgery appears to have figured prominently in the hearing officer's determination that claimant is not entitled to SIBS for the seventh quarter, we are compelled to reverse the hearing officer's determination concerning the seventh quarter and remand for further consideration and for such additional findings and conclusions as are appropriate.

The May 20, 1999, functional capacity evaluation report of Dr. B states that claimant is a reasonably intelligent 44-year-old welder with a somewhat limited education who has suffered significant neurological injuries including Bell's palsy and right pons and left cerebellar infarcts resulting in motor disturbance, primarily on the left and involving his gait and balance. Dr. B further reported that claimant demonstrates the ability to lift 20 pounds on an occasional basis and 10 pounds overhead on an occasional basis; that he can sit unrestricted; that he can use his right hand reasonably well and can probably use his left hand to assist his right hand; and that he is capable of returning to work in a controlled environment including rest breaks and the avoidance of prolonged walking, climbing, squatting, bending or significant overhead work.

Claimant further testified that before November 1998 he was attending college with his tuition and expenses paid for, in part, by the Department of Veterans Affairs; that he had to drop his fall 1998 courses because of his knee injury and surgery; that he was unable to take spring 1999 courses because of his recuperation from the knee surgery and rehabilitation; and that he has since retaken the fall 1998 courses and expects to have completed 120 hours and graduate in May 2000 with a Bachelor's degree in Applied Arts and Sciences. He further stated that he has had several basic computer courses, is computer literate, and uses the Internet, and that he has also taken an introductory legal course and course in legal research but has never pursued a job in a law office.

As for his employment search efforts during the filing periods for the seventh and eighth quarters, claimant stated that he wrote four novels and five short stories but conceded that three of the novels were probably written before November 1998. He said

his short stories were entered in a writer's competition in 1999 and were also submitted to five different magazines or periodicals and indicated that none were accepted for publication. He indicated he had not sought employment during the seventh and eighth quarter filing periods from any third party, other than looking at jobs listed by the Texas Workforce Commission. As for his future employment, claimant stated that his plan is to breed Boston terriers and be self-employed as a writer once he obtains his college degree because he feels he could not realistically get a job, given his periodic headaches and physical condition.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

For the reasons stated above, we reverse the hearing officer's decision and order and remand for such further consideration, findings and conclusions, based on the evidence of record, as are appropriate.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge