APPEAL NO. 000402

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 January 14, 2000, with the record closing on January 21, 2000. The issues at the CCH were whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth compensable quarters from February 18, 1998, through December 17, 1999; whether the claimant timely filed a Statement of Employment Status (TWCC-52) for the third through tenth compensable quarters; and whether the claimant has permanently lost entitlement to SIBS because she was not entitled to them for 12 consecutive months. The hearing officer determined that the claimant is not entitled to SIBS for any of the quarters in issue because she did not timely file a TWCC-52 for any of the quarters. The hearing officer further held that the claimant did not produce medical evidence proving a complete inability to work and, since she had made no search for employment, did not satisfy the SIBS requirement that she make a good faith search for employment commensurate with her ability to work and that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.106 (Rule 130.106), claimant has permanently lost entitlement to SIBS. The claimant appeals, requesting that another hearing should be held for her to bring out everything required to prove her case. She argues that there was an "incomplete film when doing equine therapy." Other factors involving the process of the claim are argued. She asserts that she has been unable to work since April 8, 1994. The appeals file contains no response from the respondent (carrier).

DECISION

Affirmed.

The filing and qualifying periods for the periods under review ran from August 20, 1997, through August 4, 1999. The ninth and tenth quarters were considered under the "new" SIBS rules.

The claimant's injury occurred on _____, while working in nursing for (employer). She was in her late 20s during most of the period under review. Claimant apparently worked as a nurse at the time of her injury. Her medical records are summarized in one of the exhibits. Apparently, an MRI of May 5, 1994, showed only a mild protrusion; radiographic testing three months later was reported as negative for any nerve root involvement. She was initially treated by a chiropractor and then referred to an orthopedic specialist. Claimant had back surgery on April 7, 1995. She apparently had a recurrence and second surgery on September 5, 1995. She underwent pain management once more; a doctor with the program apparently noted psychological barriers which prevented progress. In May 1996, her then doctor, Dr. K, declined to serve further, stating

that he could not continue to prescribe pain medication because he felt it detrimental to her well-being; records reflect an apparent mutual falling out between claimant and Dr. K.

Claimant apparently then sought treatment from Dr. B. Dr. B did further studies and recommended more surgery. Claimant had lumbar surgery on February 4, 1997. She was referred to the PRIDE program (pain management program) but declined services beyond a first interview. A record from another pain management program dated September 11, 1997, noted that claimant at that time was working full time for Rehabilicare (another employer).

Claimant received an 18% impairment rating from the designated doctor, Dr. L. There is reference in medical records to a motor vehicle accident in 1997 which caused an exacerbation of her condition. She was driving at the time.

A medical report from Dr. B, dated October 6, 1997, is significant in noting that claimant was in no acute distress, had mild lumbar discomfort, no radicular symptoms, and had normal muscle tone throughout her extremities. He opined that her fusion was well healed. She could squat and rise easily. There were some limitations on lumbar range of motion. Dr. B noted her primary problem as chronic pain syndrome. Claimant's treating doctor beginning November 1997 was Dr. M, a pain management specialist. The claimant underwent another surgery in August 1999. She felt she recovered well from this, in part due to Dr. M's resumption of pain medication. The carrier videotaped the claimant participating in a horse show on November 13, 1999, riding and performing maneuvers on a horse easily and without apparent pain, bending over to curry the horse, and in general undergoing visual stress to the back without apparent ill effect. The claimant produced an article in support of her contention that horseback riding is in fact a form of physical therapy for disabled persons. The article does not specifically address whether it is advisable for persons with multiple back surgeries to undergo such activities. The claimant said that this therapy had not been approved by the carrier.

Dr. M states in his January 5, 2000, letter that claimant has never been able to physically work. He said her attempt to work from September through November 1997 was a failed attempt. This apparently referred to claimant's attempts to work with her father in medical equipment sales. The claimant contended that Dr. M "verbally" took her off work in late 1997, but there is nothing in writing to this effect. His records from that time period do not mention work status.

Another medical record from December 1997 noted that she was dressed and ready to go to work at this examination. Claimant was asked when she concluded if she was physically unable to do this job and said she could not remember. The claimant said that she never received any payment, that she was "in training" with her father, who also paid her automobile insurance and payment, and that although she would have been able to receive a commission, she could not say what that percentage would have been.

The claimant said she was currently participating in Texas Rehabilitation Commission (TRC)-sponsored vocational rehabilitation, and understood that this would meet the "good faith" requirement. It is worth observing that claimant was extremely articulate during the CCH. The claimant contended that it currently hurt her to sit for too long. She said she wore a brace on her back with an electrical stimulator. She said she had psychological issues to resolve before returning to work. Claimant had received long-term disability and, since the fall of 1998, Social Security disability. She also received money from her parents, and resided in her grandmother's home while her grandmother was in a nursing home.

Concerning the late filing of the TWCC-52, the claimant contended (as she did at the beginning of the CCH with respect to the evidentiary exchange rules) that the applicable law was unknown to her. She said that she took her materials to an attorney in January or February of 1998, signed numerous forms, and understood he would file for her SIBS. The attorney was subsequently suspended from practice, and another attorney assumed his caseload around April 1999. The claimant agreed that she received no SIBS during this period. She said that she called her attorney's office several times and was told that additional information was being compiled. She also called the adjuster, who declined to talk to her because she was represented, but who she said nevertheless told her that everything was fine. She apparently did not contact the Texas Workers' Compensation Commission during this period.

The claimant contended that all of her TWCC-52s were filed in April 1999 once she discovered that they had not been filed. It was carrier's position that none were filed until the November 15, 1999, benefit review conference. The TWCC-52s in evidence are signed and dated by the claimant on November 12, 1999.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not second-guess the hearing officer's evaluation of the demeanor and credibility of testifying witnesses.

The hearing officer believed that the claimant actually filed her TWCC-52 forms in November 1999, and she could choose to disbelieve claimant's contrary testimony. This issue is dispositive of the receipt of benefits, although not necessarily on issues relating to whether claimant would permanently lose entitlement to SIBS. Section 408.143(c) states that failure to file the TWCC-52 "relieves the insurance carrier of liability for [SIBS] for the period during which a statement is not filed." The hearing officer has correctly applied this statute.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. We have held that the burden of establishing no ability to work at all is "firmly on the claimant" (Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994), and that a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. For the third through eighth quarters, the hearing officer could consider that claimant actually performed some activities with her father that were commensurate with employment, and also the comparative lack of medical information generated during that period that supported the inability of the claimant to perform any work at all.

The hearing officer's consideration of the ninth and tenth quarters was guided by the new SIBS rules. Rule 130.102(d) defines "good faith" for evaluating a job search or lack thereof:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period;
>
> (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; or

(4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

The hearing officer was free to consider that Dr. M's 2000 letter was not of the nature required by Rule 130.102(d)(4).

Claimant was represented by counsel at the CCH and was given full opportunity to present evidence and witnesses on her behalf. We see no basis to remand for further development of the evidence. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here, and affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge