

APPEAL NO. 001150

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 May 3, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th quarters, primarily because he had some ability to work but failed to search for employment commensurate with this ability. The hearing officer found that the claimant's unemployment during the quarters in issue was the direct result of his impairment.

The claimant has appealed, arguing that the primary reason he has not returned to work is that his treating doctor has warned he could suffer an enhanced injury if he did. He complained that none of the detailed letters that his treating doctor wrote concerning his inability to work were entered as evidence at the CCH. The respondent (carrier) responds that the decision of the hearing officer is supported by the record. The carrier argues that any inability to work was the direct result of a 1996 injury, not the injury under consideration. However, the response is not timely as an appeal of the direct result finding of the hearing officer.

DECISION

We affirm the hearing officer's decision.

The claimant was employed in a sales position for (employer) at the time of a cervical injury on _____. He testified that he had two neck surgeries—in May 1993 and in 1995. The claimant agreed he worked between the surgeries, and then returned to work after his 1995 surgery for (a car dealership) in late 1995, and worked to June 12, 1996. He left this employment due to a lower back injury.

The claimant contended that he worked in pain for the car dealership and was told by his treating doctor, Dr. S, that he should not have returned to work. The claimant said he did return due to financial necessity, because the carrier was not doing its part in paying income benefits.

The claimant said that Dr. S has told him he should never work again because of the possibility of further injury to his neck and paralysis. He said Dr. S has told him there is no further surgery that can be done without considerable risk. He agreed that he told a pain management clinic in October 1998 that he did not intend to work again, but was merely relaying the recommendation of Dr. S when he told them this. The claimant said that if he was able to work again, he would. He had not sought employment since December 1996 (the beginning of the qualifying periods for the quarters under review).

The surgeon who performed the claimant's second surgery was Dr. P. He released claimant back to full-duty work on November 20, 1995. Dr. S's records in 1997, 1998, and 1999 document a weakening of the claimant's left arm and worsening pain in his neck and left shoulder. Dr. S commented in several of these brief reports that claimant should try to avoid excessive bending, stooping, lifting, and overhead work, but the reports otherwise make no comments on whether the claimant has the inability to work.

A doctor for the carrier, Dr. B, examined the claimant on March 8, 2000, and apparently also performed a functional capacity evaluation. He concluded that the claimant had the ability to do sedentary and light work, with some abilities within the medium level of work. Dr. B also stated his belief that the claimant could have worked at the sedentary level from December 1996 to the date of his examination.

The claimant agreed that his work experience involved primarily paperwork and supervision, although he might be called upon to assist with automotive mechanical work if the need arose. He said he sustained his 1996 injury while lifting a box of parts.

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.

Effective January 31, 1999, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) became the criteria for evaluating SIBs entitlement. Rule 130.102(d) defines good faith as follows:

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 Texas Rehabilitation Commission 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.

There are no narratives from Dr. S for the quarters affected by Rule 130.102 in evidence, and it was the responsibility of the claimant, as part of his case, to put such narratives into evidence if they were in existence. There is at least one record, the report of Dr. B, showing some ability to work for the period of time under consideration.

We note that the Appeals Panel has before stated that generalized fears or possibility of re-injury does not equate to an inability to work. See Texas Workers' Compensation Commission Appeal No. 970475, decided April 28, 1997.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge