

APPEAL NO. 001995

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 July 25, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to the fourth quarter of supplemental income benefits (SIBs). The hearing officer determined that she was not. The claimant appealed the hearing officer's determination. The respondent (carrier) requests that the decision and order be affirmed.

DECISION

Affirmed.

The claimant sustained an injury to her low back and left leg while employed by (employer). She reached maximum medical improvement on May 27, 1998, with a 20% impairment rating. The claimant did not commute any portion of her impairment income benefits. The fourth quarter for SIBs, the quarter in dispute, was from April 21, 2000, through July 20, 2000, and the qualifying period was from January 7, 2000, through April 7, 2000. It is uncontroverted that the claimant did not seek employment during the qualifying period and her entitlement would need to be established based upon a total inability to work.

Claimant's entitlement to the fourth quarter of SIBs must be established under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)), which provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee 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.

The claimant asserts that medical records from her treating doctor, Dr. F, establish that she has no ability to work and that the hearing officer's rejection of the opinions set forth in those records would lead to an arbitrary and capricious exercise of the hearing officer's authority.

In responding to questions on cross-examination, the claimant testified that she cooks, although she needs a chair in the kitchen in order to rest; washes clothes, although with assistance from her son; and drives a car. She also responded to several work scenarios as follows:

Q: But a job that allows you maybe to get up and move around and provide you with some facilities to – some bathroom facilities – that type of environment might be something that you could do. Would that be fair?

A: Probably. Probably.

* * * *

- Q: But again . . . you feel like a working environment where you're able to get up and be mobile on occasion is the type of environment and the type of job that you could physically handle.
- A: I think so. I think so.

While the foregoing were predicated on the claimant's physical condition on the date of the CCH, it is noted that on several occasions counsel for the carrier asked the claimant if her condition had worsened since the qualifying period and she replied that it had not. The hearing officer could infer from the lack of any assertion that the claimant's condition had deteriorated since the qualifying period that it had remained static and that her assessment of a workable job environment at the time of the hearing was one that would have been tolerable in light of her physical condition during the qualifying period.

Dr. F's records of January 18, 2000, state that the claimant has ongoing significant back pain with radicular distribution into the left leg and that further diagnostic studies were warranted. Dr. F then opined that the claimant is ". . . totally disabled from any form of gainful employment." On February 14, 2000, Dr. F again noted that he believed that there was a pain generator which needed investigation, that the claimant remained totally disabled from gainful employment, and that he feared ". . . that she could reinjure herself if she went back to any kind of work with the [then] current presentation" An April 7, 2000, note by Dr. F states that the claimant's work status was unchanged from February 14, 2000. The hearing officer reviewed the evidence and found that Dr. F's statements fell short of a specific explanation of how the compensable injury resulted in a total inability to work.

The hearing officer noted that the claimant is a chronic pain patient with a history of failed back syndrome. In light of her injury and condition, the hearing officer could conclude that continued pain and physical problems were not unexpected, nor were they severe enough to render her totally incapable of performing any work of any kind.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying our standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant had some ability to work but made no effort to secure employment commensurate with her abilities; that Dr. F failed to provide a narrative which specifically explained how the compensable injury

resulted in a total inability to work; that the claimant did not make a good faith effort to seek employment commensurate with her ability to work; and that the claimant is not entitled to SIBs for the fourth quarter.

The decision and order of the hearing officer are affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge