

APPEAL NO. 950198

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 13, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issue unresolved was whether claimant was entitled to supplemental income benefits (SIBS) for his first quarter of eligibility. The qualifying period under consideration was May 13, 1994, through August 10, 1994, for payment of benefits for the first quarter running from (August 11 through November 9, 1994). It was stipulated that claimant had been injured on April 17, 1992, that he had a 22% IR, and that he had not commuted his IIBS to a lump sum payment.

The hearing officer held that claimant was not eligible for SIBS, because he had not made a good faith search for employment commensurate with his ability to work during the qualifying period.

The claimant appeals the decision. His primary point is that, because he had surgery in October 1994, he is currently unable to do anything, per his doctor's recommendation and should therefore receive SIBS. The carrier responds that claimant had been released for light duty work since March 1993 and that there was no evidence that he made more than a single inquiry about jobs before or during the qualifying period under consideration. The carrier points out that the surgery in question took place after the period under consideration.

DECISION

We affirm the hearing officer's decision.

The claimant's injury on (date of injury), according to the record in this case, involved two ruptured discs, a pinched nerve, and a broken right elbow, sustained when he was injured in an automobile accident while employed as a social worker by the (employer). Claimant's treating doctor was (Dr. N). According to the brief record, Dr. N certified claimant at maximum medical improvement on March 15, 1993, and released claimant back to light duty work then. (It appears that the IR eventually assigned came from a designated doctor). The record indicated also that an evaluation conducted as to claimant's functioning level at that time recommend he be restricted from lifting and carrying. There was no evidence that prior to the development of the controversy in this case Dr. N changed his light duty work recommendation. Claimant admitted that his sole effort at finding employment during the qualifying period was one inquiry at Department of Human Services about a position as an eligibility worker, and that it had been filled. Claimant testified that in fall 1994, he went back to school in conjunction with retraining suggested by the Texas Rehabilitation Commission (TRC), but stopped going after his surgery.

Claimant stated that he developed carpal tunnel syndrome (CTS) and had surgery on October 8, 1994, and was taken off work from his surgery. Claimant briefly testified that CTS arose from a dislocation of a nerve in his elbow. The record indicated that recommendations for CTS surgery were being formulated in July 1994, due to reduced grip strength in his right hand and EMG findings. A short letter written October 21, 1994, by (Dr. C), a consulting doctor to Dr. N, stated that claimant had been unable to work since May 1994.

Section 408.142 describes the eligibility requirements for SIBS as follows:

- (1)has an [IR] of 15 percent or more . . . ;
- (2)has not returned to work or has returned to work earning less than 80 percent of the employee's [AWW] as a direct result of the employee's impairment;
- (3)has not elected to commute a portion of the impairment income benefit . . . ; and
- (4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

The rules promulgated by the Texas Workers' Compensation Commission (Commission) envision that eligibility for SIBS, paid on a quarterly basis, is determined primarily upon facts in the quarter preceding that for which payment will be made. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). In this way, the claimant's status will be reviewed based upon the most recent historical information, and payment of SIBS will be made for the upcoming quarter for which facts are not yet known. When eligibility for SIBS is disputed, and a hearing eventually held, it may mean as a practical matter that there will be facts developed about the quarter that SIBS would ordinarily be paid. In this case, the evidence showed that claimant had surgery during the quarter that he might have received SIBS had a dispute not been lodged. But it is clear that the inability to work because of surgery did not exist in the qualifying period. The period that the hearing officer had to look at in this case ended August 10, 1994. It was therefore up to her to determine, as fact, whether claimant had any ability to work and whether he made a job search commensurate with that ability prior to that date. The hearing officer was not required to accept Dr. C's brief letter over the fact that claimant had actually been released a year before to light duty. We have indicated that a claimant bears a burden to prove that there is "no" ability to work if a claimant contends that no job search is required. Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. The inability to perform only the previous job is of marginal relevance, because the SIBs statute specifically contemplates that an injury could lead to "underemployment," which would arguably encompass an inability to go back to one's previous job. The hearing officer evidently believed that claimant's reduced grip strength

did not equate to a complete inability to work, and therefore the claimant had the obligation to make a good faith effort to obtain employment commensurate with his ability to work.

The hearing officer is the sole judge of the relevance, 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 Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The determinations underlying the order in favor of claimant are fact determinations, considering the totality of facts, that were the responsibility of the hearing officer to make. There was no error in not considering the October 9, 1994, surgery as affecting the claimant's ability to search for employment during a period from May 13 through August 10, 1994.

The hearing officer's decision and order are based upon sufficient evidence and are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge