APPEAL NO. 950204

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The sole disputed issue at the contested case hearing held in (city), Texas, on January 6, 1995, with (hearing officer) presiding, was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the first compensable quarter. Finding that claimant did not make a good faith attempt to obtain employment commensurate with his ability to work during the eligibility period, the hearing officer concluded that claimant failed to establish eligibility for SIBS during the first compensable quarter. Claimant has appealed the decision. No response was filed by the respondent (carrier).

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if on the expiration of the impairment income benefits (IIBS) period the employee has: (1) an impairment rating (IR) of 15% or more; (2) has not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) has not elected to commute a portion of the IIBS; and (4) "has attempted in good faith to obtain employment commensurate with the employee's ability to work." *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.101 through 130.110 (Rules 130.101 through 130.110).

The parties stipulated that the carrier had accepted liability for claimant's injury of (date of injury), and that the designated doctor selected by the Texas Workers' Compensation Commission (Commission) has assigned an IR of more than 15%. The hearing officer found and it was undisputed that claimant had not taken any advance payment of IIBS and that the SIBS eligibility period for the first compensable quarter was from approximately April 29, 1994, through July 29, 1994. The dispute over claimant's eligibility for SIBS centered on whether he had met the fourth statutory requirement, that is, that he have made a good faith attempt to obtain employment commensurate with his ability to work.

On his Statement of Employment Status (TWCC-52) dated and filed on July 27, 1994, claimant stated that he had not returned to work and he left blank the section of the form pertaining to employment applications made during the last 90 days. Claimant, the sole witness, stated that he was 37 years old, that he had obtained his General Equivalency Diploma, that he was trained in residential heating and air conditioning maintenance, and that the type of work he had done before his injury was apartment complex maintenance, a job he said required heavy lifting. He also stated that on one occasion, the date of which he could not recall, he stopped by some apartment complex, which he could not identify, to check on the maintenance work situation there. He did not indicate whether work was available there and whether he applied.

Claimant described (Dr. D), an internal medicine specialist, as his treating doctor and said he came under Dr. D's care in August 1991. The medical evidence adduced indicated that claimant underwent a lumbar laminectomy by (Dr. PC) on July 1, 1992, for a herniated disc at L4-5. Dr. D's Specific and Subsequent Medical Reports (TWCC-64) reflecting claimant's visits on March 22nd, May 24th, and July 2, 1993, all stated that claimant was still having "difficulties due to injuries" and that his return to limited type of work was "undetermined." (Dr. RC) reported on March 17, 1993, on claimant's participation in the work hardening program prescribed by Dr. PC, stating that claimant "appears to have questionable potential to return to work at full duty therefore some restrictions may be necessary." Dr. PC reported on March 15, 1993, that he told claimant that "he has to make an effort to rehabilitate himself, so he can return to work soon." An unsigned March 15, 1993, psychological evaluation stated that "the results of the psychological testing battery does suggest the presence of some significant psychological factors that are contributing to [claimant's] complaints of pain and disability. These factors suggest that in the absence of changes in his orientation and attitude toward pain, he is likely to continue to display significant pain and physical symptoms which are independent of any medical problem." Dr. RC reported on March 24, 1993, that claimant became disruptive and that Dr. PC ordered him dropped from the work hardening program.

Dr. PC reported that when he saw claimant on August 27, 1993, he determined that claimant had reached maximum medical improvement with an IR of eight percent; that he advised claimant he had nothing further to offer him "in spite of the fact that he developed low back pain when he went fishing;" that he was released from Dr. PC's care; and that he was dismissed "to return to work light duty first, for about a month then he can return to his normal activities. No medications were given at this time." Claimant testified that Dr. PC told him his problems were attributable to his weight but that his subsequent loss of 100 pounds did not bring relief.

(Dr. P), the designated doctor and an orthopedic surgeon, reported on January 5, 1994, that on August 31, 1991, claimant hurt his back moving a refrigerator, that claimant described continuing pain in his back and into his left lower extremity, and numbness in his left toe, that no new diagnostic studies have been accomplished since his surgery, and that Dr. P recommended further investigation with an MRI. Dr. P's impression was degenerative disc disease about the lumbar spine and postoperative disc excision and he assigned claimant an IR of 16%. Dr. P also stated: "The patient may return to work, though he needs to be cognizant as regards the vulnerability present about his lumbar spine as is expressed by the assessment of impairment detailed above." An MRI report of February 8, 1994, obtained by Dr. D showed chronic spondylosis at L4-5 and L5-S1 without evidence of an acute, focal disk herniation.

Claimant testified that he did not have therapy nor seek medical treatment after December 1993 until sometime in July 1994 when he experienced sharp pain stretching to

hand a tool to someone and the next day went to Dr. D. Dr. D reported on July 27, 1994, that claimant "is totally unable to work even at a sedentary occupation for the indeterminate future" and added an addendum to the July 27th report stating that reaching for the tool "should not be considered a new injury." Dr. D reported on October 20, 1994, that claimant has severe limitation of lumbar range of motion, some muscular atrophy and nerve weakness in the left leg, and that he "continues unable to work." Claimant said he is not scheduled for additional surgery but that Dr. D would like him to have more therapy. He testified that the "needle sensation" pain in his back has never really gone away and is worse in the mornings, that he is not presently taking any pain medication, and that he cannot work.

The hearing officer's findings contain references to Dr. PC's having released claimant to light duty on August 27, 1993, and to a resumption of his normal activities a month later, and to Dr. P's opinion reported in January 1994 that claimant could return to light duty. The findings contain no references to Dr. D's July and October 1994 statements that claimant is unable to work. The hearing officer found that claimant did not during the qualifying period attempt in good faith to obtain employment commensurate with his ability to work. This issue presented the hearing officer with a question of fact to resolve and the hearing officer is the sole judge of the materiality, relevance, weight and credibility of the evidence.

It was apparently claimant's theory that he was excused from making a good faith effort to obtain employment because of Dr. D's opinion that he could not work at all. In Texas Workers' Compensation Commission Appeal No. 94793, decided August 2, 1994, the Appeals Panel stated that "cases concerning whether an employee must have made any attempt to seek employment to qualify for SIBS tend to be very fact specific." The Appeals Panel has stated that if an employee is shown to have no ability to work at all, then "seeking employment commensurate with this inability to work would be not to seek work at all." Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994. In that case the hearing officer found the employee was entitled to SIBS for the first compensable quarter despite the fact she had not sought employment, because she had not returned to work pursuant to her doctor's recommendation. The Appeals Panel also pointed out that whether the claimant was totally or only partially limited in the ability to work was a factual determination for the hearing officer.

In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, the Appeals Panel commented on the decision in Appeal No. 931147 stating:

That case stands for the proposition that where it is proven that a claimant's 'ability' is 'no ability,' compliance with this requirement [good faith attempt to obtain employment commensurate with the ability to work] is effectively met by no search. However, we believe the burden is firmly on the claimant to prove

> that he or she indeed had `no ability' due directly to the impairment that resulted from the injury. Restricting analysis only to the ability to perform the previous job is an incomplete analysis, because the SIBS statute arguably contemplates that the claimant will not be able to return to the prior employment and wage level, because it compensates for unemployment or underemployment.

In Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, the Appeals Panel, commenting on Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994, stated that "[a] claimant's ability to work can be construed as 'no ability' only when judged against employment generally, not just the previous job where the injury occurred. We pointed out that the ability to do the previous job is of 'marginal relevance' and the burden remains with the claimant to prove he either attempted in good faith to find employment or he had no ability to work at all." In Appeal No. 941332, decided November 17, 1994, the treating doctor felt that the employee could not do any manual labor and also did not know when he could return to even limited work. The carrier contended that the evidence showed the employee could do light or sedentary work and maintained that he should have sought employment of that nature. The hearing officer in that case found for the employee.

The hearing officer in the case we consider apparently determined that claimant had the capability of performing some kind of work. There was no evidence that claimant had made any attempt to obtain employment during the qualifying period. As concerns claimant's ability to perform any type of work whatsoever, the hearing officer obviously gave more credence to the opinion of Dr. PC, who operated on claimant and followed him until discharging him from his care, and to the opinion of Dr. P, an orthopedic surgeon, than to the opinion of Dr. D, an internal medicine specialist. It is for the hearing officer to resolve the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In deciding whether claimant had no ability to perform any work at all the hearing officer could also consider the content of the psychological evaluation as well as the facts that claimant was not presently receiving any therapy or taking any pain medications. We are satisfied the dispositive findings are sufficiently supported by the evidence and are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge