

APPEAL NO. 950376

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 1, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issue resolved from the benefit review conference (BRC) was whether appellant (claimant) was entitled to supplemental income benefits (SIBS) for his fifth quarter of eligibility. The compensable quarter in issue was from November 25, 1994, until February 23, 1995. The qualifying period was August 26 to November 24, 1994.

The hearing officer agreed that claimant had made a good faith search for employment commensurate with his ability during the qualifying period. However, she found that his unemployment was a "direct result" of the economic conditions rather than his impairment, and that he was therefore not eligible for SIBS.

The claimant has appealed the finding that his unemployment did not directly result from his impairment, but rather from the economic situation. The respondent (carrier) responds that "every" employer with whom claimant sought employment was not taking applications or was under a hiring freeze, and in the absence of evidence that claimant was refused employment because of his impairment, the decision should be affirmed.

DECISION

We reverse the hearing officer's decision and render a decision that claimant is eligible for SIBS for the fifth quarter of eligibility.

The claimant sustained a back injury and received an impairment rating from his injury of 28%. During the time period in issue, he was 63 years old.

The hearing officer's findings and conclusions that claimant made a good faith effort to find employment commensurate with his ability during the qualifying period have not been appealed. Also unappealed was the hearing officer's finding that the claimant was reasonable in relying on his treating doctor's opinion that he was unable to work in any capacity, until October 11, 1994. Because these findings and conclusions are now final and binding in any further proceedings, we will focus our discussion on facts underlying the following appealed finding and conclusion:

FINDING OF FACT

13. Claimant's inability to obtain employment during the qualifying period was a result of economic conditions and the lack of available work and was not the direct result of his impairment.

CONCLUSION OF LAW

4. Claimant's inability to obtain employment during the relevant qualifying period was not the direct result of his impairment but rather was the result of economic conditions.

On November 15, 1993, claimant's doctor, (Dr. R), wrote that claimant was unable to work and his return to work was doubtful. Dr. R repeated his assessment in May 1994. However, claimant testified that he began a search for employment, and registered with the Texas Employment Commission (TEC), after Dr. R released him. Other evidence indicated the release may have occurred at or around October 11, 1994. Claimant searched for employment in (city). He stated that he applied for a greeter position at one store, and his application was taken, and when he later called to follow up they said it was on file but nothing was available. Claimant applied at another store, and in a follow-up call determined his application was "pending." Claimant was sent to a third store for a security position by TEC. Claimant said that a fourth store did not take an application because it was under a hiring "freeze." On November 22, 1994, claimant applied for a school crossing guard job with the City of (city) and was hired on a part-time basis. (He continued to look for full-time work and had found such a position by the time of the hearing.)

On January 4, 1995, claimant's new treating doctor, (Dr. B), noted that claimant could return to work only under a number of restrictions, precluding him from repetitive bending, lifting, or stair climbing, or from lifting more than 10-15 pounds.

An employment consultant for the carrier testified briefly. Most of her testimony went to the issues not on appeal. When asked if she advised claimant to say he had arthritis instead of a back problem, she stated that it was her practice to counsel persons to apply for jobs within their capabilities, and further "[e]specially with the new ADA law, you do not go in and advertise the fact that you have a back injury when you are applying for an appropriate job. That is not necessary. That is discriminatory . . . there is no need to explain prior claim injuries." Claimant testified, in response to cross-examination, that he had not been expressly refused a job because of his impairment, and that he could not say for sure that he did not get a job because of it.

The hearing officer erred in holding that claimant's unemployment was not a direct result of his impairment. According to the unappealed findings and conclusions of the hearing officer, claimant was determined not to be able to work for the first 46 days (6-½ weeks) of the qualifying quarter. Because he was unable to search for employment as a direct result of his impairment for at least half of the qualifying period, we hold that, as a matter of law, he met the "direct result" criteria for the period of time in question.

We have stated before that the capability to do jobs sought in good faith does not mean that impairment has not "directly resulted" in unemployment. Texas Workers' Compensation Commission Appeal No. 931063, decided January 4, 1994. And we have held that "direct result" is sufficiently supported by a finding of evidence that a claimant sustained a serious injury with lasting effects and that he could not reasonably perform the

type of work that he was doing at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993. Finally, we note that new evidence submitted on appeal cannot be considered; the decision here is based solely on the record in the case.

We therefore reverse the hearing officer's findings, conclusions, and order that the claimant was not entitled to SIBS for the fifth quarter of eligibility due to the "direct result" criteria, and we render a decision that his unemployment was a direct result of his impairment for the qualifying period, and he thus was eligible for SIBS. The carrier is therefore ORDERED to pay SIBS in accordance with this decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge