APPEAL NO. 990558

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 12, 1999, a contested case hearing was held. With respect to the issues before her, the hearing officer determined that respondent (claimant) is entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Appellant (carrier) appeals the determinations that claimant's unemployment is a direct result of his impairment and that claimant had no ability to work during the filing period. Claimant responds that carrier's appeal is untimely and that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

We first note that claimant contends that carrier's appeal is untimely. Records of the Texas Workers' Compensation Commission (Commission) show that the decision and order of the hearing officer was distributed on March 1, 1999, by cover letter dated that same date. Such distribution to the carrier was to its (City 1) representative, via a designated box in the Commission's central office. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Rule 102.5(b) (Rule 102.5(b)) and Rule 156.1; *see also* TWCC Advisory 93-11, dated November 4, 1993. Attached to the Commission's copy of such letter and decision is a receipt signed by the carrier's (City 1) representative dated March 3, 1999. Because Section 410.202 provides that a request for review must be filed no later than the 15th day after the decision is received by a party, the carrier had until March 18, 1999, to file. The carrier's request for review states that it was hand delivered and is date stamped received by the Commission on March 15, 1999. Therefore, the request for review was timely and we will consider the merits of the appeal.

Carrier contends the hearing officer erred in determining that claimant had no ability to work, that he met the good faith SIBS requirement, and that he is entitled to SIBS. Carrier asserts that: (1) the hearing officer mischaracterized the evidence in that she said the February 1998 functional capacity evaluation (FCE) report stated that claimant was unable to return to work; (2) the reports from Dr. P are dated outside the filing period and are "conclusory"; and (3) claimant has a history of symptom magnification.

The parties stipulated that: (1) claimant sustained a compensable back injury on _____, while working for (employer); (2) claimant had an impairment rating (IR) of 16%; (3) he did not commute any of his impairment income benefits (IIBS); and (4) the filing period for the 8th quarter was from October 1, 1998, to December 30, 1998.

Claimant testified that he sustained an injury while lifting a bag of trash. He said he has undergone two spinal surgeries, that he had severe pain and muscle spasms during the filing period, and that he did not believe he could not do any work. Claimant said he is unable to sit or stand for even short periods of time.

A November 1994 operative report indicates that claimant underwent a lumbar hemilaminectomy at L3-4 with excision of the L3-4 disc. A February 1996 operative report indicates that claimant underwent an L3-4, and L5 laminectomy, and an L3-4 foramenotomy, and discectomy. A 1996 report from the designated doctor indicates that claimant had positive Waddell's signs, that his impairment for loss of range of motion (ROM) was invalid, and that his IR is 16%. In a March 1998 report, Dr. G stated that she did not believe claimant could perform his prior work; that "theoretically he could return to some type of employment; and that his memory difficulties may cause him to have trouble finding employment. In a September 16, 1998, medical report, Dr. C stated that: (1) claimant failed to meet validity criteria for ROM testing; (2) there is no measurable evidence of neurological deficits; and (3) claimant is capable of a minimum of sedentary work. An accompanying physical examination sheet indicated that the exam was positive for "gross atrophy" of the lower extremities and all muscle groups and that he was positive for spasm or tenderness. In a November 1998 report, Dr. P, claimant's surgeon, stated that claimant's spasms are increasing, claimant complains of shooting pains into his right knee, and that he would like to start claimant back on his medications. In a January 1999 report, Dr. P stated that: (1) claimant is unable to work because of his chronic lower back pain; (2) claimant is using a walker because there is certain weakness to his legs; (3) claimant is on off-work status; and (4) claimant has difficulty with daily living activities such as bathing and driving.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. The claimant has the burden to prove he has no ability to work because of the compensable injury. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence,

the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The fact that a different hearing officer could make different determinations based on the same evidence does not mean that any one determination is against the great weight and preponderance of the evidence.

In this case, the claimant had the burden to prove he had no ability to work. Appeal No. 950582, *supra*. The hearing officer was the sole judge of the credibility of the medical evidence and determined whether the medical evidence showed that claimant had no ability to work. There was evidence from Dr. P that claimant could not work during the filing period. Although Dr. C indicated that claimant could do sedentary work, the hearing officer chose to credit the evidence from Dr. P. The hearing officer made her determinations regarding good faith and ability to work based on the evidence before her and she determined what weight to give the reports from Dr. P and Dr. C. Because the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for hers. Cain, *supra.* Carrier also challenges the hearing officer's determination that claimant's unemployment is a direct result of his impairment. However, the evidence that claimant continues to have severe work restrictions, in that he has been taken off work completely, supports the hearing officer's direct result determination. Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994.

The carrier contended that the hearing officer mischaracterized the evidence in that she said the February 1998 FCE report stated that claimant was unable to return to work. Carrier asserts that the FCE report indicated only that claimant could not return to his former job. The hearing officer made a finding that the FCE stated that he was unable to return to work. From the evidence, the hearing officer could and did make the finding that she did. The hearing officer could have made the finding that claimant could not go back to his former work in support of her direct result determination. We perceive no reversible error. Carrier asserts that Dr. P's reports are dated outside the filing period and are "conclusory." The hearing officer could consider the reports, even though they were not dated in the filing period. The hearing officer could consider that the reports are not "conclusory" in that Dr. P noted claimant's pain and weakness before he concluded that claimant was on off-work status. Carrier also contends that claimant has a history of symptom magnification. This was a factor for Dr. P to consider in making his work status recommendations and also a factor for the hearing officer to consider in making her determinations in this case. We will not substitute our judgment for the hearing officer's because she was the sole judge of the credibility of the medical evidence.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge