APPEAL NO. 980044

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 15, 1997. On the single issue before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the first compensable quarter. The appellant (carrier) appeals, urging that two findings of fact and a conclusion of law were supported by no evidence or were against the great weight and preponderance of the evidence. The claimant responds that there is sufficient evidence to support the decision and ask that it be affirmed.

DECISION

Reversed and a new decision rendered.

The filing period for the first SIBS quarter ran from July 7, 1997, to October 5, 1997. The claimant sustained a compensable injury on _____, when he was carrying a heavy pipe with other workers who dropped their end. The claimant states that the injury affected his neck, left shoulder, left hip, and low back, that he continues to have severe pain, that he did not feel he was able to work, but that after September 19, 1997, when his treating chiropractor, (Dr. M), issued a note releasing him to restricted duty, he looked for three jobs. He stated that he is no longer on any medication for pain and was told he would have to learn to live with the pain. The claimant has seen by a number of doctors since the date of injury, has had numerous diagnostic tests, and has received extensive chiropractic and other treatment including epidural and trigger point injections and spine rehabilitation and other therapy programs. He reached statutory maximum medical improvement on November 24, 1996. A designated doctor assessed his impairment rating (IR) at 15%. Another IR in the record from his treating chiropractor assesses a 33% IR and one from an independent medical examination doctor who assessed a zero percent IR.

The medical records in evidence show diagnoses of cervical sprain/strain, lumbar disc syndrome without myelopathy. A number of diagnostic tests have been performed since the accident, including a discogram, MRI, and myelogram. Dr. M referred the claimant to (Dr. H), an orthopedic surgeon, who opined that the claimant was not a surgical candidate. In reports dated "11/5/96" and "12/10/96" Dr. H indicates that the claimant "is not able to work at this time." A letter from Dr. H on February 19, 1997, states that although the claimant is not a surgical candidate, he does meet the criteria for a chronic pain program and that his chronic pain "is disrupting his activities of daily living and ability to work. " A June 25, 1997, letter from Dr. M indicated that the claimant participated in an inpatient pain clinic but that it did little but improve his flexibility very slightly. Dr. M stated that it did not enhance his employability and that he felt there is an undiscovered pain generator and another discogram was requested.

As indicated, in a note dated September 19, 1997, Dr. M released the claimant to restricted duty with limitations on standing, sitting, bending, and lifting. The hearing officer noted on the record that the claimant had been sitting at the hearing without indication of any problem for a period much longer than contained in the restriction. The claimant testified that his condition basically had not changed during the last year or from July 1997 to the present. He stated that his condition "come and goes" and that he has "good days and bad days." He generally described his physical activity limitations to walking one to two blocks, sitting for one and a half hours, stating that he does some household chores but that he did not believe he could do any work to a "professional level" and that he could not keep up with his wife or his son. The claimant stated that during the filing period in issue and after September 19, 1997, he applied for employment at three places. He also indicated that some time in October (outside the filing period) he contacted the Texas Rehabilitation Commission, but they have not gotten back to him. He stated he felt he had made a good faith effort to seek employment.

Also in evidence was a report from a carrier's investigator who stated that he had contacted the three employers listed by the claimant and that none could confirm that the claimant had put in an application and that no applications were on file.

The hearing officer entered findings, now appealed, that the claimant was totally unable to work during the filing period and that he made a good faith effort to obtain employment, commensurate with his ability. The Appeals Panel held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. 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 evidence here shows that the claimant has undergone and continues to undergo conservative treatment for almost three years, is not a surgical candidate, and continues to have chronic pain, that he is no longer on medication, that his condition has not changed during the filing period in issue, that he was released to restricted duty during the filing period, that he has the ability to engage in restricted physical activity, and that he applied at three places following September 19, 1997. This simply does not establish a

total inability to work, the burden of which was on the claimant, and the finding of no ability to work is so against the great weight and preponderance of the evidence as to be clearly wrong. Texas Workers' Compensation Commission Appeal No. 970828, decided June 20, 1997; Texas Workers' Compensation Commission Appeal No. 970290, decided April 2, 1997; Texas Workers' Compensation Commission Appeal No. 970086, decided March 3, 1997; Texas Workers' Compensation Commission Appeal No. 961235, decided August 8, 1996.

Similarly, the search for employment, asserted by the claimant to be the placing of applications with three employers sometime during the last two weeks of the filing period in issue, does not establish a good faith effort to seek employment commensurate with the ability to work. The job search requirements generally span the whole filing period (Texas Workers' Compensation Commission Appeal No. 972482, decided January 15, 1998), and a job search concentrated at the end of a filing period is not a search undertaken in good faith. Texas Workers' Compensation Commission Appeal No. 970046, decided February 20, 1997. The fact that the claimant may be significantly restricted in the type of work he can do or he is not capable of full-time employment does not do away with the requirement to seek employment commensurate with the ability to work. Texas Workers' Compensation Commission Appeal No. 962461, decided January 8, 1997; Texas Workers' Compensation Commission Appeal No. 971596, decided September 23, 1997 (Unpublished); Texas Workers' Compensation Commission Appeal No. 970366, decided April 15, 1997 (Unpublished). We conclude that there is insufficient evidence to meet the statutory good faith job search requirements and that the determination of the hearing officer is so against the great weight and preponderance of the evidence as to be clearly wrong.

The appealed findings of fact are reversed. We render a new decision that the claimant failed to established that he did not have any ability to work and that he did not make a good faith effort to obtain employment commensurate with his ability to work. The conclusion of law, decision and order are reversed and a new decision rendered that the claimant is not entitled to SIBS for the first compensable quarter.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Christopher L. Rhodes
Appeals Judge

CONCURRING OPINION:

I concur and write separately to point out that the claimant never contended at the benefit review conference he had no ability to work. The hearing officer states in his decision and order that "[t]here is no evidence that the Claimant could work in any capacity prior to September 19." The claimant had the burden to prove no ability to work. The carrier did not have to prove an ability to work. The remaining evidence from (Dr. M) and (Dr. H) is, I believe, too vague to support a conclusion of no ability to work.

Alan C. Ernst
Appeals Judge