APPEAL NO. 980053

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 4, 1997. The issue at the CCH was whether the appellant (claimant), was entitled to supplemental income benefits (SIBS) for the 11th compensable quarter. The employer at the time of the claimant's compensable injury was (employer 1), respondent, a self-insured political subdivision, which shall be referred to herein as carrier or employer, depending upon the context of the reference.

The hearing officer held that the claimant was unemployed as a direct result of his impairment, but that he did not make a good faith search for employment commensurate with his ability to work, and was not entitled to SIBS.

The claimant appeals and argues that the decision is against the great weight and preponderance of the evidence. Carrier responds that the appeal does not appear timely, and is not sufficient to raise reviewable error, and that the determinations of the hearing officer were correct.

DECISION

We affirm the decision as supported by the record, although we reverse one finding of fact.

We have determined that the appeal was timely filed and is sufficient to invoke our jurisdiction. The claimant was 72 years old at the time of the CCH. It was stipulated that the filing period for the 11th quarter of eligibility ran from June 30 through September 28, 1997. Claimant was involved in a motor vehicle accident on _____, while employed as a truck driver by the employer. He sustained injury to his neck, back, and legs. The claimant indicated that he has been left with chronic sprain of the neck and back, and while surgery has not been recommended, his treating doctor , (Dr. S), has stated that he cannot work. Claimant said he has daily headaches, cannot walk or stand for more than a few minutes, and cannot lift more than 10 pounds. He said he could not do a desk job because it would entail movements he cannot make. Claimant said he was in constant pain, and he had used a cane to walk for the last year.

As noted in Dr. S's October 31, 1997, report, which is consistent with previous reports although a little more detailed as to his assessment of the claimant's employability, claimant has "considerable" restrictions, with complete inability to stoop, squat, kneel, crawl, or bend repetitively at the waist. Claimant cannot walk longer than 15 minutes at a time, or sit or stand longer than 15 to 30 minutes. Dr. S said that claimant could not drive for more than an hour. Dr. S ended with this assessment:

> These restrictions are permanent. In view of all these facts, I not only consider [it] inadvisable for him to go back to work, but I even think it is potentially dangerous for him to go out looking for a job.

In an earlier report, Dr. S assessed claimant's employability as "nonexistent." There were no contrary medical reports or functional capacity evaluations in the evidence indicating an ability to work during or even proximate to the filing period. The carrier only offered a medical report from (Dr. A), dated March 1, 1993, which stated that the claimant could have returned to "limited work" as of May 19, 1992, and to fulltime work only at the "very sedentary" level, recommending contact with Texas Rehabilitation Commission for retraining and evaluation.

Claimant agreed that he had retired from the employer voluntarily several years before, and not due to his injury. The claimant also drew Social Security benefits due to his age since he turned 65, and not because of disability. Claimant said he considered himself retired and did not intend to return to the work force.

Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, did not do away with the requirement in Section 408.142(a)(4) that a claimant for SIBS must demonstrate that he or he attempted "in good faith" to obtain employment commensurate with an employee's ability to work. That case stands for the proposition that where it is proven that a claimant's "ability" is "no ability" to work, compliance with this requirement is effectively met by no search. In light of this case, however, it is important to note that inability to work may be found even when a claimant is not completely bedridden or wheelchair bound. Ability to move and ambulate will not in all cases equate to ability to work. Although the hearing officer in this case found the medical evidence insufficient to support an inability to work during the filing period, we cannot agree that this is true where the treating doctor has assessed not only that the claimant cannot work but that it would be dangerous for him to ever "go out looking for a job." There was no contrary medical evidence that pronounced the claimant able to work at even the sedentary level for the period of time in question. The hearing officer's determination that the claimant had some ability to work is not supported by sufficient evidence in this case, and we reverse that finding.

However, where a claimant frankly admits, as here, that he has voluntarily retired because of his age and has no intention of returning to the workplace, he can be found not to have formed the requisite intention to search for employment in "good faith." *See* Texas Workers' Compensation Appeal No. 941293, decided November 8, 1994. (Likewise, such a claimant may run the risk of being found unemployed as a direct result of his voluntarily retirement rather than his impairment). We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.- El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995.

‘Consequently, we affirm the conclusion of law and order that the claimant was not entitled to SIBS for the eleventh quarter of eligibility.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O=Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge