

APPEAL NO. 980097

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 12, 1997, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for either the seventh or eighth compensable quarters and that claimant has lost entitlement to income benefits under Section 408.146(c) because claimant has not been entitled to SIBS for 12 consecutive months.

Claimant's appeal simply states that he appeals the decision of the hearing officer. We will review the record on a sufficiency of the evidence basis and infer that claimant is asking us to reverse the decision of the hearing officer and render a decision in his favor. The file does not contain a response from the respondent, Attorney General's Office, referred to herein as the carrier.

DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable neck injury on _____, has an impairment rating of 16%, has not commuted his impairment income benefits and that the filing period for the seventh compensable quarter began on May 1 and ended July 30, 1997, with the filing period for the eighth compensable quarter being from July 31 through October 29, 1997.

Admitted into evidence was Texas Workers' Compensation Commission Appeal No. 970543, decided July 3, 1997, which affirmed a hearing officer's denial of SIBS for the fourth compensable quarter. (The hearing officer erroneously commented that Appeal No. 970543 was the affirmance of denial of SIBS for the fifth and sixth compensable quarters

when that case was actually Texas Workers' Compensation Commission Appeal No. 971899, decided November 3, 1997.) Those cases adequately set out the background facts which need not be repeated here.

Claimant testified that he was basing his claim for SIBS for the seventh quarter on a total inability to work "outside the home" and that he is unable to do any kind of outside gainful employment. Claimant explained some seemingly inconsistent medical reports which both release him to light duty and which state that claimant "is unable to work at any occupation." Claimant explained that the employer, at one point (apparently in 1996), had advised him that some alternate/modified duty would be available and claimant would be required to accept that employment or risk losing his entitlement to SIBS. Because of that letter, claimant requested that his treating doctor, (Dr. M), release him to light duty in order to be eligible for that modified duty. The modified duty apparently did not work out and claimant went back to Dr. M, who then again placed claimant in a "totally disabled from doing any work" status.

For the eighth compensable quarter, claimant continued to allege that he was unable to do any work outside the home, but that he was "self employed" raising cattle. The evidence developed that he had sold one calf in May 1997 (during the seventh quarter filing period) but none thereafter because the "calves [were] not old enough for sale [at] this time." Claimant said that he was raising 10 head of cattle on 35 acres and that when calves got big enough he would sell them at the "auction barn." Testimony developed that claimant had been raising cattle (and pigs) prior to his injury. Claimant testified, both at the CCH and in an affidavit, how he feeds cows in the winter by dropping off round bales of hay, the other chores that he does to keep the cattle and that friends help him load and unload cattle and repair fences. The hearing officer, in his Statement of the Evidence, commented that "Claimant was doing very little to develop his cattle raising business in a self-employed occupation."

There is considerable medical evidence in the file; however, much of it apparently pertains to prior quarters of SIBS. A functional capacity evaluation (FCE) performed on March 11, 1997, discussed in a report dated June 20, 1997, indicates that claimant "may be able to return to employment" with some restrictions. The FCE notes that claimant "appeared to give submaximal effort" during many of the tests. Another FCE performed in 1996 assessed that claimant "can perform light to sedentary work." The hearing officer references several reports from Dr. M in 1996 and notes that in "a medical report dated December 12, 1996" (actually an off-work slip) that claimant is "[t]emporarily disabled 2-15-97 thru 3-15-97." A Specific and Subsequent Medical Report (TWCC-64) dated December 13, 1996, releases claimant to light duty. Another report, also dated December 13, 1996, from Dr. M, states that claimant "continues to feel he is unable to perform any type of work." Other reports in January 1997 state the claimant is "disabled," and "unable to work." Reports of February 1997 both recommend an exercise program for claimant and state that he "has been unable to do any type of job. . . ." Various TWCC-64s in March and April 1997 report claimant is "disabled." In a report dated July 8, 1997, Dr. M is of the opinion

that claimant "is unable to work at any occupation due to his pain level." None of the reports give any further explanation other than as quoted. Dr. M apparently retired in July 1997 (TWCC-64 dated July 14, 1997) and apparently (Dr. S) became claimant's treating doctor. In a report dated November 18, 1997, Dr. S discusses claimant's condition, including claimant's "chronic pain syndrome with its associated depression and anxiety" and concludes that he does not believe claimant "is a candidate for return to gainful employment at this time." Claimant was also evaluated by (Dr. N), a clinical psychologist, who recited claimant's medical history and concluded:

Because he required regular daily use of narcotics and muscle relaxers to manage his pain syndrome, it is not felt that he is safe to operate any type of heavy equipment and at times, even operate a motor vehicle. . . .

In summation, it is felt that [claimant] has a permanent disability directly related to his 1-94, on-the-job injury. His injury and subsequent disability will interfere with his ability to obtain or maintain any gainful employment in the foreseeable future.

The hearing officer's determinations that claimant's cattle-raising business does not constitute a good faith effort to obtain employment commensurate with his ability to work is supported by sufficient evidence. The Appeals Panel has also frequently held 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. 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*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

We find that the hearing officer's decision is supported by the evidence and, upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge