APPEAL NO. 980100

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 29, 1997. With respect to the issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 11th compensable quarter. In its appeal, the appellant (self-insured) argues that the determinations that the claimant had no ability to work in the filing period and that she is entitled to 11th quarter SIBS are against the great weight and preponderance of the evidence. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable back injury on _____, in the course and scope of her employment as an active treatment provider with the self-insured; that the claimant reached maximum medical improvement on May 15, 1994, with an impairment rating of 15%; that she did not commute her impairment income benefits; and that the 11th compensable quarter ran from September 22 to December 21, 1997, with a filing period of June 23 to September 21, 1997. The claimant testified that she has not worked since her date of injury and that she did not look for work during the filing period for the 11th quarter.

The claimant maintained that she was unable to do any work during the relevant filing period. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated 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. We have held that 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 that 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. 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.

In treatment notes dated September 29, 1997, (Dr. N), the claimant's treating doctor, noted that he was "concerned that the L4 to sacrum fusion really doesn't look like it is consolidated." He further stated that he suspected she had a pseudoarthrosis. On the issue of whether she can work, Dr. N stated that "[w]ith the amount of pain that she is having, I do not think that she will be able to return to work until we can figure out at least

what is going on and what can be done about it." In a "To Whom it May Concern" letter dated October 17, 1997, Dr. N stated that based upon the claimant's October 14, 1997, CT scan and MRI, it was unclear if the fusion was solid or not. He recommended that she have a discogram, noting that if she had pain on the discogram, she might be a candidate for a repeat fusion. He concluded his letter, as follows:

> I feel that the patient remains unable to maintain any gainful employment until further notice.
>
> Due to the above mentioned factors, I believe that it is medically necessary for this patient to remain off work at this time.

The claimant testified that Dr. N has advised her that she needs to have a repeat fusion as soon as possible. In addition, she stated that in conversations she had with Dr. N about returning to work, he told her that she is unable to work and that he could not understand why anyone would try to make her work in her condition.

On June 18, 1997, the claimant underwent a functional capacity evaluation (FCE). In a report of June 25, 1997, the physical therapist who conducted the testing stated that the claimant gave an "excellent effort" and that, therefore, the evaluation gave valid results. The report noted that the claimant was unable to lift objects from floor to waist and that she was unable to perform single limb activities on either lower extremity. The report concluded that the claimant could perform the job demands of any job that falls within the light physical demand level.

The hearing officer determined that the claimant did not have the ability to work in the filing period for the 11th compensable quarter. In her discussion section, the hearing officer noted that Dr. N's opinions were not "conclusory" in nature because Dr. N identified the reasons that the claimant needed to be off work, namely her increasing pain, his concern that the claimant's fusion was not solid and that she needed to be off work during the period of time a decision was made as to whether the claimant would have a third spinal surgery, a repeat fusion. As noted above, the question of whether the claimant had some ability to work was a question of fact for the hearing officer to decide and is subject to reversal only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Although medical evidence from the filing period is preferred, medical evidence outside the filing period can be considered and the hearing officer can draw inferences from the a evidence about a claimant's condition in the filing period. Texas Workers' Compensation Commission Appeal No. 960092, decided February 26, 1996. The hearing officer was acting within her province as the fact finder and the sole judge of the evidence under Section 410.165(a), in interpreting the medical evidence from Dr. N as demonstrating that the claimant did not have the ability to work during the filing period for the 11th compensable quarter. While the FCE indicated that the claimant could work at a light demand level, it was the hearing officer's responsibility to resolve that conflict. She did so by giving more weight to Dr. N's

opinion. Our review of the record does not demonstrate that the hearing officer's determinations that claimant could not work during the filing period and, therefore, that she is eligible for SIBS, despite her not having looked for work, are so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for reversing the hearing officer's decision on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Christopher L. Rhodes
Appeals Judge