APPEAL NO. 980103

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 his ninth compensable quarter.

The hearing officer held that the medical evidence did not support the claimant's contention that he was unable to work at all, and as he had not searched for work, she found that he had not made a good faith search for employment commensurate with his ability to work. She further found that his unemployment was not the direct result of his impairment.

The claimant has appealed, arguing that his restrictions are so severe he would not be able to perform any work. He argues that a sedentary release he was given a year before the filing period for this quarter should not have been considered. He argues that his treating doctor has recommended another surgery, and that his doctor has fully explained why he is unable to work. He asks that the decision be reversed. The respondent, who is the carrier, responds by arguing facts it believes support the decision.

DECISION

Affirmed.

The claimant was 22 years old when injured on June 15, 1992, while employed by (employer). Claimant's treating doctor for his back injury was (Dr. S). He had two back surgeries after this injury, on (injury date 2), and (injury date 3). Claimant also said he had a previous back surgery in 1990 after an earlier work-related injury. An MRI taken on October 6, 1997, was reported as showing some post operative changes at two lumbar levels but no recurrent herniation or stenosis. The report notes a good solid fusion with good alignment at the two levels. Claimant nevertheless contended that Dr. S told him he needs another surgery, although the second opinion process has not been undertaken. Claimant said he had discussed with Dr. S returning to work, and Dr. S said he could probably return about six or seven months after the anticipated surgery.

The filing period in question was May 13 through August 11, 1997. Claimant did not search for employment nor follow up on leads provided by a vocational counselor. He asserted he was unable to work because he was sore and his back would swell if he walked too much, and because his legs would become numb. He also said that Dr. S had not released him and this was another reason he did not look for work. Claimant had not worked since his injury.

Claimant disagreed with the report from a work capacity assessment he had undergone on January 2, 1997. The evaluator stated that claimant did not foresee returning to any type of occupation, and that he had always done heavy work and could not imagine doing anything else. Claimant reportedly told the evaluator that he could not try to work until Dr. S released him. The evaluator found symptom exaggeration and poor effort on the test, and felt he had not been adequately rehabilitated. He concluded that claimant could work at a light to moderate physical level. It was noted that claimant complained through some of his testing that he was having swelling, but this was not objectively detected by the examiner. In test lifting and squatting, the evaluator noted that claimant's knee flexion was full but on active testing he could not or would not bend his knees.

Dr. S's reports essentially report that claimant is not a candidate for gainful employment and cannot work because of back or leg pain. It is not clear if part time options or sedentary occupations were considered in Dr. S's evaluation. A letter dated May 2, 1997, to the vocational consultant states that claimant cannot return to his occupation as a warehouseman. Dr. S stated his opinion that claimant would have to be retrained to do sedentary work at a point nine to 12 months after his fusion was established. There is no explanation as to why retraining could not be undertaken before then. In a September 3, 1997, letter, Dr. S wrote that claimant could not work because he could not sit, stand, or walk for longer than 15 minutes without recurrence of pain (although claimant was taking pain relief medication). Dr. S said he could not perform any type of activity that involved pushing, pulling, squatting, crawling, stooping, bending, or climbing. Dr. S stated that claimant had continued evidence of spinal instability. The letter states that the claimant qualifies for SIBS. Claimant had moved away from the area where Dr. S was located, but continued to see him monthly, making a five-hour drive to do so. Claimant said he rested in the van while others in his family drove him.

The hearing officer indicated that she believed these letters were conclusory. Of course, a hearing officer is not precluded from considering conclusory opinions, but is not bound by medical opinions whether conclusory or not. We believe that the hearing officer considered but did not credit Dr. S's opinion, and she found a contradiction between his assessment of spinal instability with the CT scan a month later indicating a "good, solid" fusion. We feel it important to emphasize that 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 she 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," compliance with this requirement is effectively met by no search. However, we believe the burden is firmly on the claimant to prove that he indeed has "no ability" to work at all due directly to the physical injury. Restricting analysis only to the ability to perform the previous job is an incomplete analysis because the SIBS statute contemplates that the claimant will not be able to return to the prior employment and wage level, and because it compensates for unemployment or underemployment. Underemployment means not just

less wage working full time, but may mean fewer hours than the job held at the time of injury, if that is the maximum that the physical capabilities of the injured worker will allow.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here, and affirm the determination of the hearing officer as supported by sufficient evidence.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge