APPEAL NO. 980109

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 November 25, 1997. With respect to the issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the seventh 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 he is entitled to seventh quarter SIBS are against the great weight and preponderance of the evidence. In his response, the claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable left shoulder and low back injury on _____; that he reached maximum medical improvement on March 8, 1995, with an impairment rating of 17%; that he did not commute his impairment income benefits; that his preinjury average weekly wage was $380.59; and that the seventh compensable quarter of SIBS ran from August 28 to November 26, 1997, with a filing period of May 29 to August 27, 1997.

The claimant maintained that he 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.

On July 21, 1997, (Dr. L) examined the claimant at the request of the self-insured to provide an opinion on the claimant's work capability. In a letter of the same date, Dr. L stated:

> [Claimant] is a 67-year-old gentleman who is firmly convinced that he is unemployable for any sort of occupation. He has not worked in over 4 years, and I am most certain that he will not ever be willing or feel capable of

> returning to his work as a janitor from this time forward. However, he would be able to perform sedentary activities involving infrequent lifting no more than 10 to 15 pounds at a time. Nevertheless, as a practical matter he should be considered as incapable of returning to any productive occupation.

The claimant's treating doctor, (Dr. C), an orthopedic surgeon, testified by telephone at the hearing. He stated that he had last seen the claimant on November 12, 1997, and that the claimant has chronic low back pain and left lower extremity radicular pain resulting from the _____, compensable injury. Specifically, Dr. C testified that the claimant's on-the-job injury aggravated a preexisting condition. He testified that the claimant's condition is permanent in the sense that he has lumbar facet arthritis, degenerative disc disease, and chronic denervating lower extremity problems as shown by EMG and nerve conduction studies performed in September 1993. On direct examination, Dr. C testified that when the factors of the claimant's injury, as demonstrated by the objective testing, his age, and his educational level (no formal education) are considered together the claimant cannot return to any work. On cross-examination, Dr. C was asked if he would agree with Dr. L's assessment that the claimant could do sedentary work if his age and lack of education were not considered. Dr. C stated that he would not, noting that the EMG and nerve conduction studies revealed chronic denervation of the claimant's lower extremities. He explained that if the claimant were to work in a sedentary position, the sitting would cause the sciatic nerve to stretch and the claimant's pain from the denervation disease would increase. Thus, he maintained that the claimant's prohibition against working in a sedentary position had nothing to do with his age or education level; rather, it was related to the physical condition of denervation. On cross-examination, Dr. C was also asked if he had had any conversation with the claimant concerning what he could do and Dr. C responded that he is an orthopedic surgeon and not a social worker. On redirect examination, Dr. C stated that he would agree with Dr. L that the claimant could work in a sedentary position except that the denervation of the lower extremities excludes sitting.

Dr. C's progress notes were also admitted in evidence and they contain some conflicting opinions on the claimant's ability to work. In a note of November 26, 1996, Dr. C stated "I don't think the pt. can return to work." He noted that the claimant had lumbar facet DJD (degenerative disc disease), chronic lumbar sciatica, chronic denervation of the lower extremities and that he was 66 years old and speaks Spanish. Dr. C opined that the claimant could do no lifting, and that he could do no prolonged standing or sitting, which was defined as greater than 15 minutes. In a Specific and Subsequent Medical Report (TWCC-64) dated December 6, 1996, which refers to the November 26, 1996, examination, Dr. C stated:

> This patient cannot return to his regular course of work. He cannot lift over 15 lbs. No prolonged sitting. No standing. This will be detrimental to his back.

Dr. C's progress notes of April 29, 1997, June 10, 1997, and October 1, 1997, likewise

state that the claimant is unable to return to work. However, Dr. C's November 12, 1997, progress note provides that the claimant "can't return to hard labor."

The hearing officer determined that the claimant did not have the ability to work in the filing period for the seventh compensable quarter. The hearing officer determined that both Dr. C and Dr. L believed that the claimant was incapable of working in the filing period. As noted above, Dr. C was somewhat inconsistent in his opinion. At times, his opinion is stated in terms of the claimant not being capable of returning to work in a manual labor position. However, at other times his opinion is stated in broader terms that the claimant is not capable of any work. Specifically, Dr. C took issue with Dr. L's opinion that the claimant could work in a sedentary position, noting that the claimant has chronic denervation of his lower extremities which precludes prolonged sitting. Dr. C's progress notes indicate that the claimant cannot sit or stand for greater than 15 minutes. Dr. C testified that based upon the denervation, the claimant was unable to work and that "it has nothing do with age or education level," which is somewhat at odds with his progress notes which appear to consider age and education in making the assessment of the claimant's work abilities. 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). It was the hearing officer's responsibility to resolve the conflicts and inconsistencies in the evidence before him and to determine what facts had been proven. The hearing officer was acting within his province as the fact finder and the sole judge of the evidence under Section 410.165(a), in interpreting the medical evidence from Dr. C as demonstrating that the claimant did not have the ability to work during the filing period for the seventh compensable quarter. He was free to accept a part of the evidence from Dr. C and to resolve the conflicts and inconsistencies in that evidence in favor of a determination that, in Dr. C's opinion, the claimant was not able to work in any position, even a sedentary position, and that his inability to work was a result of the impairment from his compensable injury. 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 he is eligible for SIBS 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 fact that another fact finder may have drawn different inferences than the ones drawn by this hearing officer, which could have supported a different result, does not provide a basis for us to disturb the decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The self-insured argues that the hearing officer erred in finding that Dr. L believed that the claimant was not capable of any type of productive or gainful employment. It argues that when Dr. L's report is read as a whole, he only concluded that "as a practical matter [claimant] should be considered as incapable of returning to any productive occupation" because the claimant had convinced himself that he could not return to work. Assuming, without deciding, that the hearing officer erred in interpreting Dr. L's opinion, any

such error would be harmless because the determination that the claimant was unable to work in the filing period was supported by the evidence from Dr. C.

The self-insured also asserts error in the hearing officer's finding that the "Claimant attempted in good faith, with the assistance of his spouse, to find employment at 2 or 3 places of employment commensurate with his inability to work, and the rejections further support an inability to work." It is apparent from the hearing officer's decision and order that he found the claimant was entitled to seventh quarter SIBS under a no ability to work theory. We affirm that determination as not being so against the great weight and preponderance of the evidence as to compel reversal. Thus, the claimant was not required to make a search for employment in order to satisfy the good faith requirement in this instance. However, the hearing officer could consider that the claimant had made limited efforts to look for work nonetheless and that some of the employers he contacted indicated that they could not offer him employment because of his physical condition as corroborative of the determination that the claimant was unable to work. We perceive no error.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge