APPEAL NO. 980116

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 9, 1997. She (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 10th quarter. The claimant appeals this determination, contending that it is against the great weight of the evidence. The respondent (carrier) replies that the decision is correct, is supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____. She described her work limitations as an inability to "effectively" use her arms, hands, and upper body "to a productive purpose."

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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, "filing 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] for any quarter claimed." Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. The 10th quarter was from September 2, 1997, to December 1, 1997, and the filing period for this quarter was from June 3, 1997, to September 1, 1997.

The focus of this case was whether the claimant made the required good faith effort to obtain employment commensurate with her ability to work. Although she did some research on the Internet, it produced no job leads and no applications. She listed no employment contacts on her Statement of Employment Status (TWCC-52) for the 10th quarter and asserted that she had no ability to work at all during the relevant filing period. The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, 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 we have stressed the need for medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. *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.

A functional capacity evaluation completed on October 7, 1996, reflected an ability to work at a sedentary level. In a report of a July 8, 1997, visit, (Dr. A) also noted that she could do sedentary work.[1] The claimant also testified that she has a bachelor's degree and extensive computer training.

As noted above, whether the claimant has no ability to work is a question of fact for the hearing officer to decide. We will reverse a factual determination of a hearing officer only if it is so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of the hearing officer that the claimant did not make the required good faith job search effort and was not entitled to SIBS.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

[1]In her appeal, the claimant refers to two reports of Dr. A which indicate that she is "totally unemployable." These reports are not in evidence.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge