APPEAL NO. 980118

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 October 28, 1997, with hearing officer. The issue at the CCH was whether appellant (claimant) was entitled to supplemental income benefits (SIBS) for the sixth, seventh, and ninth quarters. The hearing officer determined that claimant was not entitled to SIBS for those three quarters, that he did not make a good faith effort to obtain employment commensurate with his ability to work, and that his unemployment was not a direct result of his impairment. On appeal, claimant contends that the "great weight of evidence is to [the] contrary [sic]." Respondent (carrier) responds that sufficient evidence supports the hearing officer's determinations and requests affirmance.

DECISION

We affirm.

Claimant contends that the hearing officer erred in determining that he is not entitled to SIBS for the sixth, seventh and ninth quarters. Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage (AWW) as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Good faith is a subjective notion and generally means honesty of purpose, freedom from intent to defraud and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then the employee may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. 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 a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he used to be a truck driver and that he injured himself on _____, moving big screen televisions. He said he has three herniated discs, that he has not had surgery, that he has moved to another state, that he did not look for work or work during the filing periods in question, and that he is and has been unable to work because of his pain and inability to "get around." Claimant said he takes pain medication and that he cannot sit, stand or walk for "any length of time."

Claimant's Statement of Employment Status (TWCC-52) for each quarter indicates that he did not work during the filing periods in question. In an August 29, 1996, letter, written a few months before the filing period for the sixth quarter, (PA) said that claimant had chronic cervical and lumbar radiculopathies, that he had persistent leg, arm, back, and neck pain, and that due to the persistent nature of his discomfort with associated nerve root impingement, "it would not be likely that [claimant] would be able to return to work." In a November 14, 1996, off-work slip, Dr. PA said claimant "needs to be excused from work until further notice." In an August 6, 1997, letter, Dr. PA said that claimant "will not be able to return to work due to the persistent nature of his discomfort associated with his nerve impingement from cervical and lumbar disc degeneration and radiculopathies as evidenced by MRI and EMG studies . . . ." In an August 26, 1996, report, (Dr. DO), who reviewed claimant's chart for carrier, stated that he reviewed claimant's medical records, and that he has severe reservations about claimant returning to truck driving duties, that claimant should undergo a functional capacity evaluation (FCE), and that claimant "would have to concentrate on a job that falls under a light-duty to sedentary job category."

The parties stipulated that: (1) claimant sustained a compensable injury on _____, 1994; (2) claimant's IR was 15%; and (3) claimant did not elect to commute his IIBS. The sixth quarter was from December 21, 1996, to March 21, 1997; the seventh quarter was from March 22, 1997, to June 20, 1997, and the ninth quarter was from September 20, 1997, to December 19, 1997. The qualifying period for each quarter was the 90 days preceding that quarter.

In this case, our review of the record does not indicate that the hearing officer's good faith and SIBS determinations regarding the sixth, seventh, and ninth quarters are so against the great weight and preponderance of the evidence as to be clearly wrong or

manifestly unjust. Cain, *supra.* Therefore, there is no basis for disturbing his decision on appeal. The hearing officer heard claimant's testimony about his work ability and his impairment, and he reviewed the medical evidence in this case. He was the sole judge of the medical evidence and he determined that the medical evidence did not establish that claimant had no ability to work at all. The fact that the evidence could have allowed different inferences under the state of the evidence does not provide a sufficient basis for reversing the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992. Regarding direct result, the hearing officer also determined that claimant's unemployment was not a direct result of his impairment. The hearing officer made this determination after judging the credibility of the evidence. After reviewing the evidence, we conclude that this determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge