APPEAL NO. 980135

Following a contested case hearing (CCH) held, on December 18, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the seventh compensable quarter. Claimant has appealed this conclusion and three related findings of fact for evidentiary insufficiency. The file does not contain a response from the respondent (self-insured).

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, that she reached maximum medical improvement on February 4, 1994, with an impairment rating of 36%, that she did not commute any portion of her impairment income benefits, and that the filing period for the seventh compensable quarter began on July 5 and ended on October 3, 1997.

The hearing officer's decision contains a summary of the evidence with which neither party takes issue. Accordingly, we will mention only so much of the evidence as is necessary for the decision. Claimant testified that she was injured on _____, while working as a cook for the self-insured. The medical records indicate that she slipped and fell while pushing a food cart, injured her right shoulder, neck, and back, and later underwent right shoulder surgery. She stated that she did not look for work during the filing period, that her treating doctor, (Dr. E), has advised her not to return to work "at this time," notwithstanding that a functional capacity evaluation (FCE) in January 1997 indicated that she could perform some work, and that Dr. E wants to try a multi-disciplinary approach to her problems, which include pain and depression. Dr. E wrote on October 29, 1997, that since the earlier part of the year, he has written many letters indicating that claimant is not able "to get and keep meaningful employment due to her myofascial back pain and depression," that she remains in "a curious limbo," and that she needs "multi-disciplinary help specifically tailored to bolster the prospect of success--namely re-entry into employment." Dr. E had written on August 4, 1997, that claimant was "still disabled, still deconditioned, still depressed, still unable to work due to the aforementioned." He wrote on July 22, 1997, that claimant "can not work" and that "this note is to address the period from 4/5/97 - 7/4/97 but also the next quarter through October."

Claimant said she had twice visited the Texas Rehabilitation Commission (TRC) and was told she could not be helped and that if Dr. E releases her for work, she will return to the TRC. (Ms. M) of the TRC wrote on November 3, 1997, that she spoke with claimant on that date and earlier in June 1997, and that claimant said she does not feel she is able to

participate in the rehabilitation process due to medical reasons and that her doctor would not release her for work or school.

Claimant's Statement of Employment Status (TWCC-52), dated "9/22/97," reflected claimant's receipt of $15.00 per week in wages for nine weeks in the preceding 13-week period. Claimant testified that during the filing period she cared for her infant granddaughter in her home, at first for three or four hours a day, three days a week, and later for five days a week, that she was paid $15.00 a week at first and later on, $50.00 a week. She acknowledged having to lift the baby to change the diapers and for feeding and so on. Claimant said that Dr. E told her she could engage in that activity at home but could not care for more children "at this time," and that he has not released her "to go look for work." Dr. E wrote on December 18, 1997, that claimant can try working in her home doing babysitting or some other flexible work since it is a low stress setting and that this is a reasonable beginning as long as it is sedentary with no lifting of more than five pounds, no stooping, minimal bending, no crawling, no overhead work, and limited sitting and standing. He further stated that if she gets appropriate counseling or is sent to a pain camp, she may then be enabled to graduate to full-time, light-duty work, and that "she was still fully disabled between 7/4/97 to 10/4/97 due to the aforementioned problems."

In his September 18, 1997, report to the self-insured, (Dr. C) stated that claimant told him "that none of the grandchildren stay with her and that she does not babysit them." He also stated that claimant's examination was essentially negative except for some right shoulder range of motion limitation, mild bulges at C4-5 and L40-5, and some depression. Dr. C felt claimant could probably work a full eight hour day or part-time in a light category, as the FCE found, and that "getting into a pleasant light-work situation would help her depression."

The January 3, 1997, FCE report stated that claimant was screened for symptom magnification and that she exhibited inappropriate responses in 50% of the tests. The report further stated that while it is not recommended that claimant return to her previous food service job, she is advised to enter vocational job retraining at a sedentary to light work level.

Claimant has challenged findings that during the filing period, she earned wages for part-time work providing day care services for her daughter, that she worked three days a week, five hours a day, and that she did not make a good faith effort to obtain employment commensurate with her ability to work. Not appealed is the finding that claimant earned $15.00 per week as wages for day care service for 15 hours of work. Claimant took the position at the hearing that during the filing period she had no ability to work and thus did not look for work. She seemed to characterize her babysitting in her home as preparation for workforce reentry rather than actual employment.

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." 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 a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." 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. The absence of a doctor's release to return to light duty 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.

We are satisfied that the challenged findings are 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951) The hearing officer could consider the results of the FCE, the opinion of Dr. C, the content of Dr. E's several letters on claimant's ability to work, and the fact that claimant did in fact work during the filing period in determining that she had an ability to work.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge