

APPEAL NO. 980136

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 January 2, 1997, with hearing officer. The issue at the CCH was whether the appellant, , who is the claimant, was entitled to supplemental income benefits (SIBS) for his sixth compensable quarter.

The hearing officer held that the claimant had some ability to work during the filing period in question and did not attempt to obtain employment commensurate with his ability to work. He further found that the claimant's unemployment was the direct result of his impairment.

The claimant has appealed, arguing that he proved through medical evidence that he was unable to work during the filing period, and that the only medical evidence showing he had some ability was based upon an examination well outside the applicable filing period. He argues that the "only reason" he had not returned to work was that his physician had not released him. The carrier responds that the decision of the hearing officer was correct and should be affirmed.

DECISION

Affirmed.

Claimant injured his back and neck while involved in a motor vehicle accident on _____, while acting in the course and scope of his employment with, (employer). Claimant said he had been employed for most of his working life as a truck driver. It was stipulated that the filing period for the sixth SIBS quarter ran from April 25 through July 23, 1997. Claimant said he had not looked for work during that period of time. However, claimant also testified that when he had a doctor's appointment with (Dr. K), his treating doctor, on July 24, 1997, he discussed with him the fact that a friend was going to start a business and wanted him to work with him, and that Dr. K told him he would allow it so long as claimant did not undertake activities which would hurt him. Dr. K released the claimant effective August 1, 1997, with restrictions on lifting and repetitive bending and twisting, and claimant went back to work changing oil in cars for a month but then sought and obtained a different job instructing others in truck driving.

The claimant said he had neck surgery but no back surgery. He said his back continued to bother him every day to varying degrees, but he had learned to live with it. Claimant said his condition had not changed throughout the filing period, and he had not gotten better but was about the same.

On March 6, 1997, the claimant had an MRI reported as unremarkable except for some disc desiccation at two lumbar levels. On April 24, 1997, Dr. K noted that the claimant complained of intermittent discomfort in his back. Dr. K recommended further evaluation of his lower back and suggested that he, "in the meantime, continue off work."

Claimant was examined by (Dr. H), as doctor for the carrier, on August 27, 1997. Dr. H questioned whether there was an objective basis for reports of pain, in the absence of objective test results or tender and trigger points on examination. Dr. H recommended further testing, and his report indicates one recommendation was a functional capacity evaluation. Claimant said he did not return to Dr. H for any further testing on advice of his attorney.

Dr. H referred to viewing a videotape (which is not in evidence) and seeing activities consistent with his demonstrated range of motion during the exam. Dr. H concluded that the claimant could work at the medium-duty level.

The provisions of the 1989 Act that added the SIBS program also incorporated the requirement that the injured worker search for employment commensurate with the ability to work to continue the entitlement to SIBS. Sections 408.142(a)(4) and 408.143(a)(3). As such, it is a transition benefit designed to support a worker in his or her return to the workforce before benefits end utterly 401 weeks after the injury date. See Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995. Only where there is solid medical evidence of an inability to work can no search be equated to a "good faith" search commensurate with ability. Being limited to work with restrictions is not the same as being unable to work. Texas Workers' Compensation Commission Appeal No. 941263, decided November 3, 1994.

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 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. The lack of a release from the doctor, standing alone, is not dispositive of the issue of ability to work.

Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It does not appear to us that the hearing officer based his decision upon the claimant's physical abilities that were well outside the filing period. He could conclude from claimant's testimony that he remained the same, along with evidence that the claimant discussed going back to work on the day after the filing period ended, as supporting the inference that he had similar abilities in the time period pertinent to the sixth quarter of SIBS.

We do not agree that the decision here is not supported by the record and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge