APPEAL NO. 980266
FILED MARCH 26, 1998

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 29, 1997, a contested case hearing was held in (City), Texas, with (hearing officer) presiding as hearing officer. The issues concerned whether the appellant, RP, who is the claimant, was entitled to his first quarter of supplemental income benefits (SIBS) and the amount of his average weekly wage (AWW).

The hearing officer held that the claimant had not made a good faith search for employment commensurate with his ability to work, but made no findings as to whether his unemployment was the direct result of his impairment. The hearing officer rejected the claimant's contention that he was without any ability to work during the filing period and found that he had some ability, however, restricted. The hearing officer consequently found that claimant was not eligible for SIBS. He further found that the claimant's AWW was $547.55.

The claimant has appealed, arguing that his treating doctor pronounced him totally disabled from any work and there is no evidence in support of the hearing officer's finding of fact that claimant had some ability to work. He argues that he should not be required to search for employment contrary to the recommendations of his physician. The carrier responds that the hearing officer's decision is supported and argues that the stipulation that the claimant made no job search supports the fact finding that he did not exert a good faith effort to find employment. There is no appeal of the findings on AWW.

DECISION

Affirmed.

Claimant injured his back on _____, while employed by (employer). It was brought out that he was released to light duty by his then treating doctor, (Dr. F), and went back to work for the employer in September 1996. Claimant said he was unable to continue working because of increasing pain; he was also diagnosed with two herniated discs in December 1996. His last day of work was January 4, 1997, and he pointed out that his duties at that point exceeded his restrictions. He went at this point to (Dr. M) because Dr. F was not being paid by the carrier. Dr. M took him entirely off work.

Claimant went to Dr. M after the benefit review conference to get written documentation of what his situation had been with respect to work. Dr. M supplied a letter dated December 2, 1997, but which was plainly intended to point out what the claimant's restrictions had been since January 4, 1997. It was stipulated that the filing period for the first quarter of SIBS ran from June 4 to September 2, 1997.

Dr. M's letter stated that claimant was unable to perform his reasonable and customary duties. He said claimant was not a candidate for surgery, and that he required heavy doses of pain medication, which resulted in lethargy and poor coordination, making it inadvisable for claimant to operate heavy machinery or vehicles. He stated that claimant's restrictions were: no prolonged sitting or standing for more than 30 minutes to an hour at a time, no lifting more than 10 to 20 pounds, no manual pulling or tugging heavy objects in excess of 10 to 20 pounds, no climbing, standing, stooping, or bending, no prolonged riding in vehicles, and no operation of heavy equipment and vehicles.

Dr. M concluded by saying that in light of such restrictions, he considered claimant "totally disabled from engaging in any substantial gainful employment" since January 4, 1997.

We must first emphasize that the "requirement" of looking for employment as an element of eligibility for SIBS is not imposed by the Texas Workers' Compensation Commission, but was established by the legislature. Section 408.142(a)(4). Whether this requirement is ludicrous for certain types of injuries is a matter that is more properly addressed to the legislature. 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. However, we have held that the burden of establishing no ability to work at all, at any form of gainful employment, 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.

It is worth emphasizing that the requirement to search for work is commensurate with the ability to work. This is not necessarily measured against a 40-hour work week. If the physical abilities of the claimant are such that he is, for example, capable of working only part time, then these are the jobs that should be sought. The SIBS statute compensates for "underemployment" as well as for being out of work entirely; a worker who has returned to work may be underemployed by virtue of being paid less or working fewer hours. We emphasize this because the claimant's position that he is

unable to work, as supported by Dr. M's letter, appears to be analyzed with reference only to his previous work duties or full-time employment.

It may be that another finder of fact would have evaluated the facts in favor of eligibility and found that the restrictions amounted to a practical inability to work at that point. However, Dr. M's letter, tied as it is to the ability of claimant to return to what he had done before, cannot be said to be conclusive on the issue of inability to work and, indeed, the restrictions enumerated in that letter set forth an area that can fairly be characterized as the hearing officer has done: "although limited, claimant had some ability to work during the filing period. . . ."

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). We affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge