APPEAL NO. 990006

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 9, 1998, a contested case hearing was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 13th, 14th, and 15th compensable quarters in that claimant had some ability to work and had not made a good faith attempt to obtain employment commensurate with his ability.

Claimant appealed, contending that he has a 25% impairment rating (IR) from the compensable injury and "a 70% disability rating from the (Military)" for a prior unrelated injury, stating that his treating doctor believed he was unable to work and discussing his various surgeries and psychological conditions from both the compensable injury and the prior unrelated injury. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior 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]."

It is undisputed that claimant was employed as a laborer and had sustained a compensable injury on _____, when he was involved in a motor vehicle accident (MVA). He sustained multiple injuries to both legs, left shoulder, liver, arms and head. Claimant had also been in another unrelated MVA while in the (Military) in 1983. Claimant testified that he has been diagnosed with a number of mental conditions, including depression, paranoid schizophrenia, multiple personalities, suicidal ideation and hostility toward others. Claimant testified that he has had multiple surgeries for various conditions due to the MVAs.

The parties stipulated that claimant reached maximum medical improvement (MMI) on October 5, 1993, with a 25% IR; that IIBS were not commuted; that the filing period for the 13th compensable quarter began December 17, 1997, and the filing period for the 15th compensable quarter ended on September 15, 1998; and that claimant had not sought

employment during any of the filing periods at issue. Claimant alleges that he is entitled to SIBS during the quarters at issue based on a total inability to work. 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*.

Claimant clearly has a number of both physical and psychological problems. Dr. O performed a functional capacity evaluation and in a report dated March 18, 1997, evaluated claimant as being physically able to do light to medium work with some restrictions (such as no climbing ladders or any overhead work). Dr. D, claimant's treating doctor, in a note dated April 3, 1997, indicated that he had "no strong disagreement" with Dr. O's evaluation. Claimant was subsequently referred for a psychological evaluation. In a comprehensive 10-page psychological evaluation, Dr. S, a psychologist, reviewed claimant's medical and social history, including the 1983 accident, and concluded that claimant's "personality characteristics . . . have intensified over the subsequent six years [since the compensable injury]." Dr. S recommended certain treatment to include medication and psychotherapy, suggested "prognosis in treatment is poor" and concluded that if there is successful intervention "it is thought that the most appropriate type of employment setting for him would involve a work setting in which he was not required to interact with others and in which he could work at his own pace." (Claimant testified that he enjoyed playing with his computer, mowing the yard, gardening and fishing.) In another report dated August 18, 1998, from Dr. F, a psychiatrist, to Dr. D, Dr. F commented that claimant " is an intelligent man" (claimant testified that he has at least one associate college degree), that there is "no psychological reason to preclude his employment" and that the type of employment be determined by claimant's "job skills, vocational interests and his mobility." An undated report by Dr. R apparently performed in determining claimant's IR commented that claimant has a "recent memory deficit" which "could be a safety impairment on any job."

Claimant appeals the following findings of fact:

FINDINGS OF FACT

9. During the filing periods for the 13th, 14th, and 15th compensable quarters, a good faith effort to find employment by Claimant could have included seeking employment, or attempting to establish a business, as a carpenter, woodworker, picture framer, or in some other type of field where Claimant would interact with other people on a limited basis.

10. During the qualifying periods for the 13th, 14th, and 15th compensable quarters, Claimant did not attempt in good faith to obtain employment commensurate with Claimant's ability to work.

(The hearing officer's findings on direct result, in favor of claimant, have not been appealed.) Basically, claimant's argument is that at the time he was certified to have been at MMI "it was determined I was unable to work" and that condition has not changed. Claimant discusses his physical condition, surgeries and various injuries at some length and concludes with summaries of Dr. R's, Dr. O's, Dr. S's and Dr. F's reports. Claimant's appeal states that "[Dr. F] said psychologically I should work part-time in a low-stress, creative environment." While we do not read Dr. F's report to say that, the quoted statement is certainly supported by other medical evidence, particularly Dr. S's report. Further, we believe that is exactly what the hearing officer is holding in Finding of Fact No. 9 when he lists some areas of employment which could generally be viewed as "part-time . . . low-stress, creative" work where the claimant would interact with other people on a limited basis. The medical reports generally state claimant is physically able to perform light to medium work while psychologically he has some difficulty interacting with other people (other than his wife). That does not constitute a total inability to work. As the hearing officer's finding and Dr. S's report suggest, claimant has the ability to do some work and should make efforts to at least attempt to seek part-time employment in a low-stress, creative environment where claimant has limited contact with other people. We find the hearing officer's decision supported by the evidence, including Dr. O's and Dr. S's reports and claimant's own testimony and contentions.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Judy L. Stephens
Appeals Judge