APPEAL NO. 990023

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 14, 1998. He (hearing officer) determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 15th quarter. Claimant appeals, contending that the credible medical evidence showed that he had no ability to work during the filing period in question. Respondent (carrier) replies that the Appeals Panel should affirm the hearing officer's decision and order. The parties did not appeal the direct result determination in claimant's favor.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he is not entitled to SIBS for the 15th quarter. He asserts that he had no ability to work during the filing period and that he met the good faith SIBS criterion. Claimant contends that Dr. B is not a neurologist and is not qualified to give medical evidence regarding claimant's condition.

The hearing officer determined that claimant sustained a compensable injury to his back, neck, head, and right leg on _____. The parties stipulated that: (1) claimant had an impairment rating (IR) of 17%; (2) the filing period in question was from June 26, 1998, to September 24, 1998; and (3) claimant did not commute any of his impairment income benefits (IIBS).

Claimant testified that he sustained a compensable injury on _____, when he slipped and fell on some stairs, and then someone opened a steel door that hit him in the head, causing him to lose consciousness. Claimant stated that he was unable to work during the filing period in question. He said he continues to have seizures, throbbing headaches, dizziness, short-term memory problems, balance problems, and low back pain. He testified that his medications make him drowsy and that he spent his days during the filing period watching television. Claimant said he did not look for work or earn wages during the filing period in question.

The record contained conflicting medical evidence regarding whether claimant had any ability to work during the filing period in question. Claimant's neurologist, Dr. M, stated that claimant is "100% disabled" and that he "is unable to return to work." Dr. B, who stated that he is an independent medical examination doctor, stated that: (1) claimant refused to be seen for an examination and that Dr. B was told to base his report on claimant's functional capacity evaluation (FCE); (2) Dr. B reviewed claimant's FCE and medical records; (3) claimant's FCE report states that claimant gave submaximal effort and exhibited four out of five Waddell's signs; and (4) claimant's FCE indicated that he should be able to do sedentary work. Dr. S stated that claimant has been driving his car, that there are no positive objective clinical abnormalities demonstrated with respect to claimant's lumbar spine, and that, "from an orthopedic standpoint, the patient may return to full time employment" without restrictions.

The hearing officer determined that: (1) claimant's condition has stayed the same from _____, until the end of the filing period in question; (2) during the filing period in question, claimant was unable to perform the type of work he did before; (3) during the filing period, claimant had some ability to work; (4) claimant did not meet his burden to prove good faith in this case; and (5) claimant's "decrease in earnings" is a direct result of his impairment.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage 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. 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 has no ability to work at all, then he 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*. The claimant has the burden to prove he has no ability to work because of the compensable injury. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. When a claimant alleges a total inability to do any work, that contention generally must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 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 are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has 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.

In this case, the claimant contended that he had no ability to work. Appeal No. 950582, *supra*. The hearing officer was the sole judge of the credibility of the medical evidence and determined whether the medical evidence showed that claimant had no ability to work. The hearing officer specifically found that claimant was capable of doing some work. Therefore, because claimant did not look for work, the hearing officer did not err in determining that claimant did not meet the good faith job search requirement in this case. There was evidence from which the hearing officer could have determined that claimant was capable of doing

sedentary work. The hearing officer made his determinations regarding good faith and claimant's ability to work based on the evidence before him. Because the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for his. Cain, *supra.*

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge