APPEAL NO. 990086

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 17, 1998, a contested case hearing (CCH) was held. He determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the second compensable quarter. Appellant (carrier) appeals, contending that the hearing officer erred in determining that claimant had no ability to work and that he is entitled to SIBS. The direct result determination in claimant's favor was not appealed. The appeals file does not contain a response from the claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant had no ability to work and that he is entitled to SIBS for the second quarter. Carrier asserts that a functional capacity evaluation (FCE) showed that claimant was able to work at a light to medium level, that claimant's doctor, Dr. W, did not clearly state that claimant was unable to perform any and all work, and that the evidence shows that claimant failed to cooperate with the Texas Rehabilitation Commission (TRC). Carrier also asserts that the medical evidence from Dr. W was "conclusory."

The parties stipulated that: (1) claimant had an impairment rating (IR) of 19%; (2) he did not commute any of his impairment income benefits (IIBS); and (3) the second quarter filing period was from July 3, 1998, to October 1, 1998.

Claimant testified that he sustained a compensable injury to his neck, back, hand, and shoulder performing drilling work for (employer). He said he underwent a two-level lumbar fusion and that he also underwent surgery to his cervical spine. Claimant testified that he had very little ability to function during the filing period, that he is able to sit and stand for only short periods, and that prolonged sitting causes muscle spasms. Claimant said his treating doctor, Dr. W, said that he will not ever be able to return to any work.

The evidence conflicted regarding claimant's ability to work during the filing period. An FCE from Dr. S states that claimant is capable of performing duties at a level between "light and medium." However, in September 1998, claimant's treating doctor stated that, "within reasonable medical probability, [claimant] will not be able to carry on any type of work type activity in the future."

The hearing officer determined that: (1) claimant wants to work; (2) claimant had no ability to work during the filing period for the second compensable quarter; (3) claimant's decrease in earnings during the filing period "is a direct result of claimant's impairment from his compensable injury"; (4) claimant did not refuse services with the TRC; (5) claimant

attempted in good faith to obtain employment commensurate with his ability to work; and (6) claimant is entitled to SIBS for the second quarter.

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 or she has no ability to work at all, then he or she 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. *See* Texas Workers' Compensation Commission Appeal No. 982251, decided November 4, 1998.

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 had the burden to prove 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. There was evidence from Dr. W that claimant could not perform any work. Although Dr. S indicated that claimant could do light-duty or medium-duty work, the hearing officer chose to credit the evidence from Dr. W regarding claimant's ability to work. There was evidence that, before September 1998, Dr. W had stated that claimant could not return to the type of work he had done previously. However, the hearing officer determined what weight to give to this evidence. The hearing officer made his determinations regarding claimant's good faith and ability to work based on the evidence before him and he determined what weight to give to the various medical reports. 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.

Carrier contends the hearing officer erred in determining that claimant did not refuse to cooperate with the TRC. Carrier contends that claimant told TRC employees that he was having knee replacement surgery and that because this is not a true statement it constituted a refusal to cooperate with the TRC. Claimant testified that he contacted the TRC and that TRC employees told him that there was nothing that could be done for him at that time. He said he was told that he may be able to obtain services if his health improves. He testified that he previously had a total knee replacement and that he underwent patella resurfacing surgery to his knee in August 1998 for an unrelated knee injury. A July 1998 letter from a TRC vocational rehabilitation counselor states that the TRC was unable to begin the profile process for claimant "due to knee replacement surgery scheduled in August." The hearing officer determined what weight to give to this evidence and concluded that claimant did not refuse to cooperate with the TRC. The hearing officer also considered whether the medical evidence in this case was "conclusory" or "ambiguous" and made his determinations based on the evidence before him. We have reviewed the evidence and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge