

APPEAL NO. 990136

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 29, 1998. On the single issue before her, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the seventh compensable quarter. The appellant (carrier) appeals the finding of fact, and corresponding conclusion, that the claimant was unable to perform any work during the filing period for the seventh quarter as a direct result of his impairment and urges that the finding was against the great weight and preponderance of the evidence and is manifestly unjust or, alternatively, that the finding is not supported by any evidence. Carrier also urges error in the admission of medical evidence outside the filing period in issue. No response has been filed.

DECISION

Affirmed.

The claimant sustained a compensable back injury in _____, underwent laminectomy and foraminotomy spinal surgery in April 1995, was certified at maximum medical improvement on September 7, 1995, and was assessed a 27% impairment rating. The claimant has not returned to work and testified that his condition continued to deteriorate resulting in a second surgery consisting of L2-S1 decompression with bilateral fusion at L2-5 on October 20, 1998. Since the filing period for the seventh quarter ran from June 26, 1998, through September 24, 1998, this second surgery was close to a month after the filing period. Carrier objected to the records concerning this second surgery, urging that they were inadmissible being outside the filing period. This assertion of error we find lacking in merit. Clearly, each quarter of SIBS is individually decided on its own facts and the medical evidence concerning that particular filing period is generally the more pertinent. However, medical evidence outside the particular filing period can be admitted and considered where relevant and, as here, in close proximity to the period in issue. Texas Workers' Compensation Commission Appeal No. 951832, decided December 15, 1995. See *also* Texas Workers' Compensation Commission Appeal No. 970910, decided July 2, 1997.

The claimant did not seek employment during the filing period and testified that he was not able to work at all. He stated that during the filing period his back pain and condition continued to worsen to the point that surgery was scheduled and ultimately performed in October 1998. He testified that his doctor and his surgeon told him he could not work during the filing period and they had taken him off work. He stated he was only able to walk a little bit, that he used a cane during the filing period, and that he was able to drive his car and do some errands and limited daily activity.

Medical reports from the claimant's treating doctor and his surgeon describe the claimant's treatment and surgery that he has had and state that he is totally disabled and

not able to work. A report from June 9, 1998, from Dr. L states "continue no work status" and one from July 1, 1998, states "permanently disabled." Surgery was concurred in a report dated August 3, 1998, and Dr. L reiterates that the claimant "cannot work." The surgeon stated in a September 11, 1998, note that the claimant will be disabled from "6-26-98 to 9-24-98."

Two videos were introduced by the carrier from September 1997 and October 6 and 7, 1998, which generally shows the claimant walking with a cane, driving his car, getting gasoline, and taking some laundry into a laundromat. Carrier also introduced a functional capacity evaluation from December 1, 1995, which indicated that while the claimant was at very high risk for musculoskeletal injury and had severe limitation on activity, his physical demand level is of a sedentary to light classification. A report from a Dr. A, who saw the claimant in June 1998, indicated that the claimant was not able to return to any type of heavy job; that he, Dr. A, did not think there were many activities which are left for the claimant to do; and that he suspected that the claimant was going to have disability and he would be surprised if the claimant returns to work. Carrier also introduced some job leads from an employer specialist which the claimant apparently did not contact.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. 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." 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. 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 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*. 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 hearing officer found from the medical and other evidence before her that the claimant established that he had no ability to work during the filing period. Clearly, there was a degree of conflict in the evidence regarding no ability to work, a matter generally left to the resolution and determination of the fact finding hearing officer. Texas Workers' Compensation Commission Appeal No. 982727, decided January 7, 1999. While the evidence may be said to give rise to inferences different than those found most reasonable by the hearing officer, we have held this is not a sound basis to disturb her findings and conclusions. Texas Workers' Compensation Commission Appeal No. 971678, decided October 9, 1997. Only were we to conclude, which we do not from our review of the evidence, that the findings and conclusions of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be reason to reverse her decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Here, the claimant's testimony and medical evidence show his severe chronic pain and worsening condition to the point of a second back surgery shortly after the end of the filing period. The medical evidence is not merely conclusory when considered in its totality and the fact that videos show some limited activity does not preclude a determination of no ability to work. We have not held that severe chronic pain, where there are significant debilitation effects on the ability to work as supported by medical evidence, cannot establish an inability to work and thus satisfy the good faith requirement to seek employment commensurate with one's ability to work. Texas Workers' Compensation Commission Appeal No. 982844, decided January 20, 1999.

For the reasons stated, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge