APPEAL NO. 990182

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 6, 1999, a contested case hearing (CCH) was held. In response to the issues before him, the hearing officer determined that respondent (claimant) had no ability to work during the filing periods for the fifth through tenth quarters and that she is entitled to supplemental income benefits (SIBS) for those quarters. The hearing officer also found that claimant did not permanently lose entitlement to SIBS and that appellant self-insured (referred to as "carrier" herein) is relieved of liability for a portion of tenth quarter SIBS because claimant was late in filing her Statement of Employment Status (TWCC-52). Carrier appeals, contending that claimant did not prove that she is entitled to SIBS, that the evidence shows she had an ability to work, and that claimant permanently lost entitlement to SIBS. 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, that she met her burden to prove the good faith and direct result requirements, and that she is entitled to SIBS. Carrier asserts that there is evidence that claimant magnified her symptoms and that she did not cooperate with the Texas Rehabilitation Commission (TRC).

The parties stipulated that: (1) claimant had an impairment rating (IR) of 20%; (2) she did not commute any of her impairment income benefits (IIBS); and (3) the filing periods for the fifth through tenth quarters ran from January 29, 1997, through October 29, 1998.

Claimant testified that she injured her back, arms, and legs when she moved a bed while working as a housekeeper on _____. She said that during the filing periods in question she could not work and her doctor told her that she could not work. Claimant said she had continuing pain, occasional numbness in her legs, and difficulty sitting and standing for long periods. Claimant said she contacted the TRC but that an employee told her that "there was nothing they could do." Claimant denied that she refused services from the TRC.

The medical evidence conflicted regarding whether claimant had an ability to work during the filing periods in question. There was evidence from Dr. B and Dr. S that claimant should be able to do some work. However, in a December 1997 report, claimant's treating doctor, Dr. G, stated that claimant is "unemployable at this time because of limitations of sitting, standing, walking, and lifting." He said "the parameters within which her capability falls are such that she could not function" in a workplace situation. In a November 1998 letter, Dr. G said he read the medical opinion of Dr. S, that he disagreed with Dr. S's

assessment of claimant's ability to work, and indicated that he did not find claimant to be a "malingerer." In a January 1998 letter, Dr. G said:

> [Claimant], as a result of the injury she sustained . . . , is impaired to the extent that she is unemployable at this time. Sitting and standing is tolerated no more than thirty minutes without pain in the low back area and hips radiating into the legs. The pain in the affected area is aggravated by walking, bending and stooping as well. [Claimant's] capability of lifting is limited to two to three pounds. Repeated lifting of that weight or weight in excess of two to three pounds increases the pain in the low back area. [Claimant] is on numerous medications, many of which cause drowsiness and impair her ability to drive a motor vehicle. . . .

Dr. G also noted that claimant had developed clinical depression.

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 (AWW) 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. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 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, claimant had the burden to prove she 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 during the filing periods in question. There was evidence from Dr. G that claimant could not work due to pain, inability to sit or stand for very long, and to the effects of medications. Although Dr. B and Dr. S stated that claimant exhibited signs of symptom magnification and indicated that she should be able to work, the hearing officer chose to credit the evidence from Dr. G over that from Dr. B and Dr. S. The hearing officer made his determinations regarding good faith and ability to work based on the evidence before him and he determined what weight to give to Dr. G's reports. The hearing officer also made a determination that claimant did not refuse to cooperate with the TRC and apparently considered that factor in making his determinations in this case. Because the hearing officer's good faith determinations are 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.* Because the hearing officer found entitlement to SIBS for these quarters, we also affirm the determination regarding permanent loss of entitlement.

Carrier contends that the hearing officer's determinations were inconsistent because he determined that claimant is "entitled" to tenth quarter SIBS but also determined that carrier is "relieved of liability" for a portion of tenth quarter SIBS. Claimant was late in filing her TWCC-52 for the tenth quarter.

At first glance, these determinations might seem inconsistent. However, the hearing officer was merely addressing two different sections of the 1989 Act in making his determinations. He applied Section 408.142 and made the determination that claimant had met her burden to prove SIBS entitlement under that section. He then considered Section 408.143(c), which states, "Failure to file a [TWCC-52] . . . relieves the insurance carrier of liability for [SIBS] for the period during which a [TWCC-52] is not filed." After a hearing officer makes a determination that a claimant is "entitled" to SIBS for a certain quarter pursuant to Section 408.142, the hearing officer may still determine that carrier does not have to pay, or is "relieved of liability," where that claimant has not filed the TWCC-52 for that quarter in a timely manner. We perceive no inconsistency or error in the manner in which the hearing officer addressed the above-mentioned sections of the 1989 Act.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge