

APPEAL NO. 990236

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 13, 1999, a contested case hearing was held. With regard to the issue before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the sixth, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th and 20th compensable quarters because claimant "had some ability to work," that claimant did not make good faith efforts to seek employment and that claimant's unemployment was not a direct result of his impairment.

Claimant appeals, asserting the medical evidence establishes an inability to work and that claimant's unemployment was "the direct result of his 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 impairment rating (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]."

The parties stipulated that claimant sustained a compensable (repetitive trauma injury to his left shoulder and elbow) injury on _____, that claimant reached maximum medical improvement on September 17, 1992, with an 18% IR, that IIBS have not been commuted and to the dates of the various compensable quarters. The hearing officer found that the filing period for the sixth compensable quarter was from October 1 through December 29, 1994, and that the other filing periods generally ran from December 30, 1995, through June 25, 1998.

Claimant alleges 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." 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.

Claimant testified that he has not had surgery for his compensable injury but that, a few years ago, he developed heart problems and underwent open heart surgery. Upon the hearing officer’s inquiry, claimant’s attorney represented that there has been no Texas Workers’ Compensation Commission determination that the heart condition (and surgery) were work related. In evidence as Claimant’s Exhibit No. 1 is a stack of 31 sheets of paper labeled “various documents” (many of which appear to be duplicates of each other). A series of Specific and Subsequent Medical Reports (TWCC-64) dated February, April, September and December 1997, apparently dealing with his compensable arm and shoulder condition, all release claimant to light duty. A handwritten prescription note dated “6/2/98” appears to say claimant “has been unable to work for 1 years” because of “heart failure.”

The hearing officer asked claimant why he had not looked for work after his treating doctor released him to light duty in 1997. The hearing officer commented that “[n]o explanation was given for not looking for work”; however, our understanding of the translation was that claimant said he did not have money to go around and look for work.

The hearing officer determined that claimant failed to meet his burden of proving his entitlement to SIBS for the quarters at issue. We agree. There is no medical evidence of a total inability to work due to the compensable injury. Claimant’s attorney conceded no determination has been made that claimant’s heart condition was part of the compensable injury and even claimant’s testimony was that he made no attempt to seek employment; not because of his injury, but rather because he did not have money to go around and look for work.

We find the hearing officer's findings to be amply supported by the evidence and, accordingly, we affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge