APPEAL NO. 990241

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 6, 1999. She (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the seventh and eighth quarters. The claimant appeals these determinations, expressing his disagreement with them. The respondent (carrier) replies that the claimant's appeal is untimely and that otherwise the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

We find the claimant's appeal timely based on the receipt of his appeal in the field office on January 28, 1999. *See* Texas Workers' Compensation Commission Appeal No. 951375, decided August 16, 1995. However, because the claimant did not testify at the CCH, we will not consider matters in the nature of testimonial evidence presented for the first time in his appeal.

The claimant, who is 66 years of age, sustained a compensable injury on _____. He reached maximum medical improvement on June 9, 1995, and was assigned a 30% impairment rating.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "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 [SIBS]." The seventh quarter was from August 25 to November 23, 1998, and the eighth quarter was from November 24, 1998, to February 22, 1999. The filing periods for these quarters were the preceding 90 days.

The hearing officer found that the claimant did not make the required good faith job search effort in each quarter and did not establish that his unemployment was a direct result of his impairment. The claimant challenges the direct result findings on the basis that this was not an issue and he was not prepared to address it at the CCH. The Request for Benefit Review Conference (TWCC-45) prepared by the carrier dealt only with seventh quarter SIBS. The parties agreed to add the issue of eighth quarter SIBS at the CCH. The block checked on the TWCC-45 states that the carrier was contesting the entitlement to SIBS, or the amount of SIBS or "whether the injured employee's underemployment is a

direct result of the impairment." The carrier also typed on the form that the claimant "has not made a good faith effort to seek employment." The report of the benefit review conference states the carrier's position as that the claimant did not make the required good faith effort and that his unemployment was not a direct result of his impairment. Under these circumstances, we cannot agree that direct result was not in issue. The claimant should have been prepared to address this question at the CCH.

As noted above, the claimant did not testify at the CCH, but instead relied on his documentary evidence that he had no ability to work. He made no job search efforts during the seventh quarter filing period. He wrote on his Statement of Employment Status (TWCC-52) for eighth quarter SIBS that he was unable to work, but also listed on the form nine employment contacts over six days of the filing periods. He also wrote on the eighth quarter TWCC-52 that he was offered a job on October 23, 1998, by "X-tell Long Distance" doing "Phone L.D. Sales." He apparently declined this job.

Ms. A, the adjuster in this case, testified that she reviewed a video surveillance tape which showed the claimant walking down stairs, with a package, and getting into and out of a vehicle. She also said that she assigned Mr. C to this case to assist the claimant in identifying appropriate job opportunities. During the seventh quarter filing period, she said, Mr. C contacted the claimant and sent him a list of potential jobs. The claimant in response faxed Mr. C stating:

> Don't send me anymore bad news from [Ms. A]. If you do, my Brother will come see your ass. Don't run out of town, he will find you.

Ms. A said she interpreted this as a threat and decided that the claimant would not cooperate with Mr. C. Apparently, there was no further contact between Mr. C and the claimant. She further testified that she contacted the prospective employers listed on the eighth quarter TWCC-52 and considered many of the jobs to be demanding and beyond the claimant's "fairly significant restrictions."

The claimant's medical evidence regarding his ability to work consisted of the opinions Dr. K and Dr. L. Dr. K wrote on September 8, 1998, that the claimant was "incapable of sitting in a job for more than a few hours and he is incapable of prolonged standing." On October 28, 1998, Dr. K he wrote that he did not think the claimant could return to work because of his chronic pain, difficulty with mobility, surgery and ongoing need for medications. He considered claimant "totally disabled and unemployable." He also commented that the claimant has chronic bowel and bladder difficulties, "but I do not think these override his other limitations as far as employment and just compound the problem." In a letter of January 22, 1998, Dr. L wrote that the claimant was not able to return to work because of his "recent severe and significant abdominal problem" (adynamic ileus), bilateral total hip replacements, and chronic debilitating lower back pain. On July 23, 1998, nine months after the left hip replacement, Dr. L wrote that the claimant was "totally disabled" even from light work because of his chronic lower back discomfort. On December 2, 1998, Dr. L referred to the claimant's bilateral hip replacement, total right

knee replacement, partial colectomy and right elbow arthrotomy and concluded that he could not return to any type of work. He also commented with regard to sedentary work ability that this would be directly related to his "ability to get to the place of work and his ability to sit for any protected [sic] length of time." Dr. T examined the claimant at the request of the carrier on June 18, 1998. He noted claimant's urinary and bowel incontinence and his depression in addition to his other physical limitations. He concluded that the claimant "might be capable of returning to the workforce in a Sedentary capacity. Although he could return to the workforce at this level, he has significant restrictions." In particular, he observed that the incontinence and bowel problems would preclude him from working where "complete cleanliness is required throughout the work day." He further commented that "theoretically" the claimant could return to work within his restrictions of sedentary or light type of duty."

As noted above, the claimant did not look for work during the seventh quarter filing period because he considered himself unable to work at all. 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 we have also stressed the need for medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. *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 that the claimant had some ability to work. The claimant appeals this determination, arguing essentially that the hearing officer misinterpreted Dr. T's opinion and that, when considered in common sense terms and in its totality, it reflected a practical inability to work. The carrier agreed that the claimant had "significant" limitations, but argued that these limitations did not amount to an inability to do any work at all. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). In her role as fact finder, she gave more weight to Dr. T's opinion and concluded that it established that the claimant had some ability to work. Such a conclusion is clearly at odds with Dr. K's opinion, but was arguably consistent with Dr. L's comments in his December 2, 1998, letter which could be read as endorsing some limited ability to work. We will reverse a factual determination of a hearing officer only if that determination is so

against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case and observing that another hearing officer may have found otherwise, we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the opinion of Dr. T, found credible and persuasive by the hearing officer, sufficient to support her finding that the claimant had some ability to work during the seventh quarter filing period. Because he failed to seek employment commensurate with this ability, he was not entitled to seventh quarter SIBS.

The hearing officer did not expressly find that the claimant had no ability to work during the eighth quarter filing period. She did, however, find that he failed to make the required good faith job search effort during this filing period. Because of this finding and because the claimant relied on the same evidence to establish an inability to work in each filing period, we infer a finding that the claimant had some ability to work during the eighth quarter filing period. We affirm this implied finding for the same reasons that we affirmed the finding of some ability to work in the seventh quarter filing period.

In separate findings of fact, the hearing officer determined that the claimant did not make the required good faith job search during the eighth quarter filing period and that during the period he was offered a job, but did not accept it. The Appeals Panel has generally defined good faith as a subjective notion characterize by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993. Whether a claimant has made the required good faith effort is also a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. In this case, Ms. A testified about her efforts to assist the claimant in finding work and his response, as quoted above. Ms. A also testified that she believed many of the nine jobs listed on his TWCC-52 for this quarter were "fairly demanding" and beyond his "significant restrictions." The claimant elected not to testify at the CCH and therefore he did not present a response to Ms. A's testimony. Nor did he attempt to explain what motivated him to write the note back to Mr. C.[1] Such evidence somewhat directly reflected his state of mind and attitude toward looking for work. Under our standard of review, we believe the hearing officer's finding that there was no good faith job search in the eighth quarter filing period had ample evidentiary support in the record and we will not reverse it on appeal.

With regard to the note itself from the claimant to Mr. C, the claimant argues that because the hearing officer quotes only this note verbatim in her listing of the evidence, it "gives me the feeling that the Judge [sic] made his [sic] decision on this alone." The decision and order reflects that the hearing officer considered all the evidence, including the medical evidence, in reaching her findings. We perceive no error in her simply restating this brief evidence verbatim in the decision and order and cannot agree that it reflects improper conduct on her part.

[1] His attempt to do so only at the appeal stage and not at the CCH will not be considered.

The claimant also appeals the finding of fact that he rejected a job offer during the eighth quarter filing period. In his appeal, he challenges the genuiness of this job offer and calls the finding "not entirely accurate." As pointed out above, he chose not to testify at the hearing and explain this job offer there for the hearing officer to consider. Given this failure to present this evidence at the CCH, we will not consider it on appeal.

Finally, the claimant appeals the determinations of the hearing officer that in neither quarter did he establish that his unemployment was a direct result of his impairment. Given our affirmance of the findings of no good faith job search in either quarter and that he rejected a job offer within his restrictions in the eighth quarter, we find the evidence sufficient to support the direct result findings for each quarter.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge