APPEAL NO. 990278

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 21, 1998, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the fifth and sixth compensable quarters. The hearing officer's findings on the claimant's unemployment being a direct result of his impairment have not been appealed.

Claimant appealed, largely regarding matters not at issue or raised at the CCH, fulminating about insurance companies in general and the respondent (carrier) in particular, about the perceived unfairness of the Texas Workers' Compensation Act, and about a third party settlement and submitting various other materials not offered or admitted at the CCH. We will accept claimant's appeal as a request to review the sufficiency of the evidence supporting the hearing officer's decision. Claimant inferentially requests that we reverse the hearing officer's decision and render a decision in his favor. 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 (AWW) 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 injury on _____; that he reached maximum medical improvement on September 6, 1994, with a 51% impairment rating; that impairment income benefits were not commuted; and that the filing periods in issue are from May 13 through November 10, 1998. Although the exact nature of claimant's injury was not apparent from this hearing, Texas Workers' Compensation Commission Appeal No. 982295, decided November 12, 1998 (Unpublished), where we affirmed the hearing officer's decision of entitlement to SIBS for the fourth quarter recited:

The claimant testified that on _____, he sustained a work-related injury from inhalation of welding fumes. Subsequent to the injury, he suffered strokes and in 1994 had

heart surgery. He said that during the filing period he continued to suffer from facial paralysis, speech impairment, and problems with balance and walking, and that he took blood pressure medication and medications for depression and sleeping. In Texas Workers' Compensation Commission Appeal No. 951097, decided August 17, 1995, we affirmed the hearing officer's decision that the claimant has a 51% IR as determined by the designated doctor.

As in Appeal No. 982295, claimant testified that he continued to suffer from facial paralysis, speech impairment, tinitus (ringing in the ears) and emotional problems.

This is a total inability to work case and claimant testified that he did not seek any employment during either of the filing periods but that he had registered with a local community college placement office. Claimant also testified that he made some writing efforts and attempted to sell a short story. Claimant testified that he took three courses (nine semester hours) during the spring 1998 semester, which began January 1998, but that after two months he dropped one of the courses, leaving him with six semester hours, and that he successfully completed the other two courses. He said that in the summer of 1998 he completed the course he dropped, that he has about 99 semester hours towards a bachelor's degree, and that he expects to complete his degree requirements in the fall of 1999. In that the filing period for the fifth quarter began on May 13, 1998, claimant would have finished the math course that he dropped in the spring during that filing period. Claimant did not take any courses in the second summer session. Claimant testified that he enrolled in three courses (nine credit hours) in the fall and attended classes until November 1998, when he was forced to withdraw because of a knee injury. Claimant testified that he had eye surgery in August 1998 (unrelated to the compensable injury) and knee surgery on December 1, 1998 (also unrelated to the compensable injury). Claimant testified that he thought he would be able to perform a job which principally involved sitting.

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." 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.

Some of claimant's medical reports were excluded upon carrier's objection due to lack of timely exchange. A report, dated January 20, 1999, admitted into evidence, from Dr. P, claimant's current treating doctor, discussed claimant's recovery from the knee surgery, claimant's hyperglycemia, hyperlipidemia, and ear wax buildup. Dr. P did not comment on claimant's ability to work. Also in evidence is a brief note dated January 19, 1999, from Dr. L regarding claimant's knee surgery. The hearing officer comments that the "medical evidence in this case is simply insufficient to establish a total inability to work." We would add that claimant's own testimony that he registered with the community college placement office and about his ability to do a "sitting job" belies a total inability to work. The hearing officer also commented:

> During the filing period for the sixth quarter, the Claimant enrolled in three separate classes and remained in the classes for the majority of the filing period. In November 1998, the Claimant withdrew from the classes. Assuming, without deciding, that the Claimant was enrolled at the local community college during the entire filing period, he still has an obligation to see employment commensurate with his ability.

We agree that the hearing officer's comments were correct during the filing period for the sixth quarter and we find the hearing officer's determinations that claimant had not made a good faith effort to obtain (or seek) employment commensurate with his ability during either filing period to be supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge