

APPEAL NO. 990292

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 27, 1999, a contested case hearing was held. With regard to the only issue before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the sixth compensable quarter because he had not made a good faith effort "to look for work" commensurate with his ability and that claimant's unemployment was not a direct result of his impairment.

Claimant appeals, contending that the medical evidence and claimant's testimony "establishes that he was unemployable" and that he had "made a good faith effort to seek employment commensurate with his physical abilities." 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 the claimant sustained a compensable (back, neck and shoulders) injury on _____; that claimant reached maximum medical improvement (MMI) on September 16, 1996, with a 15% IR; that IIBS have not been commuted; and that the filing period for the sixth compensable quarter was from July 31 through October 29, 1998.

Claimant had been employed by (employer), as a bus driver. (Claimant got injured when a luggage bin door came down and hit claimant's neck, back and shoulders.) Claimant testified that he was released to light duty in July 1996 by Dr. M., claimant's treating doctor, but that the employer had no light duty available. It is undisputed that claimant was eventually released to full duty and returned to his preinjury job with the employer in October 1996. Claimant continued in that position until May 17, 1998, when he quit his job "to become an independent driver." Although not entirely clear from the testimony, claimant was unable to start his business because of the substantial start-up

expenses. Claimant testified that he then began taking care of his granddaughter and was being paid \$80.00 a week, which he considered to be a gift “out of, you know, kindness of their heart.” Claimant filed for SIBS for the fifth compensable quarter (not at issue here), which was decided adversely to claimant in Texas Workers’ Compensation Commission Appeal No. 982630, decided December 18, 1998 (Unpublished).

Claimant submitted two applications for SIBS for the sixth quarter. The first application listed no job contacts and stated “[Dr. M] will not permit me to search for or perform any work. See attached Drs. report.” Attached is a form report of July 31, 1998, which states:

(X) Please excuse from X Work (search) From 07-31-98 To present & possible future.

Dr. M explains that claimant has “pain and discomfort of a fluctuating type.” Also in evidence is another, similar, report dated October 28, 1998, from Dr. M. A functional capacity evaluation (FCE) which was performed on August 31, 1998, stated that claimant “did not demonstrate the ability to return to work as a bus driver for [employer].” The FCE does not note that claimant had, in fact, worked for the employer as a bus driver for 19 months after achieving MMI for his injury. The FCE is positive for Waddell signs showing symptom magnification. The benefit review conference (BRC) for this case was held on December 3, 1998, apparently shortly after claimant received the hearing officer’s decision in the case that resulted in Appeal No. 982630. At the BRC claimant filed a second application for SIBS for the sixth compensable quarter, alleging some 32 job contacts between August 3 and September 28, 1998. Claimant explained that Dr. M did not want him to work but that “I’m looking for work because I’m requested and ordered to by rules and regulations.” In addition, claimant apparently, for the first time, informed the carrier that he was earning \$80.00 a week caring for his granddaughter.

Regarding claimant’s contention of a total inability to work, we noted in Appeal No. 982630, that the Appeals Panel has held 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. In this case, the only medical evidence of a total inability to work is Dr. M's two form reports. In addition, we note that the hearing officer could find that claimant had demonstrated some ability to work by caring for his granddaughter.

Regarding the claimant's job contacts, claimant only found 10 of the 32 job contacts through the newspaper and the remainder were through cold calls. In addition, the hearing officer could consider the timing of claimant's job search as well as the reasons claimant gave for engaging in a job search (that he was ordered to do so). We have many times held that good faith is an intangible quality with no technical meaning or statutory definition. Texas Workers' Compensation Commission Appeal No. 950346, decided April 26, 1995. In assessing whether claimant's efforts amounted to good faith, it is appropriate to look to the manner of the job search, the timing, diligence and forethought and those other tangible manifestations of good faith. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. From our review of the evidence, and applying our standard of review on factual sufficiency of the evidence, we cannot conclude that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge