APPEAL NO. 990296

On January 28, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). The appellant (claimant) requests reversal of the hearing officer's decision that he is not entitled to supplemental income benefits (SIBS) for the fourth quarter. The respondent (self-insured) requests affirmance.

DECISION

Affirmed.

Section 408.142(a) provides that 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 claimant during the prior filing period. Rule 130.104(a) provides that an injured employee initially determined by the Texas Workers' Compensation Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent quarters if the employee, during each filing period: (1) has been unemployed, or underemployed as defined by Rule 130.101, as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. The claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

This case concerns an assertion of no ability to work. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he had no ability to work at all during the filing period, 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. In Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, the Appeals Panel stressed the need for medical evidence to affirmatively show an inability to work if that was being relied on by the claimant, and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, the Appeals Panel noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred."

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement on November 7, 1996, with a 22% IR; that he

did not commute IIBS; that he made no attempt to seek employment during the filing period for the fourth quarter; that the fourth quarter was from November 12, 1998, to February 10, 1999; and that the filing period for the fourth quarter was from August 13 to November 11, 1998 (the filing period). There is no appeal of the hearing officer's finding that claimant's unemployment during the filing period was a direct result of his impairment.

On _____, claimant was employed as an English teacher by the self-insured when he fell in a hole in the classroom floor and injured both knees. At the time of that accident, he was recovering from left knee surgery done in September 1994. Claimant underwent right knee surgery in March 1995, and in August 1995 returned to work teaching for the self-insured for two and one-half months. He said he had too much pain to continue to work. Claimant underwent another surgery on his right knee in January 1996. Claimant began seeing Dr. FU for pain management in June 1996 and Dr. FU referred claimant to Dr. FO, who performed claimant's third right knee surgery in August 1996. Claimant said that in August 1997 he returned to work teaching for the self-insured for six days when his knee brace broke and he reinjured his right knee. He said he has not worked since that time and has continued to see Dr. FU and Dr. FO. The claimant has undergone physical therapy. He attended a pain management program for 20 days, 19 of which were in the filing period and the 20th day occurring after the filing period. Claimant said that his doctors have told him that his left knee will have to be operated on when his right knee gets well. He has not had surgery on the left knee following his injury of _____.

Claimant said he did not earn any wages or look for any work during the filing period. He said that during the filing period he was unable to do any type of work due to the pain in his knees, the trouble he has with standing and sitting, and the effects of his pain medications. He said his pain medications make him fuzzy headed and disoriented and that he has to be careful when driving his vehicle. He said he wears various types of knee braces. He said that during the filing period he would walk 12 to 15 minutes a day for exercise and that that increased his pain. He said that Dr. FU has told him he is unable to work. He said that during the month and a half just prior to the CCH he had been more active than during the filing period.

Dr. FU wrote in March 1998 that claimant was having substantial problems with his right knee, that he needs surgery on his left knee, that until the right knee is stabilized surgery will not be done on the left knee, and that until the left knee is operated on and stabilized claimant remains unable to work. Claimant underwent a functional capacity evaluation on April 30, 1998, and in the report of that evaluation KA wrote that she does not feel that claimant can return to gainful employment and that he needs to undergo additional therapy to strengthen his right knee so that surgery on his left knee can be done. Dr. FU wrote on May 5, 1998, that claimant remains unable to work and that he might be able to return to light-duty work when he completes a chronic pain program. Claimant was examined by Dr. C at the carrier's request on June 2, 1998, and Dr. C wrote in a report of that date that he had reviewed claimant's job description and that he felt that claimant "could resume those activities." Dr. C added that claimant should not lift more than 20

pounds, should have a restriction on squatting and climbing, and needs to limit his time at the chalkboard somewhere between 15 and 30 minutes out of every hour.

Dr. FU stated in an oral deposition taken on August 19, 1998, that the claimant is unable to work because of instability of both knees, chronic pain, inability to stand for more than 10 minutes, and pain medications he has claimant take. Dr. FU also stated that after claimant's last knee surgery, claimant was able to get off his crutches but that claimant wears knee braces, and that he disagrees with Dr. C's report that claimant is able to work. Dr. FU wrote on October 28, 1998, that claimant "has been unable to work from August, 1998, through November."

Dr. FO wrote on September 28, 1998, that he had been following claimant for a prolonged period of time and that claimant has been unable to work since his surgery in August 1996 and that he was currently still unable to work due to his right knee. On November 6, 1998, Dr. FO wrote that he felt that it would be possible for claimant to return to his job as a schoolteacher if modifications could be made in his work so that he can sit most of the time and have to do only a minimal amount of standing or walking.

The hearing officer found that claimant had the mental and physical ability to do some work, although limited, during the filing period and that claimant did not make a good faith effort to seek employment commensurate with his ability to work during the filing period. He concluded that claimant is not entitled to SIBS for the fourth quarter. Claimant contends that the evidence shows that he had no ability to work during the filing period and points out that he was awarded SIBS for the third quarter. In Texas Workers' Compensation Commission Appeal No. 982973, decided January 29, 1999 (Unpublished), the Appeals Panel affirmed a hearing officer's decision that claimant was entitled to SIBS for the third quarter based on that hearing officer's finding that claimant was totally unable to work during the filing period for that quarter, which the Appeals Panel said was supported by sufficient evidence. The Appeals Panel noted that the hearing officer who decided the third quarter SIBS issue could choose to give more weight to the opinion of Dr. FU than to the opinion of Dr. C and that he could consider the opinions of Dr. FO. Although claimant was awarded SIBS for the third quarter, that does not make him automatically entitled to fourth quarter SIBS. In Texas Workers' Compensation Commission Appeal No. 941053, decided September 20, 1994, the Appeals Panel noted that eligibility for each quarter of SIBS is dependent upon the facts pertinent to that quarter and that a ruling on a specific quarter does not guarantee benefits for every subsequent quarter. In Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996, we stated that medical evidence from the filing periods is clearly relevant but that other medical evidence from outside the filing periods, especially that which is relatively close to the filing periods, may also be relevant to the condition of the claimant during those periods.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in

the evidence, including conflicts in the medical evidence, and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The hearing officer who decided the issue of fourth quarter SIBS could give more weight to the medical evidence that indicated that claimant has some ability to work than to evidence to the contrary. An appellate level body is not a fact finder and does not normally pass upon the credibility of the witnesses or substitute its judgement for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge