APPEAL NO. 990310

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 14, 1999. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the fourth, fifth, and sixth quarters. The claimant appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence. The respondent (self-insured) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained compensable injuries, which, as he described them, were to his right shoulder (rotator cuff tear), right hip (sprain/strain), neck and back (sprain/strain), and groin (hernia), in a slip and fall on _____, while working as a park technician (ranger) for the self-insured, and for which he was assigned a 26% impairment rating (IR).

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 fourth quarter began on May 16, 1998, and the sixth quarter ended on February 12, 1999. The filing periods for these quarters were the 90 days preceding each quarter. The hearing officer determined that the claimant failed to make the required good faith job search in each filing period and did not establish that his unemployment in each filing period was a direct result of his impairment.

The claimant made no job search efforts in each filing period and contended that he had no ability 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 medical evidence submitted to support the claimant's position that he had no ability to work consisted primarily of the testimony and written opinions of his treating doctor, Dr. L, D.C. In his testimony, Dr. L stated that the claimant had no ability to work because of "problems" associated with his compensable injuries. He based this conclusion on his long course of treatment since March 3, 1994, and the subjective complaints of the claimant. He testified that the claimant is in pain "most of the time"; cannot write for more than 15 minutes; can only sit or drive for up to 45 minutes; cannot stand for more than 45 minutes; cannot walk for more than 45 to 60 minutes; and cannot crawl or push and pull. He did not think that a functional capacity evaluation (FCE) of January 1998,[1] which placed the claimant at a light physical demand category, was valid or complete. He admitted he did not see a video surveillance tape which showed the claimant walking his dog for about an hour, but from a description of its contents did not believe it contradicted his opinion about the claimant's inability to work.

In undated letters, Dr. L said that he was writing about disability for September, October, November and December 1997 and January and February 1998; that the claimant was advised not to return to work because of injuries related to his work-related injury; and that it is highly probable that the claimant would aggravate or worsen his condition if he returned to work. In a brief letter dated April 6, 1998, Dr. L wrote:

> A car is able to travel 160 mph. But it would not be a good idea to push a car to travel 160 mph on a continuous basis.

In another undated letter, received by the carrier on November 8, 1998, Dr. L referred to the claimant's IR as 36%, not the correct 26%, and described the claimant's job at the time of his injury as a park technician. He concluded that the claimant was unable to return to that type of work.

[1] A report of an FCE dated January 28, 1998, states that the claimant was evaluated to see if he could return to his usual and customary job as a park technician; that the job requires lifting 20 pounds occasionally and 10 pounds frequently; that he can lift 20 pounds occasionally and 10 pounds frequently; that he was not able to do floor to knuckle and knuckle to shoulder tests because his heart rate reached sub-maximal levels and tests were discontinued; and that it was recommended that another FCE be conducted at a later date to see if he meets his job requirements.

The claimant testified about his education background, including extensive college credits and courses taken during his 23-year career in the (military). He stated that he received care through the Department of Veterans Affairs (VA) and was diagnosed with post-traumatic stress disorder (PTSD) as a result of three combat tours in Vietnam. The claimant said that the PTSD showed itself some 18 months after his injury as a result of stresses associated with dealing with the self-insured and limits his ability to work in public. No medical documentation of this condition or its effect, if any, on his ability to work was offered into evidence. The claimant did not, however, contend that the PTSD was part of his compensable injury or that his unemployment during the filing periods was a result of his PTSD. He further said that his condition as related to his compensable injuries has not improved. He did agree with the FCE that he could lift 10 pounds and 20 pounds occasionally, but said he did this by compensating for his right hand weakness with his left hand. Also in evidence was a resume which reflects extensive work experience and job skills.

As noted above, the claimant had to affirmatively establish that he had no ability to work. Whether he did or did not have any ability to work was a question of fact for the hearing officer to decide. The medical evidence consisted solely of the opinions of Dr. L. While Dr. L concluded that the claimant had no ability to work, he also described various physical limitations imposed on the claimant. The hearing officer, in an extensive discussion of the evidence, pointed to problems he found in accepting Dr. L's testimony at face value, including Dr. L's statement in one letter that the claimant's IR was substantially more than it actually was and his unfamiliarity with the claimant's course of treatment with the VA or the surveillance tape. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). He did not find Dr. L credible in his assertion that the claimant had no ability to work during the filing periods. 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, we find the evidence sufficient to support the determination of the hearing officer that the claimant had some ability to work. Because the claimant did not make a good faith job search commensurate with this ability to work, he was not entitled to SIBS for the quarters in issue.

Having affirmed the finding that the claimant failed to make the required good faith job search, we also find the evidence sufficient to affirm the further determination of the hearing officer that the claimant's unemployment during these quarters was not a direct result of his impairment.

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

_____
Gary L. Kilgore
Appeals Judge