APPEAL NO. 990355

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 22, 1999. The issue at the CCH was whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his 13th quarter of eligibility.

The hearing officer found that the claimant was not entitled to SIBS, because he failed to search for employment commensurate with his ability to work. He found that his unemployment was the direct result of his impairment.

The claimant has appealed, pointing out the evidence he believes supports a complete inability to work. The respondent (carrier) asserts that the decision is supported by the evidence and should be affirmed.

DECISION

Affirmed.

Claimant was injured on _____, when he slipped and fell at a construction site he was inspecting for (employer). He broke his left leg. Claimant had surgery in 1993. He said that his leg ended up shorter as a result of the injury, and he has an insert in his left shoe.

The filing period in question ran from July 1 through September 28, 1998. Claimant agreed he had not sought any work. Claimant said he had continuing pain in his leg from the ankle to above the break area during that period of time. He said he walked with a limp as a result. Claimant estimated that the longest he could walk at a stretch was 15 to 20 minutes. At the time of the CCH, claimant was 77 years old. He testified that he had a few other health problems, notably diabetes and prostate cancer, neither of which affected his ability to function. A letter from his urologist verified that his cancer did not affect his ability to work.

Claimant denied that it had been his original intent to stop working at 75 years of age. His treating doctor was Dr. W; other doctors treated him for nonwork-related conditions. Dr. W wrote on September 2 and 9, 1998, that the claimant was completely unable to work due to his leg. Dr. W explained that claimant had significant delay in healing of his fracture and developed dysvascular disease as a result. An earlier July 8, 1998, treatment note stated that claimant was still unable to work.

Claimant had a functional capacity evaluation (FCE) performed at the request of Dr. S. The FCE report was dated July 14, 1998, and found that claimant had a sedentary work function. However, the report went on to note that the claimant demonstrated performance "inadequate to return to work full duty and would severely limit his ability to perform repetitive work at this point." The report noted that he had a 40-minute sitting tolerance,

and a two-minute walking and two-minute standing tolerance. The FCE found that the claimant's previous work fell into the light-work category. Dr. S, who had ordered this FCE, evaluated it and concluded that the claimant was permanently disabled. He noted that claimant's effort was valid and maximal during this examination. Claimant said that he had visits from some vocational counselors for the carrier who suggested jobs to him, but he did not follow up on these because Dr. W told him he was unable to work. The claimant said he had pursued, until one and one-half years ago, a hobby of building and running model trains. A transferable skills analysis was done near the end of the filing period, on September 15, 1998. This report took into account the prior FCE and claimant's experience and education, and identified five sedentary and two light-duty jobs that claimant had the skills to do. However, the evaluator noted that the sedentary recommendations did not take into account the time that would be required in sitting to perform them.

Claimant was examined by Dr. M for the insurance company, who told him he did not see why he could not return to the type of work he used to do. Claimant disagreed, because he could no longer climb a ladder or walk correctly. Dr. M's report of December 28, 1998, found that claimant had a 10 to 15 degree rotational deformity in his lower left extremity. He also had atrophy in his calf. Dr. M stated, however, that claimant had a full active knee and ankle motion, and there was no objective evidence of an injury that would prevent him from returning to his preinjury work.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated 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. We have held that 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 that 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 injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. 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 very short discussion in the decision indicates that the hearing officer used Dr. M's report as the basis for finding an ability to work. However, this evaluation was not performed until near the end of what would be the filing period for the 14th quarter. While we have said that inferences may be drawn from medical evidence not strictly within the filing period for the disputed quarter, we are troubled when such medical evidence, particularly that used well after the end of the quarter, is weighed against more current, and

pertinent, medical evidence from within the filing period. Nevertheless, the hearing officer could weigh all the evidence and determine that although the claimant might not be able to return to full-time work, he was not totally without ability to find some work. Consequently, the fact that different inferences could be drawn from the evidence here will not, in and of itself, lead to reversal where there is some evidence that supports the inferences reached by the hearing officer. We accordingly affirm the decision as not being against the great weight and preponderance of the evidence.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge