APPEAL NO. 990482

Following a contested case hearing held in Texas, on February 10, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the sole disputed issue by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer, determining that during the first quarter filing period claimant had some ability to work and did not seek employment, concluded that he is not entitled to SIBS for that quarter. Claimant has appealed, asserting that he met his burden to prove that he made a good faith attempt to obtain work commensurate with his ability to work both with medical records, which state physical restrictions showing he was "very limited" in what he could do, and with the Statement of Employment Status (TWCC-52) which reflects job contacts and contact with the Texas Rehabilitation Commission (TRC). The respondent's (carrier) response asserts the sufficiency of the evidence to support the challenged determinations of the hearing officer.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury; that he reached maximum medical improvement on November 19, 1997, with an impairment rating (IR) of 18% and has not commuted any portion of his impairment income benefits (IIBS); that the first compensable quarter began on December 2, 1998, and ends on March 3, 1999; and that the filing period for that quarter began on September 3 and ended on December 2, 1998 (all dates are in1998 unless otherwise stated).

The hearing officer's finding that during the filing period claimant was unemployed as a direct result of his impairment has not been appealed and has become final. Section 410.169.

Claimant testified that on _____, while employed as a derrick man for a drilling company, he injured his back when he was pulled off balance four times while swinging to the side the heavy drill pipes being pulled from the drill hole; that he had previous lumbar spine surgery in 1994 and returned to oil field work in 1995; that he underwent two-level lumbar spine fusion surgery in 1997 by Dr. Z; that he has a spinal stimulator implant; that he has been treated by Dr. D for approximately one year; and that he is also seeing a chiropractor, Dr. M. He said he takes pain and muscle relaxing medications three times a day. Claimant further testified that Dr. Z felt he could return to work and that Dr. D said he could return to "extra lite duty" for four hours a day and that he disagreed. When asked directly, "Can you work?," claimant responded, "No," and stated his opinion that he cannot work at any kind of job. He further stated that despite his disagreement with Dr. Z and Dr. D that he could do some work, he nevertheless did seek employment in November at the

places listed on his TWCC-52. He also said he was to pick up a paper at Dr. D's office soon after the hearing which would state that he is not able to work. Claimant also said that he cannot read or write; that Dr. Z referred him to the TRC where he was tested; and that the TRC is awaiting a writing from Dr. D as to whether or not he can work. He further stated that he cannot mow the yard or rake leaves and that he cannot sit for more than 30 minutes without discomfort.

According to claimant's TWCC-52, he sought cashier's jobs at a convenience store on November 24th, at a food store on November 28th, at a department store on November 30th and December 2nd, and at a discount store on December 1st. The TWCC-52 also reflected that he contacted the TRC on November 25th. Asked how he could function as a cashier when he could neither read nor write claimant acknowledged that the type of cash register used would make a difference.

According to a February 9th report of a functional capacity evaluation, claimant's physical demand classification was sedentary.

Dr. Z wrote on January 20th that claimant has permanent restrictions against repeated bending, stooping, or lifting greater than 10 pounds; that claimant's future treatment plan will consist of pain management; and that in his opinion, claimant was able to return to work performing light-duty functions after his MMI date.

According to the February 6th report of Dr. PM, the designated doctor who certified to an MMI date of "11/19/1997" with an 18% IR, the assessment was status post anterior lumbar interbody fusion at L4-5 and L5-S1, status post discectomy at L4 and L5, and chronic low back pain.

Dr. Z wrote on October 14th that he completed a form for the TRC stating that claimant is capable of modified work, standing for two to four hours at one time in total, sitting for one to two hours at one time for two to four hours total, and walking for two to four hours at one time and total. Dr. Z further stated that claimant should not climb, nor lift more than 10 pounds occasionally, nor bend, squat, kneel, or reach overhead, but that he can work six to eight hours in one day. Dr. Z also commented that he had not seen claimant in four months.

On November 4th, Dr. D reported that claimant can return to sedentary work for probably four hours a day but that he is not to perform any heavy lifting, bending, prolonged sitting or standing, twisting, crawling, kneeling, ascending ladders, and so on.

On September 16th, Dr. M wrote Dr. D, who had referred claimant, stating that claimant's diagnosis is lumbar subluxation and lumbar intervertebral disc syndrome, that claimant's is a chronic and complicated case, and that he estimates 40 to 60 visits, three times a week, for chiropractic treatment. On a "disability record" form, Dr. M wrote on August 12th that claimant's total disability dates are August 21st to "unknown," and on

November 9th, from that date to "unknown," that claimant has been disabled from August 21st, continues to be totally disabled, and that in his opinion, claimant's disability is permanent.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

Claimant's assistant did not assert, in either opening statement or closing argument, whether claimant's theory of his good faith attempt during the filing period to obtain employment commensurate with his ability to work was based on having proved a total inability to perform any type of work at all, or on the number and quality of job search contacts he did make, as indicated on his TWCC-52, or on both theories.

As for the theory of the total inability to work, 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." 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 light duty 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*.

Under either theory, or both, we are satisfied that the hearing officer's determination that claimant failed to prove he met the "good faith" criterion for SIBS is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could consider the opinions of Dr. Z and Dr. D, as well as the FCE report, in determining that claimant had some ability to work during the filing period. As for the employment search effort that claimant said he made, the hearing officer apparently did not find that evidence credible since in her discussion she states that claimant did not seek employment during the filing period.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge