APPEAL NO. 990489

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 22, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that appellant (claimant) had the ability to work at the light physical demand level, that claimant made some limited attempt to seek employment, but that claimant had not made a good faith effort to obtain employment commensurate with her ability and, therefore, claimant was not entitled to supplemental income benefits (SIBS) for the ninth compensable quarter. The hearing officer's finding that claimant's unemployment was a direct result of her impairment has not been appealed.

Claimant appeals, asserting that the medical evidence and claimant's testimony establishes that she made a good faith effort to obtain employment commensurate with her ability to work. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

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, and amount of, [SIBS] for any quarter claimed.

The parties stipulated that claimant sustained a compensable (low back) injury on _____, that claimant reached maximum medical improvement on December 26, 1995, with a 15% impairment rating and that impairment income benefits have not been commuted. The parties appear to agree that the ninth quarter filing period is the 90 days prior to November 5, 1998. The parties stipulated that claimant earned no wages during the applicable filing period.

Claimant initially contended that she had a total inability to work. Dr. H in a report dated September 23, 1997, comments that he doubts that claimant will ever return back to work and recommends a repeat functional capacity evaluation (FCE). 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*. An FCE performed on February 23, 1998, indicates that claimant has a "self perception" that she is disabled and she is not capable "of working an 8 hour day." Claimant testified, and the FCE noted, that "during the course of a regular day (when the weather is nice) she walks about two miles, with intermittent rests." Claimant was found to be able to work at the light physical demand level. Dr. L, D.C., in a May 5, 1998, report states that claimant "cannot maintain and begin gainful employment at this time" and that she is "unemployable." Dr. L contended:

> I feel she is permanently disabled from normal work activities.
>
> * * * *
>
> At this point I do not anticipate [claimant] ever having a pain free state and I do not anticipate her having the capacity for regular work or even light work. Sedentary work is out of the question as well because of the prolonged sitting requirement that she is incapable of. She had difficulty even driving her car for distances over 10 or 15 minutes because her back begins to spasm with a great deal of pain. She is therefore limited in her travel and would also have difficulty in terms of transporting herself to a job site on a regular basis.

Dr. P, on a work-status form dated September 9, 1998, simply checks the word "none" and writes "4 (four)" weeks.

Although claimant maintained that she had a total inability to work, at the CCH she testified that she had made some 21 telephone job contacts during the filing period and began reciting the names of prospective employers. The hearing officer commented that claimant had named only nine contacts and the claimant explained some were call backs. The hearing officer asked if those were the same contacts that claimant asserted to have made in a prior quarter and claimant agreed they were. The alleged job contacts claimant made were not listed on the Statement of Employment Status (TWCC-52) nor were they otherwise documented. Carrier represented that those job contacts had not been mentioned at the benefit review conference.

The hearing officer, in her Statement of the Evidence, noted the February 1998 FCE, Dr. H's report of March 2, 1998, where he agreed with the FCE report and restrictions, and

stated that he Dr. H believes claimant "should be able to work an eight-hour day" with certain restrictions. The hearing officer concluded that there was insufficient medical evidence to corroborate claimant's contention of a worsening condition and total inability to work, stating:

> Although the evaluation by [Dr. L] was performed after the FCE, it states what activities the Claimant cannot physically perform but [sic, does] not state what she could do. Taking into account the Claimant's testimony and the medical evidence, the Claimant failed to prove she had a total inability to work during the filing period.

The hearing officer went on to state:

> Since the Claimant had an ability to work, albeit limited by her physical restrictions, she was required to seek employment commensurate with that ability. . . . The Claimant testified that she made approximately 21 contacts over a short period of time during the filing period. This information was not documented on her SIBS application and they are the same contacts she made in the prior SIBS quarter. Claimant testified that she did not conduct a job search over the entire filing period because "she got mad." Claimant has failed to meet her burden that she made a good faith effort to obtain employment commensurate with her limited ability to work.

Claimant states in her appeal that the medical evidence and her testimony establish that she made a good faith effort to obtain employment commensurate with her ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We are satisfied that these findings are 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 more recent FCE results in which Dr. H concurred and claimant's testimony about the nature and extent of her efforts to seek/obtain employment in the ninth quarter filing period and that those contacts were the same as she had made in a prior filing period.

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge