APPEAL NO. 990548

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 February 18, 1999. He (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the first quarter. The claimant appeals this determination, expressing her disagreement with it. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable right shoulder injury on _____. She was later diagnosed with reflex sympathetic dystrophy (RSD) and fibromyalgia. She testified that she has swelling and pain in virtually every joint and has "hot, throbbing" pain throughout her body. She reached maximum medical improvement on September 15, 1997, and was assigned a 21% impairment rating (IR).

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (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 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. 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]." The first SIBS quarter was from December 2, 1998, to March 2, 1999, and the filing period for this quarter was the preceding 90 days.

At issue in this case is whether the claimant made the required good faith job search during the filing period. She testified that she made no job searches because she believed, based on her own and medical opinion, that she had no ability 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." 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 requirement 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 diagnoses of RSD and fibromyalgia were made in December 1995. In 1996, she was released to light-duty work and returned to work for about three weeks in early 1997. She said she stopped working because it was beyond her physical ability. Dr. F, the current treating doctor, wrote in a report of October 28, 1998, that during the filing period the claimant "was unable to hold even a light duty job or sedentary job because of flares of her fibromyalgia." At the same time he issued a "physical profile work sheet" which reflected no overhead work, no standing over three hours, no lifting over 10 pounds, no sitting over two hours and that the claimant was off work from September 1998 through March 1999. On December 14, 1998, he wrote, "I retract previous limitations given" pending a functional capacity evaluation (FCE). The FCE was completed on January 27, 1999. It concluded that there was "significant submaximal effort and/or symptom magnification." She was placed in the light-duty category. Dr. F commented on this FCE:

> The patient has severe deconditioning. Her work level would be sedentary, but I do not think in reasonable medical probability that she will be able to obtain and maintain employment as a result of her chronic pain.

Dr. F also referred the claimant for psychological evaluation.[1] Dr. M, Ph.D., in an evaluation and report of August 24, 1998, noted that the claimant "may have overendorsed symptomatology, perhaps as a 'plea for help.'" He suggested referral to the Texas Rehabilitation Commission. Dr. K, Ph.D., examined the claimant on October 3, 1998, and concluded that the claimant "would have a great deal of difficulty dealing with work-related stress due to her constant preoccupation with physical pain . . . . She cannot function independently in the work place because of her poor physical condition. She would depend on others for even simple activities that require physical effort . . . ."

The hearing officer considered this evidence and found that the claimant had some ability to work during the filing period and that, not having looked for work at all, she failed to make a good faith effort to obtain employment commensurate with her ability to work. Hence, he found her not entitled to first quarter SIBS. The claimant appeals this determination, contending that the reports of Dr. K and Dr. F establish an inability to work. As noted above, whether the claimant had some ability to work was a question of fact for the hearing officer to decide. As factfinder, the hearing officer was the sole judge of the weight

[1] Dr. F's comment in an August 26, 1998, report that the claimant was currently working as a teacher without any difficulties appears to have no basis in fact.

and credibility of the evidence. Section 410.165(a). He found the report of the FCE, which placed the claimant in a light-duty work category, credible and persuasive. Dr. F, while arguably concluding that the claimant had no ability to work, nonetheless provided work restrictions that could be construed as showing some, although severely limited, ability to work. His comments in response to the FCE also could be interpreted as reflecting an ability to do sedentary work. Her ability to find such work, however unlikely, was a separate question from her ability to work and could only be resolved by an attempt in good faith to obtain work commensurate with that ability. 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 determinations of the hearing officer that the claimant did not make the required good faith job search and was not entitled to first quarter SIBS.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge