APPEAL NO. 990642

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 18, 1999, a hearing was held. He determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 11th quarter, because he was unable to work, and for the 12th quarter, because he attempted in good faith to find work commensurate with his ability. Appellant (carrier) asserts that medical evidence, including that of claimant's treating doctor, showed that claimant could do some work in the filing period of the 11th quarter and that claimant did not seek work in the filing period of the 12th quarter with the requisite motive and belief necessary to determine that good faith existed. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) when a heavy metal rack fell on him, causing a compensable injury. This injury was described in the evidence as including injury to the low back, knee, and abdomen. The parties stipulated that claimant's impairment rating (IR) was 15% or more, that his filing period for the 11th quarter began on April 20, 1998, that the filing period for the 12th quarter began on July 20, 1998, and that the claimant did not seek work during the filing period of the 11th quarter.

Claimant's treating doctor is Dr. H; the record contains his reports provided in April, May and June 1998, with progress notes provided in July and August 1998. While carrier states that Dr. H indicated claimant has some capacity for work, the hearing officer could consider all of Dr. H's comments, especially those in and just before the filing periods in question. In mid April 1998, Dr. H said that claimant could not return to "any job at this time," noting a herniated disc, radiculopathy, and internal knee derangement. In May 1998, Dr. H mentioned spinal "instability" along with the radiculopathy, which could be considered to be more serious; he also said that claimant has "anesthesia" of the left leg (in conjunction with the internal derangement). Dr. H also added two points that are not being considered in regard to whether claimant had any ability to do any work at all--claimant cannot drive a vehicle such as used in his previous job, and he has a sixth grade education. In June 1998, Dr. H noted that claimant's knee gives way about three times a month, with one fall having occurred during the past month. *See* Texas Workers' Compensation Commission Appeal No. 962226, decided December 19, 1996 (Unpublished) and Texas Workers' Compensation Commission Appeal No. 962259, decided December 23, 1996 (Unpublished), both of which considered a knee giving way in determining a no ability to work question. (In so citing the latter two cases, we acknowledge that a fact finder may consider a knee giving way, but we do not say that a fact finder must always determine whether good faith exists, when there is a knee problem, based on whether the knee gave way or not.)

Later in June 1998, Dr. H then critiqued a report by Dr. C, who examined claimant on behalf of the carrier. Dr. H stated that several positive Waddell signs are not necessarily indicative of lack of injury, pointing out that a person who is "hurting a lot" is "likely to say 'yes' to any maneuver." Dr. H then stated that claimant "is unable to work even in a sedentary job for which he would not be qualified to start with." This obviously mixes skill or training into the opinion, but the hearing officer may have reasonably concluded that this statement contained two parts--one said that claimant could not even work in a sedentary job and the second then added the surplusage that claimant was not qualified to do so anyway.

On July 8, 1998, Dr. H mentioned that claimant had a "rehab exam." While he does not say when restrictions were set forth, Dr. H does say in January 1999, after the end of the filing period for the 12th quarter, that claimant could not lift over 10 pounds, with no bending, and no sitting or standing "more than a few minutes at one time." Dr. H commented in this report that any search by claimant will be useless, pointing to his physical condition, his lack of education, and his inability to use the English language.

Dr. C acknowledged that claimant has "had a couple of falls" in the last year, relative to his knee giving way. He said in June 1998 that claimant can "sit at a desk and do bench or table top activities"; he also said claimant could do "light type activities"; he also said:

> I did not find truly objective physical impairments on this gentleman sufficient to consider him to be 100% disabled or unable to work.

Dr. C is correct in stating that impairment must be based on objective findings. However, as stated, the parties stipulated as to the IR in this case; that is not in issue. Insofar as SIBS are concerned, Texas Workers' Compensation Commission Appeal No. 961881, decided November 7, 1996, said that SIBS sections of the 1989 Act do not require objective medical evidence, but do require medical evidence in determining any claimant's ability to work.

Carrier also states that a videotape shows claimant can work. The tape shows claimant driving a car for a few minutes and walking with a cane. Groceries were loaded in the car by others. The tape does not compel a finding of ability to work. The medical evidence sufficiently supports the finding of fact that claimant could do no work at all during the filing period of the 11th quarter.

Carrier then states that claimant's 31 contacts made during the filing period of the 12th quarter contained some jobs for which claimant could not qualify, that not all the employers could be verified, and that claimant indicated at the hearing that he was looking for work because "carrier was making you look for work." Claimant testified that he contacted every employer the name of which was provided to him by carrier's agent, plus others he found in the newspaper. While some of the contacts claimant made were for cashier positions and claimant acknowledged he had significant problems with math, one or more of the cashier positions were provided to him be carrier's agent.

The Appeals Panel has stated that there are many facts that a hearing officer may consider in determining that a claimant did, or did not, attempt in good faith to find work. One question that a hearing officer may consider is whether a claimant sought work with diligence, forethought, and timing (*see* Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996), but the hearing officer does not have to give significant weight to whether forethought was shown, especially since the good faith test is not one involving a "reasonable man" but rather, the individual claimant under consideration by the fact finder. *See* Texas Workers' Compensation Commission Appeal No. 950471, decided May 10, 1995. We note that most Appeals Panel comments about points that may be considered in determining the statutory question of "good faith" are also not mandatory.

In addition to answering "yes" on cross-examination to the question concerning whether carrier made him look for work (which occurred after discussing the fact that his doctor did not think he could work), claimant also said that he was discouraged when he got no interviews; he also stated he was willing to work at night; he also said he would like to have a job to help himself and his family, noting the reduced amount he now received. The hearing officer should consider all the evidence in determining whether this Spanish speaking, limited education worker, with back and knee problems that result in repeated falls, was attempting in good faith to find work commensurate with his ability during the filing period of the 12th quarter. The evidence sufficiently supports the determination that claimant attempted in good faith to find work during the filing period of the 12th quarter.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Elaine M. Chaney
Appeals Judge