

APPEAL NO. 990663

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 2, 1999, a contested case hearing (CCH) was held. In response to the issue at the CCH, the hearing officer determined that the respondent (claimant) had no ability to work, that he made a good faith effort to find work commensurate with his ability to work, that his unemployment is a direct result of his impairment, and that he is entitled to supplemental income benefits (SIBS) for the 4th quarter. Appellant (carrier) appeals, contending that claimant had some ability to work and that he did not make a good faith effort to find work commensurate with his ability to work. Carrier also challenges the direct result determination in claimant's favor. Claimant replied that the hearing officer's determinations are supported by the record.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant is entitled to SIBS for the fourth compensable quarter. Carrier contends that the evidence failed to establish that claimant had no ability to work during the filing period in question.

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 impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than 80% of the 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. Although the claimant's good faith effort must, generally, span the filing period, the Appeals Panel has stated that a claimant's job search does not have to encompass a certain length of time. Texas Workers' Compensation Commission Appeal No. 961454, decided September 11, 1996; Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. There is no requirement that a claimant look for work every day of the filing period. Texas Workers' Compensation Commission Appeal No. 960818, decided June 3, 1996. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

It was undisputed that: (1) claimant sustained a compensable hip and back injury on _____; (2) claimant's IR was 24%; (3) claimant did not elect to commute his IIBS; and (4) the fourth compensable quarter was from August 19, 1998, to November 17, 1998.

Claimant testified that he sustained a hip and back injury when he slipped while working as a welder and mechanic. Claimant said he underwent hip replacement surgery on November 22, 1994, and that he is treating with Dr. G. Claimant said he is being treated with lumbar epidural steroid injections, but that he has only a few each year. He said he is unable to sit or stand for very long because of pain.

The hearing officer determined that: (1) claimant did not return to work and did not search for employment during the filing period in question; (2) during the filing period in question, claimant had no ability to work and had very severe physical limitations; (3) claimant made a good faith effort to find work commensurate with his ability; and (4) claimant's unemployment is a direct result of his impairment.

In this case, our review of the record does not indicate that the hearing officer's determinations regarding the fourth compensable quarter are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra. Therefore, there is no basis for disturbing his decision on appeal. The hearing officer heard claimant's testimony about his pain and his ability to walk and sit and reviewed the medical evidence in determining whether claimant was able to perform any work. The hearing officer could consider the medical evidence from Dr. G that claimant is "totally disabled" and "unable to work," in determining whether claimant could do any work. The fact that there was contrary evidence regarding claimant's work ability was merely a factor for the hearing officer to consider in making his determinations. The fact that the evidence could have allowed different inferences under the state of the evidence does not provide a sufficient basis for reversing the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

Carrier complains that the medical opinions that claimant is unable to work are "conclusory." However, Dr. G explained that claimant could not work because of his poor sitting and standing tolerance. Therefore, his medical opinion was not "conclusory." Carrier complains that the hearing officer stated that claimant has undergone extensive medical treatment. Claimant has undergone a total hip replacement and has had epidural steroid injections for his lumbar herniated disc. We perceive no error in the hearing officer's characterization and note that error, if any, would not constitute reversible error under these facts. Carrier contends that the hearing officer's findings are contradictory because he found both that claimant had no ability to work and that claimant made a good faith effort commensurate with his ability to work. These findings are not contradictory. See Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Carrier asserts that claimant is capable of "some amount of sitting," emphasizing that claimant is able to drive. Claimant said he could drive, but said he must exit the car periodically to get out and walk because of his pain. This evidence was for the hearing officer to consider in making his determinations and he determined that claimant was unable to work during the filing period in question. We perceive no error. We also affirm the hearing officer's direct result determination

in this case. The evidence that claimant continues to have work restrictions and cannot perform his prior work supports the hearing officer's direct result determination. Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION

I respectfully dissent. It is true that 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*. We have further held that the total inability to do any work at all will arise in only rare and unusual cases, as opposed to the fairly common situation where a seriously injured employee cannot return to his or her previous employment. Texas Workers' Compensation Commission Appeal No. 960714, decided May 20, 1996.

In this case, the hearing officer cites Dr. G's October 7, 1998, report as establishing that rare and unusual circumstance of a total inability to work at all. That comment says that claimant "has poor sitting and standing tolerance and therefore is total disabled in my opinion and unable to work." Another report dated March 26, 1998, by Dr. Renshaw (Dr. R) states that Dr. R has "doubts that the patient would be suitable for any occupation except a very specifically designed situation just for him." This does not sound like the rare and unusual situation of a total inability to work at all, rather, together with the FCE of May 12, 1998, which states that claimant "certainly . . . can return to work, but it would have to be in a sedentary capacity"; presents a clear picture, at least to me, of a seriously injured employee who has some ability to work in a sedentary job specifically designed for him. The medical evidence, in my opinion, does not support a total inability to work at any job whatsoever, which is the standard.

I would hold that the hearing officer's decision to be against the great weight and preponderance of the evidence, reverse that decision and render a new decision that claimant has some ability to work and not having made any attempt to seek employment is not entitled to SIBS for the fourth compensable quarter.

Thomas A. Knapp
Appeals Judge