APPEAL NO. 990666

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 9, 1999. With respect to the issues before him, the hearing officer determined the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first and second compensable quarters. The appellant (self-insured) urges that the hearing officer's findings of fact and conclusion of law are against the great weight and preponderance of the evidence. The claimant responds, urging that the evidence is sufficient to support the determinations of the hearing officer, and requesting that his decision be affirmed.

DECISION

Affirmed.

The hearing officer found that the claimant attempted in good faith to obtain employment commensurate with his ability to work, that the claimant's decrease in earnings is a direct result of the claimant's impairment from his compensable injury, and that the claimant did not refuse services or refuse to cooperate with the Texas Workers' Compensation Commission's (Commission) referral to the Texas Rehabilitation Commission (TRC). The self-insured contends that the claimant is not entitled to SIBS for the first quarter because he did have some ability to work during the first quarter filing period and he did not look for any work. The self-insured contends that the claimant is not entitled to SIBS for the second quarter because he did have some ability to work during the second quarter filing period, did not begin to seek employment until the 48th day of the filing period, and the type of jobs he sought were not commensurate with his ability to work. The self-insured states there is insufficient evidence to support the hearing officer's finding that the claimant's decrease in earnings during the first and second quarter filing periods is a direct result of the claimant's impairment. The self-insured also asserts that the claimant's failure to contact the TRC during the filing periods is tantamount to his refusing the services or failing to cooperate.

Not appealed is the finding of fact that on _____, a pallet fell and hit the claimant on the head as he was performing his job duties as a warehouse worker for self-insured, causing him to sustain an injury to his head, back, and neck. The parties stipulated that the claimant reached maximum medical improvement (MMI) on July 29, 1997, with an 18% impairment rating (IR). The filing period for the first quarter was from May 13, 1998, through August 11, 1998, and the filing period for the second quarter was from August 12, 1998, through November 11, 1998.

The claimant testified that he has never been released to return to work by any of his doctors and that none of the doctors have indicated that he is able to work. The claimant testified that during the first quarter filing period, he was treated by Dr. R and Dr. J, a psychiatrist. Dr. R closed his office on November 10, 1997. On October 27, 1998, the claimant requested a change of doctor to Dr. B, whom he had seen previously at the

request of the carrier for an impairment rating assessment in July 1998. The Commission approved the change of treating doctor on October 30, 1998. The claimant testified that during the second quarter filing period he was treated by Dr. B and Dr. J. Not appealed is the hearing officer's finding that due to the injury of _____, the claimant continues to have symptoms of headaches, back pain, nausea, sleeplessness, disorientation, and ringing in the ears.

The medical evidence indicates that on February 1, 1996, the claimant had a functional capacity examination (FCE). The FCE report does not indicate that the claimant was able to return to work at that time, but does state a "medium" physical demand characteristic level of work based upon the FCE and that "[claimant] is able to lift up to 50# infrequently and 35# infrequently and 35# or less more frequently; he complains of increased headache with repetitive lifting." Dr. B in a report dated July 20, 1998, gives a history of the claimant's medical treatment. In that report, Dr. B states that a CT of the claimant's head was normal, an MRI of the claimant's brain was negative and his impression was: chronic lumbosacral strain, chronic cervical strain, and postconcussion syndrome with depression. There are only two medical reports in evidence from Dr. B since he became the claimant's treating doctor in October 1998. Dr. B states in a report dated November 13, 1998:

> To whom it may concern: the above mentioned patient [claimant] has been under my care from November 13, 1998, to November 30, 1998, and is currently unable to work. The patient has not yet reached [MMI]. Diagnosis: chronic headaches/concussion, chronic cervical strain/chronic lumbar strain.

A letter from Dr. B dated January 12, 1999, states:

> [The claimant] does not have the ability to obtain or retain employment at pre-injury wage levels because of his injury. As you know, he has chronic headaches and a concussion as a result of a blow to the head. His diagnoses are postconcussion syndrome with severe depression, chronic cervical strain, and chronic lumbar strain.

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 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.

The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no

ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. 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.

In this case, the claimant contended and the hearing officer found that he had no ability to work during the first and second quarter filing periods. Although there was no medical evidence from the filing period, we have held that, while medical evidence from the filing period is clearly relevant, other medical evidence outside the filing period, especially that which is relatively close to the filing period, may be relevant. Texas Workers' Compensation Commission Appeal No. 960901, decided June 20, 1996. There was evidence from Dr. B that the claimant could not work, although there appears to be some conflict in Dr. B's reports. Dr. B's report dated November 13, 1998, and closest in time to the filing periods, indicates an inability to work. Dr. B's report dated January 12, 1999, refers to the claimant's inability to obtain and retain employment at preinjury wage. While we realize that inability to work at preinjury wage does not mean a complete inability to work, the hearing officer could interpret Dr. B's reports, in addition to the other medical evidence, and conclude, as the fact finder, that the claimant had no ability to work during both filing periods. There are medical reports indicating that the claimant has chronic lumbosacral strain, chronic cervical strain, postconcussion syndrome with depression and chronic headaches. Considering all the documents, they are more than conclusory. The evidence is sufficient to support the hearing officer's determination that the claimant had no ability to work during the first and second quarter filing periods.

The self-insured asserts that the claimant's failure to contact the TRC during the filing periods is tantamount to his refusing its services or refusing to cooperate. In evidence is a letter from the Commission, "Notice of Vocational Rehabilitation Services" (EES-42) dated June 25, 1998. The claimant testified that he did not go to the TRC until February 9, 1999. The claimant testified that he was told at the TRC that they could not assist him until he was released by the doctor. We reject the self-insured's argument since it did not show that the Commission determined the claimant should be referred to the TRC and then referred him there. *See* Section 408.150(a); Texas Workers' Compensation Commission Appeal No. 961344, decided August 26, 1996. The EES-42 relates only to the Commission's dissemination of vocational rehabilitation information to employees and does not relate to the *referral* of employees to the TRC or to the ramifications of not complying with a referral. *See* Texas Workers' Compensation Appeal No. 982171, decided October 26, 1998. There is sufficient evidence to support the hearing officer's finding that the claimant did not refuse services or refuse to cooperate with services provided after a Commission referral to the TRC.

The self-insured contends the hearing officer erred in determining that the claimant's unemployment is a direct result of his impairment. The hearing officer's direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing period, he could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

Whether the claimant's unemployment was a direct result of his impairment and whether the claimant had no ability to work at all during the filing periods for the first and second quarters presented the hearing officer with questions of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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 decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge