

APPEAL NO. 990820

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 29, 1999, a contested case hearing was held. The issue concerned the entitlement of the appellant, who is the claimant, to her 14th quarter of supplemental income benefits (SIBS).

The hearing officer determined that the claimant had the ability to work but had not made a good faith search for employment commensurate with this ability and, therefore, was not entitled to SIBS for this quarter. The hearing officer rejected her contention that she had the complete inability to work. The hearing officer further held that her unemployment was not the direct result of her impairment.

The claimant appeals, arguing that she could not work and was under strict orders from her doctor not to work. She argues that there is no medical evidence of a sedentary or light ability as the hearing officer found. The respondent (carrier) responds that the decision should be affirmed.

DECISION

Affirmed.

The filing period in issue ran from September 15 through December 14, 1998. The claimant injured her neck and lower back on _____, and had cervical surgery. Her treating doctor was Dr. G. The claimant agreed she had worked for seven months in 1997 for a retailer; she alluded to the fact that unrelenting pain prevented her from continuing. The claimant said she sought no employment during the period in question because her doctor ordered her not to, pending further tests and a course of shots. The pending tests that would preclude any work were not described. Dr. G's October 20, 1998, report refers to the desirability of obtaining an updated cervical MRI, but did not tie returning to work to this.

The hearing officer has fully set out the evidence and indicated the weight she assigned to Dr. G's general statement (made January 18, 1999) that the claimant should be considered "totally and medically disabled." In that same letter, Dr. G stated that the claimant was unable to walk, sit, stand over 30 minutes, bend, or twist, and had a 10-pound lifting ability.

The claimant was treated for chronic pain by Dr. H. Dr. H wrote on October 12, 1998, that the claimant had a generalized pain syndrome and myofascial pain which he opined were related to her neck injury. He felt she was unable to work as a result. An independent medical evaluation performed by Dr. C on December 9, 1998, yielded a report that showed he found no evidence of radiculopathy. Dr. C noted stiffness in the claimant's neck. He rated it as likely difficult to get her to return to work but did feel that it would be worthwhile to have her start at a two-hour a day job and then gradually increase. He noted good function of the lower extremities. Dr. C suggested that a receptionist job might be appropriate.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated 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. We have held that 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 that a finding of no ability to work must be based on medical evidence. 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 injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. 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 importance of seeking even a part time return to work is underscored by the fact that income benefits do not last indefinitely under the 1989 Act, and entitlement ends 401 weeks after the date of an accidental injury. Section 408.083. As the search must be conducted for work "commensurate with the employee's ability to work," this will not in all cases require a return to full-time employment. The fact that jobs may have been few within the restrictions set out in Dr. G's January 1999 letter, or the suggested gradual re-entry proposed by Dr. C, did not mean that they did not have to be sought.

In reviewing the record, we cannot agree that the hearing officer's decision was against the great weight and preponderance of the evidence, and we affirm her decision and order. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge