APPEAL NO. 991002

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 April 20, 1999. He (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the sixth quarter, except for the period of time the claimant was late in filing his Statement of Employment Status (TWCC-52) with the respondent (carrier). The carrier appeals the entitlement determination, contending that it is contrary to the great weight and preponderance of the evidence. The appeals file contains no response from the claimant. The finding of late filing has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____. He was originally diagnosed with a left wrist fracture. The current diagnosis includes severe end-state reflex sympathetic dystrophy (RSD) of the left arm with atrophy and fasciculations of the intrinsic muscles of the hand. He is left-hand dominant. The claimant reached maximum medical improvement on November 25, 1994, and was assigned a 51% impairment rating (IR).

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought 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 sixth quarter was from January 23 to April 23, 1999, and that filing period for this quarter was from October 24, 1998, to January 22, 1999.

This is a no-ability-to-work case. The claimant testified that he is in chronic severe pain 24 hours a day, has equilibrium problems and generally cannot focus on anything. He made no effort to obtain employment during the filing period for the reason that he believed he had no ability to work in any capacity. The Appeals Panel 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 need 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.

Dr. B, the treating doctor, wrote on April 12, 1999, after the filing period but during the sixth SIBS quarter, that he did not feel the claimant was "employable" at the present time. In a separate letter of this date, Dr. B wrote that he did not feel the claimant had any ability to work specifically during the filing period "secondary to severe complex regional pain syndrome of the left upper extremity." He also noted "episodes of severe pain, causing inability to perform any activity." Given the claimant's condition, he did not believe a functional capacity evaluation "would be a significant help." The claimant testified that in his discussions with Dr. B, his work status was "not a total main subject." At one point, he said he needed a "dramatic drop" in pain to return to work and at another point he said he did not believe he could work even with some pain and that he wanted to be pain free before he returned to work.

The hearing officer considered this evidence and concluded that the claimant had no ability to work during the filing period, that his unemployment was a direct result of his impairment, and that he was entitled to sixth quarter SIBS. The carrier appeals, arguing that Dr. B's April 12, 1999, report and letter was completed long after the filing period and should be given no credibility, that it fails to articulate reasons for the conclusion of no ability to work, and that Dr. B's use of the word "employable" in the report is not the equivalent of saying that the claimant had no ability to work at all. Dr. B in his letter of April 12, 1999, specifically relates his opinion back to the filing period, speaks in terms of the claimant's ability to work, and cites his severe pain as the basis for his conclusion that the claimant had no ability to work. It was up to the hearing officer, as fact finder, to weigh this evidence and give it the degree of credibility and persuasiveness he felt it deserved. Section 410.165(a). The carrier also argues on appeal that the claimant's expressed unwillingness to return to work until he is pain free and his failure to discuss with his doctors what he could do, not what he could not do, rendered Dr. B's opinion of his ability to work essentially meaningless. Under what circumstances the claimant would return to work was arguably irrelevant to the position that he had no ability to work. While the concurring opinion in Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996, did encourage claimants to work with their doctors to determine what they can do to reenter the labor force, this opinion did not establish a new, independent standard for SIBS eligibility. This opinion does, however, contain sound advice to injured workers who are well-advised to heed it. The effect of failure to follow this advice on the ultimate issue of SIBS entitlement is for the hearing officer to decide in light of all the medical

evidence. 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 findings of no ability to work and direct result in this case.

For the foregoing reasons, we affirm the decision and order of the hearing officer that the claimant was entitled to sixth quarter SIBS except for the period of late filing for these benefits.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge