APPEAL NO. 991013

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 22, 1999, a contested case hearing (CCH) was held. The hearing officer recites that the record was closed on April 15, 1999. With regard to the only issue before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the ninth compensable quarter, that claimant's unemployment was not a direct result of his impairment and that claimant had not attempted in good faith to seek employment commensurate with his ability.

Claimant appeals, citing his severe injuries, his two surgeries and doctors' reports as supporting his position that he has a total inability to work. Claimant cites the treating doctor's comments and that the hearing officer and respondent's (carrier) doctor failed to consider claimant's "recurrent herniated disc" and the "doctor's diagnosis of seizure disorder and cognitive deterioration." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds that the evidence, including a surveillance videotape made during the filing period, supports the hearing officer's decision, and urges affirmance.

DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to 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, "[f]iling 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 employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable (head, back and shoulder) injury on _____; that claimant reached maximum medical improvement on December 23, 1994, with a 34% impairment rating; that impairment income benefits were not commuted; and that the filing period for the ninth quarter was from September 5 to December 4, 1998. Claimant testified that he had been an aircraft assembler for the employer and had sustained the compensable injury when a hoist and motor assembly hit him on the head and shoulders. The hearing officer, in the Statement of the Evidence, recites the extensive diagnostic testing performed on claimant. Claimant had cervical spinal surgery in October 1993 and lumbar spinal surgery in October 1994 for a ruptured

lumbar disc at L4-5. Claimant testified that he has made no effort to seek work and that he has been receiving Social Security disability payments since 1995. Claimant acknowledged that he was aware that he could lose his Social Security disability entitlement if he returns to work. Claimant contends that although he does some light duties around the house, such as wash his car, he has a total inability to work.

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. 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*.

Claimant's treating doctor is Dr. M, who has consistently and steadfastly maintained that claimant "is still 100% disabled" (report dated July 27, 1998). In that report, Dr. M states that claimant could probably return to "sedentary light duty" if his injury was just to his neck and low back, but that claimant has a "recurrent herniated disc in his back at L4-5," and as evaluated in 1995, "was status post brain concussion with partial complex seizures." Dr. M opined that claimant was physically capable of:

> [S]tanding, sitting, walking and driving under 30 minutes. The only thing that I felt he could not do at all was that of crouch and reach above several levels and occasionally probably 30 minutes a day maximum. For that reason, I don't think he can return to work.

Dr. M indicated in a report dated September 9, 1998, that he was upset with the carrier's medication peer review because it felt Dr. M's prescriptions were "not reasonable and necessary." Dr. M's opinion and conclusions are restated in a report dated October 20, 1998, that claimant remains "100% disabled." In a report dated December 8, 1998, Dr. M contends that an abnormal EEG "strongly substantiates [claimant's] seizures." The prognosis was guarded and Dr. M felt claimant is still "100% disabled." That opinion was essentially repeated in a report dated February 23, 1999. Other, earlier reports in 1997 from Dr. K and Dr. T generally support Dr. M's opinion.

In a functional capacity evaluation (FCE) performed by Dr. O on November 17, 1998, Dr. O noted that if claimant's condition was as bad as he contends, claimant "should

not be able to get out of bed, walk or function in any sort of normal manner." In part of the history taken for the FCE, there is a note that Dr. MA has noted in a peer review that "medication for Viagra is not medically related, reasonable and necessary" for the compensable injury. (Claimant is 49 years old.) Dr. O concludes:

> Prognosis is extremely poor. Interestingly, when he does a physiological function such as an 11 pound frequent lift, he does not have changes in the system. There is no change in his respiratory rate or heart rate. There is nothing to document that he is having the significant pain he says he is having. Therefore, a great deal of this has to be on a psychological basis rather than a physical basis.

Claimant was photographed in a surveillance videotape on October 24 and 17, 1998. The video is about 20 minutes long and covers several hours on the listed dates. The hearing officer accurately describes the video thusly:

> The Claimant was observed entering, exiting and driving a red Toyota pickup without any limitations. The video shows Claimant carrying a computer into a store, and later cleaning the interior of his vehicle; including vacuuming, beating mats on the pavement, pounding seats and cleaning windows. During the filming the Claimant bent, squatted and leaned inside the vehicle numerous times. Claimant was observed lifting a vacuum cleaner and carrying it into the passenger side of the vehicle; later he carried the vacuum cleaner into the garage.

Upon being shown a video summary, Dr. O, in a note dated December 18, 1998, opined that claimant "can perform at least light duty work and probably higher . . . ." Later, after viewing the video, Dr. O, in a report dated February 8, 1999, commented that claimant "can perform work far beyond Light duty work" and concluded:

> It is obvious from the video tapes that he should be able to easily return to gainful employment. Simply being able to hold an upright vacuum cleaner away from the body at that distance, and carry it with one hand, requires enough strength to compete in at least the Medium category at work.

The hearing officer found claimant was capable of performing sedentary to light work, makes two findings of fact dealing with the surveillance video and concludes claimant is not entitled to SIBS for the ninth quarter. Claimant, in his appeal, cites and quotes from Dr. M's February 23, 1999, report, cites a 1995 report and complains that carrier has "refused to authorize payment for prescription issued by [Dr. M] for controlling the seizures and pain which keep the Claimant disabled . . . ." Claimant, neither at the CCH nor on appeal, offers any explanation for the video other than to say those activities were all within the restrictions imposed by Dr. M.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer could assign greater weight to the opinions of Dr. O than those of Dr. M, claimant's protestations notwithstanding, and the hearing officer fairly clearly gave substantial weight to the surveillance video showing claimant engaged in rather vigorous activity, as it was his prerogative to do.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge