APPEAL NO. 991035

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 14, 1999. She (hearing officer) determined that the respondent/cross-appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the first through 11th quarters because he did not make the required good faith job search and that the claimant timely filed a Statement of Employment Status (TWCC-52) for these quarters. The claimant appeals the finding of non-entitlement, contending that it is against the great weight and preponderance of the evidence. The appellant/cross-respondent (carrier) replies that this portion of the decision and order is correct, supported by sufficient evidence, and should be affirmed. The carrier appeals the determination that the claimant timely filed a TWCC-52 for each of the quarters in issue, contending legal error and factual insufficiency to support this determination. The appeals file contains no response to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant sustained a compensable lumbar and cervical spine and closed head injury on _____. He reached statutory maximum medical improvement on February 8, 1994, and was assigned a 40% impairment rating (IR) by Dr. B, the designated doctor selected by the Texas Workers' Compensation Commission (Commission), in a Report of Medical Evaluation (TWCC-69) signed by Dr. B on August 10, 1998, and received by the Commission on August 26, 1998. Thirty percent of this IR was based on Mental and Behavioral Disorders under Chapter 14 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Dr. B described the 30% as a "Table 1, Class 2 or 3" impairment under Chapter 14. Class 2 is described in the AMA Guides as an impairment compatible with "most useful function" and Class 3 with "some but not all useful function" in the areas of activities of daily living, social functioning, concentration, and adaptation.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior 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 first SIBS quarter began on August 29, 1996, and the 11th SIBS quarter ended on February 23, 1999. The filing periods for these quarters were the preceding 90 days.

The primary and dispositive question in this case is whether the claimant made the

required good faith job search. As reflected in his testimony and TWCC-52s for each quarter, the claimant made no job search efforts at all in any filing period, contending that he had no ability 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." 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 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 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.

The claimant testified that he is in chronic pain, which he rated at "three to four" on a scale of one to 10. He said he had a five-pound lifting restriction, but that he did some work around the house including mowing the lawn with a self-propelled mower on occasion, and no doctor has released him to return to work. Videotapes were also admitted into evidence which disclosed the claimant engaged in various physical activities. Among the numerous letters and reports of Dr. G, the treating doctor, only one addresses the claimant's ability to work. On November 10, 1998, Dr. G described the claimant's pain and wrote that the claimant "is unable to look [for] or perform any type of gainful employment." He further commented that the claimant's medications posed a potential safety threat "especially if the course of the patient's duties places the patient in a potentially hazardous environment. The medications also impair a patient's judgement, which would disallow the patient from participating in any type of activity that requires concentration and attention." He concluded that it was not "practical for this patient at this time to be considered a vocational candidate." The hearing officer considered this evidence and was not persuaded that it established that the claimant was unable to work. The claimant appeals this determination, asserting that there was essentially no evidence to the contrary and "no doctor has ever described his condition as likely to return to work." The Appeals Panel has commented that use of the phrase "gainful employment" is ambiguous and need not be construed by the hearing officer to be synonymous with no ability to work. *See* Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998. As noted above, the claimant had the burden of affirmatively proving an inability to work. The carrier had no burden of proving an ability to work. As further noted, whether the claimant had some ability to work presented a factual question for the hearing officer to decide. Pursuant to Section 410.165(a), the hearing officer was the sole judge of the weight and credibility of the 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 determination of the hearing officer that the claimant had some ability to work during each of the filing periods. By his own admission, having failed to look for work during these filing periods, he was not entitled to SIBS for any quarter in issue. For the foregoing reasons, we affirm this portion of the decision and order of the hearing officer.

We also find the evidence sufficient to support the hearing officer's determination that the claimant's unemployment in each filing period was a direct result of his impairment based on the rationale contained in Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

There remains the question of the claimant's timely filing of his TWCC-52s for each quarter. Unfortunately, much of the pertinent information on this issue came from the representations of counsel, not from anyone with personal knowledge of the facts, and the hearing officer provided no rationale for her finding of a timely filing of a TWCC-52 for each quarter in issue. In any case, the matter was addressed primarily as a question of law. The Commission's initial determination that the claimant was not entitled to SIBS because he failed to make the required good faith job search was contained in a letter of January 9, 1998, which was deemed received by the claimant five days later on January 14, 1998.[1] *See* Rule 102.5(h). The claimant's TWCC-52s for each quarter were received by the carrier a year later on January 12, 1999, some two months into the 11th SIBS quarter. Section 408.143 generally requires that after the Commission's initial determination of SIBS, the employee must file a statement, *i.e.*, a TWCC-52, with the carrier and failure to do so relieves the carrier of liability for SIBS for the period during which the statement is not filed. *See also* Rules 130.103 and 130.104.

The Appeals Panel has determined that, where the Commission fails to make an initial determination regarding SIBS due to no fault of the claimant, so that the claimant delays in applying for SIBS, the late filing of the application may result in a delay in payment of SIBS, but it does not thereby extinguish the entitlement altogether. Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995. Such an application for SIBS may be considered timely if filed within a calendar quarter (three months) of the initial determination of SIBS eligibility. Appeal No. 941753. That case involved an initial determination by the Commission that the claimant was entitled to first quarter SIBS. In the case we now consider, the initial Commission determination was one of non-entitlement to SIBS, and there has never been a determination by the Commission that the claimant was entitled to SIBS for any quarter. We do not believe that these facts are so significant as to change the basic holding of Appeal No. 941753, that is, that Commission inaction should not in itself, without more, extinguish entitlement to SIBS. *See* Texas Workers' Compensation Commission Appeal No. 951975, decided January 8, 1996.

[1]Presumably this was based on a 38% IR assigned by Dr. K, a prior designated doctor in this case, on August 27, 1997.

What is required consistent with these cases is that a claimant file a TWCC-52 for each filing period or part thereof that has already passed within 90 days of the Commission's initial determination that a claimant is or is not entitled to first quarter SIBS. In this case, that determination was received by the claimant on January 14, 1998. He had 90 days thereafter to file for the quarters already passed. Failure to do so would relieve the carrier of liability for SIBS for those quarters. *See* Rule 130.105(g). There was no explanation from the claimant of why he did not file his TWCC-52s until a year after the Commission's initial determination.[2] Because the claimant waited more than 90 days to file his TWCC-52s, we conclude they were untimely for all quarters in issue. The hearing officer's determination to the contrary is erroneous as a matter of law. Because the TWCC-52 for the 11th quarter was filed midway through the quarter, had the claimant been found to be entitled to 11th quarter SIBS, these SIBS would only have accrued on the date of the filing. Because of the findings of a lack of a good faith job search, the claimant is in any case not entitled to SIBS for the first through 11th quarters.

The finding of non-entitlement to SIBS for the first through 11th quarters is affirmed. The findings that the claimant timely filed TWCC-52s for first through 11th quarter SIBS are reversed and a new decision rendered that the claimant did not timely file TWCC-52s for these quarters.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge

[2]We reject the claimant's position that he had to file his TWCC-52s in the 90-day period that only began after 90 days from the date Dr. B signed the TWCC-69 in August 1998. This position is premised on a clearly incorrect reliance on Rule 130.5(e), which has no application whatsoever to the designated doctor's report. Similarly, we reject carrier's argument that the claimant had to file his TWCC-52s within 90 days of Dr. B's report. The timing of the Commission's SIBS entitlement determination is critical, not the date of the designated doctor's report.