

APPEAL NO. 991070

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 27, 1999. He (hearing officer) determined that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fifth quarter. Claimant appeals, contending that she had no ability to work, that she acted in good faith, and that she is entitled to SIBS. The file does not contain a response from respondent (carrier). The direct result determination in claimant's favor was not appealed.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that she is not entitled to SIBS. She contends that she had no ability to work during the filing period and that she met the good faith criteria.

The parties stipulated that: (1) claimant sustained a compensable injury on _____, while working for (employer); (2) claimant had an impairment rating (IR) of 27%; and (3) claimant did not commute any of her impairment income benefits (IIBS). The filing period for the fifth quarter was from December 9, 1998, through March 9, 1999.

Claimant testified that she was working as a home health care worker when she sustained her compensable neck injury on _____. She said she noticed an oxygen cylinder that was about to fall and she reacted by jerking her body, injuring her neck. She subsequently underwent cervical surgery and her medical records indicate that she had a two-level fusion and diskectomy. Claimant testified that she has severe neck pain and suffers from depression, that she spends most of her time in bed, that she does not do housework, that wearing clothing is painful, and that she sees a doctor for pain management medications.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the 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 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. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then the employee 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*. When a claimant alleges a total inability to do any work, that contention generally must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the claimant had the burden to prove she had no ability to work. Texas Workers' Compensation Commission Appeal No. 950582, decided June 5, 1995. The hearing officer was the sole judge of the credibility of the medical evidence and determined whether the medical evidence showed that claimant had no ability to work. The hearing officer specifically found that claimant was capable of doing some limited work and that, because she did not look for work, she did not meet the good faith requirement. The hearing officer made his determinations regarding good faith and ability to work based on the evidence before him. After considering the medical evidence, and deciding what weight to give to the medical evidence, the hearing officer determined that claimant did have some ability to work. Because the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for his. Cain.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge