APPEAL NO. 991147

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 6, 1999. The appellant (claimant) and the respondent (self-insured) stipulated that the filing period for the fourth quarter for supplemental income benefits (SIBS) began on October 27, 1998, and ended on January 25, 1999. It is undisputed that the claimant did not work during the filing period. The hearing officer determined that during the filing period for the fourth quarter the claimant's unemployment was a direct result of his impairment from the compensable injury. That determination has not been appealed and has become final under the provisions of Section 410.169. The hearing officer found that during the filing period the claimant had some ability to work, that he contacted five employers, and that he did not in good faith attempt to obtain employment commensurate with his ability to work and concluded that the claimant is not entitled to SIBS for the fourth quarter. The claimant appealed those findings and conclusion, urging that they are against the great weight and preponderance of the evidence and requesting that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for the fourth quarter. The self-insured responded, urging that the evidence is sufficient to support the decision of the hearing officer and requesting that it be affirmed.

DECISION

We affirm.

The claimant, who was 74 years old during the filing period for the fourth quarter for SIBS, testified that he injured his head and eye when he fell; that he still has headaches that resulted from the fall; that he had difficulty remembering things; that thinking makes his headaches worse; that his wife handles paperwork and money matters for them; that Dr. H released him to return to sedentary work; but that he is unable to work because of the memory loss and headaches. He said that he worked as a supervising security guard when he was injured; that he sought work as a security guard with five employers during the filing period; and that he did not think he could perform the work of a security guard, but that he would try if he was offered a job. A Statement of Employment Status (TWCC-52) for the fourth quarter indicates that five employers were contacted a total of 24 times.

In a return to work certificate dated July 20, 1998, Dr. H said that the claimant could return to work doing sedentary duties on June 29, 1998. In a letter dated September 18, 1998, to the attorney representing the claimant, Dr. H stated that the claimant was unable to work prior to June 29, 1998, solely due to his job-related injury and that she had released him to return to work at "a sedentary job including unlimited sitting, driving short distances, walking one block and no lifting over five pounds." In an office visit note dated March 12, 1999, Dr. H said that the claimant was unable to work at the time because of chronic pain and chronic headaches from his accident and that, considering his age as well as his injury, she did not see that he will ever be able to return to gainful employment.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is firmly on the claimant and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be judged against employment generally, not just the previous job where the injury occurred. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated a claimant's inability to do any work must be supported by medical evidence.

Whether good faith in seeking employment commensurate with the ability to work was shown is usually a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. Consideration can be given to the manner in which a job search is made and timing, forethought, and diligence may be considered in determining whether a good faith job search was made. Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996. In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel rejected the contention that a certain number of job applications showed good faith and stated the following about good faith:

> In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.

And, in Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel stated that the trier of fact, in determining whether the claimant in good faith sought employment commensurate with the ability to work, sometimes assesses whether undeniable contacts made with prospective employers constitute a true search to reenter employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS. In Texas Workers' Compensation Commission Appeal No. 950592, decided May 25, 1995, the Appeals Panel affirmed the determination of the hearing officer that the claimant did not make a good faith effort to seek employment where he sought employment for jobs that he did not think he was capable of performing with his restrictions rather than seeking employment with jobs that were within his restrictions.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer's findings that during the filing period the claimant had some ability to work and did not in good faith seek employment commensurate with his ability to work and his conclusion that the claimant is not entitled to SIBS for the fourth quarter are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge