APPEAL NO. 991217

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 May 6, 1999. With regard to the only issue before him, the hearing officer determined that, while appellant's (claimant) unemployment was a direct result of his impairment, claimant had not made a good faith effort to obtain employment and was not entitled to supplemental income benefits (SIBS) for the first compensable quarter. The direct result finding has not been appealed.

Claimant appeals several of the hearing officer's other findings, contending that he had a total inability to work because he was awaiting additional left knee and left shoulder surgery (which has been delayed because of nonwork-related conditions) and that the treating doctor's April 19, 1999, report (six weeks after the end of the filing period) clarified his prior instructions restricting claimant from any kind of work. Claimant also complains that the hearing officer's comment in his Statement of the Evidence that the treating doctor "in his normal style" precluded claimant from working was "inappropriate." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds urging affirmance.

DECISION

Affirmed.

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 impairment rating (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 parties stipulated that claimant sustained a compensable left knee and left shoulder injury on _____, which resulted in an 18% IR; that the filing period for the first compensable quarter was from December 1, 1998, through March 1, 1999; and that the Texas Workers' Compensation Commission, in its initial determination, did approve SIBS for the first quarter.

Claimant's testimony and the medical records establish that claimant was employed as a mechanic and that on the date of injury, he stumbled getting off a forklift and fell on his left side, sustaining a left knee and left shoulder injury. Claimant had shoulder surgery in

January 1997 and knee surgery in June 1997. Claimant has also had "lots of therapy" and apparently "manipulation of the shoulder under anesthesia." Additional surgery has been recommended by the treating doctor, Dr. G, but has been delayed because of claimant's nonwork-related heart condition and high blood pressure. Claimant testified that he has neither sought nor obtained any employment during the applicable filing period and relies on a total inability to work theory.

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.

Dr. C, carrier's doctor, in a report dated February 20, 1999, notes "symptom magnification with overlay"; agrees that claimant may need additional shoulder surgery "if he is ever cleared by his internist"; and concludes that claimant can do a "light to moderate duty job that does not require any repeated over the shoulder level activities with the left arm nor any activities requiring prolonged . . . [use of] his left knee." Dr. C gives various other restrictions and comments that claimant's other nonwork-related medical conditions "may indeed make additional restrictions necessary." A functional capacity evaluation begun on February 12, 1999, had to be terminated because of high blood pressure problems. Dr. O, the designated doctor, does not express an opinion on ability to work.

In evidence are various reports from Dr. G beginning in February 1998 through April 1, 1999. Those reports generally say "no work" and/or "no work status" without explanation. In a report dated April 19, 1999, Dr. G comments on Dr. C's (apparently February 20, 1999) report stating:

> [It] is my opinion that [claimant], taking into account his medical condition, certainly cannot return to work at this point. This includes the fact that we are getting hm stabilized for a major surgical procedure and the fact that he is

> taking Lortab 7.5 which would affect his ability to drive as well as the ability to think and concentrate. To send him back to light duty at this point in time with any type of restrictions would in fact cause him further injury and more pain necessitating use of stronger medications.

Claimant takes the position that Dr. G's April 19th report, together with the extensive restrictions in Dr. C's report, establishes a total inability to work.

The hearing officer, in his Statement of the Evidence, reviews the doctors' reports, claimant's testimony, and what the hearing officer believes the law is, and comments:

> A medical opinion should be evaluated in terms of its thoroughness and credibility, which can be assessed partly by considering any offered basis for that opinion. TWCC Appeal No. 970834 [Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997]. [Dr. G's] basis includes a lumbar spine medical condition, too, which is not part of the compensable injury. The cardiologist was still trying to stabilize the Claimant's heart condition, which is not part of the compensable injury. [Dr. G] failed to say how or why employment, or some particular type of employment, would further injure the Claimant. These medical conditions were involved in the doctor's allegation of no ability to work, rather than just the knee and shoulder, but were not the sole cause of the asserted inability. TWCC Appeal No. 990048 [Texas Workers' Compensation Commission Appeal No. 990048, decided February 18, 1999]. They were considered for determining the credibility of [Dr. G's] one attempted explanation of why the Claimant could not or should not seek any work at all. Lortab may have affected the Claimant's thought or concentration, but the doctor failed to state to the degree of the effect or why that would prevent him from doing either light or sedentary employment. (Emphasis in the original.)

As we have previously noted, whether a claimant has any ability to work or not, is essentially a question of fact for the hearing officer to determine. The hearing officer saw the claimant, was able to observe his demeanor, and is the sole judge of the weight and credibility to be given to the evidence, which includes medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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 decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Claimant, in his appeal, complains that the hearing officer, in commenting on the treating doctor's report, referred to the report as being "in his normal style." We note that the hearing officer, in referring to the carrier's doctor, Dr. C, also says "as that doctor

usually does. . . ." We would note that such parenthetical comments lend absolutely nothing to the substantive decision and, as this appeal points out, procedurally, only calls the hearing officer's objectivity into question, and are best omitted from the Statement of the Evidence and decision. That said, we find that the hearing officer fairly and accurately summarized the evidence and any inference that the hearing officer relied on information outside the record, if error, constitutes harmless error. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Similarly, carrier's reliance, in its appeal and on cross-examination at the CCH, on Judge Kelly's concurring comments in Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996, urging the injured worker to work with her doctor to see what they can do, does not establish some kind of a new nonstatutory requirement that the failure to so consult with the doctor will mandate a finding of nonentitlement.

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:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge