APPEAL NO. 991285

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 May 20, 1999. The hearing officer determined that the appellant (claimant) was not entitled to 14th and 15th quarter supplemental income benefits (SIBS) and that the claimant has not permanently lost his entitlement to SIBS. The claimant appeals the adverse determinations, contending that they are contrary to the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The finding that the claimant has not lost permanent entitlement to SIBS has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant sustained a compensable injury to his wrists and cervical spine when he fell from a truck on _____. He was assigned a 21% impairment rating. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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, "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 14th SIBS quarter began on October 30, 1998, and the 15th quarter ended on April 29, 1999. The filing periods for these quarters was the preceding 90 days.

At issue in this case is whether the claimant made the required good faith job search commensurate with his ability to work during each of the filing periods. He testified that he has "problems" dropping things, has pain and swelling in the neck, has headaches "80% of the time," takes medication with side effects that make him drowsy and unfocused, and has trouble sleeping which makes it hard for him to get up for a job every day. On July 18, 1997, a request for spinal surgery was disapproved because there was no second opinion approval. Dr. S, the treating doctor, has attempted to reinitiate the approval process.

The claimant testified that he made no effort at all to look for work during either of the filing periods because he believed 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 we have also stressed the need for medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. *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 medical evidence submitted by the claimant in this case to support his contention of no ability to work consisted primarily of a series of letters and notes from Dr. S in which he sought approval of the carrier for a discogram and the reinitiating of the spinal surgery approval process. Nowhere does this evidence address the claimant's ability to work. His other evidence was a list of prescription medications taken by the claimant and pages from the Physicians' Desk Reference (PDR), which discussed this medication in general, including adverse reactions. Other evidence from the carrier included medical evidence from 1995 and 1996 which generally opines that the claimant's problem is not amenable to surgical correction and a functional capacity evaluation which places him in the "light" category with a 20-pound lifting restriction.

The hearing officer considered this evidence and found that the claimant had some ability to work and that his medications did not prevent him from seeking employment. Because the claimant did not look for work commensurate with this ability, the hearing officer concluded he was not entitled to 14th or 15th quarter SIBS. The claimant appeals these determinations, contending that an inability to work was established by evidence of the medications, particularly Lortabs six times per day, which, he contends, "prevent him from being alert enough to perform a sedentary job," and by evidence that the claimant is a "candidate for a multi-level fusion in his cervical spine and his doctor has stated that he was beginning the second opinion process in his February 5, 1999, report, eight (8) days after the end of the filing period for the 15th quarter." As noted above, there was no medical evidence relating the claimant's prescription medication to his inability to work. Clearly, the hearing officer did not have to interpret the PDR references as supporting such inability in this claimant. While we have not demanded that a claimant who has surgery pending and scheduled during a filing period look for work even though the surgery will certainly interrupt the work, *see* Texas Workers' Compensation Commission Appeal No. 982569, decided December 17, 1998, that is not the case here. There was no surgery pending during either filing period, but only the reinitiating of the process for approval of spinal surgery that has already resulted in one denial. The claimant's own opinion that he cannot work at all does not rise to the level of medical evidence establishing such inability. The hearing officer's

factual determination that the claimant had some ability to work during each filing period is subject to reversal on appeal 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 appealed determinations of the hearing officer.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge