

APPEAL NO. 991294

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 24, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that appellant (claimant) had not made a good faith effort to obtain employment commensurate with his ability, that claimant's unemployment "was not a direct result of Claimant's impairment" and therefore claimant was not entitled to supplemental income benefits (SIBS) for the second compensable quarter.

Claimant appeals, contending that his doctor never said he could return to work, that he has not been released to return to work, that his unemployment was a direct result of his impairment and that the Texas Rehabilitation Commission (TRC) would not assist him until he was released to work. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The file does not contain a response from the carrier.

DECISION

Affirmed in part and reversed and rendered in part.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to 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, "[f]iling 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 employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable (low back) injury on \_\_\_\_\_, that claimant reached maximum medical improvement with an impairment rating (IR) of 15% or greater (there was some testimony claimant has a 24% IR), and that the filing period for the second compensable quarter was from November 18, 1998, through February 16, 1999.

Claimant testified that he has had two spinal surgeries with the most recent being April 28, 1998, that he has not been released to return to work, that TRC will not assist him until he has been released to work by his doctor, and that he is unable to work because of his persistent back pain. Claimant seems to confuse disability (as defined in Section 401.011(16)) standards with a total inability to work, stating that he is unable to obtain and retain employment and, on cross-examination, when asked if he could do some type of

desk job, claimant answered that he "couldn't sit there all day" and that he has to take his medication. Neither claimant, nor claimant's treating doctor at the time, Dr. L, an orthopedic surgeon, have commented that sedentary part-time employment was ever considered or contemplated. Although no evidence or testimony developed what claimant's preinjury work was, it appears undisputed that claimant cannot return to that type of 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. 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.

A May 27, 1998, Specific and Subsequent Medical Report (TWCC-64) by Dr. L indicates claimant "is really doing pretty well" and that claimant "has no leg pain at all." Claimant was referred for an functional capacity evaluation (FCE) conducted by Dr. S, who in a report dated November 4, 1998, suggested that claimant put forth "less than maximal effort" and assessed claimant as having the ability to perform work in the light-duty classification. (Dr. S defines what that entails.) Dr. L, on a form note dated November 25, 1998, simply checks "Off Duty." In a TWCC-64 dated January 13, 1999, Dr. L notes that claimant has finished his physical therapy but still has pain. In a TWCC-64 dated January 27, 1999, Dr. L notes complaints of pain and that the TRC "is unwilling to train him, thinking he may need more surgery." Dr. L comments that he does not believe further surgery "would resolve his symptomatology." Dr. L concludes "I do not feel that he is able to work at this point in time and have told him so." In a Report of Medical Evaluation (TWCC-69) dated February 16, 1999, Dr. L notes that claimant's SIBS "have been cut off due to his not trying to apply for work" and that claimant has been "unable to get a second opinion" for further lumbar surgery. Dr. L concludes "that until [claimant] is retrained into some type of work which is sedentary, that he is unemployable." In a "To Whom It May Concern" letter dated March 2, 1999, Dr. L repeats that claimant is "unemployable" unless retrained. In a TWCC-64 dated March 2, 1999, Dr. L states:

[Claimant] comes in today for no specific reason. He has some questions on some paperwork that was done. I have answered the questions. He feels that he wishes to undergo anterior fusion to see if that will resolve all the

symptomatology. I told him my opinion, my biases that he has a well decompressed nerve root, he has a fusion which appears to be a solid posteriorly and I am not sure more surgery, even anterior fusion interbody type, would resolve his symptomatology. I told him that but he wishes to seek opinion regarding this . . . .

Claimant testified that Dr. L has referred him to Dr. C, who has become claimant's treating doctor and that Dr. C is contemplating additional surgery. No report from Dr. C is in evidence.

The medical evidence of claimant's total inability to work is, at best, conflicting. Dr. L rather clearly believes that additional surgery is not warranted. Claimant is apparently searching for other doctors that will recommend and approve additional surgery. The FCE releases claimant to light duty and Dr. L's reports seem to indicate with retraining claimant would be able to perform sedentary work. We have frequently noted that the total inability to work at all will arise in only rare and unusual cases, as opposed to the fairly common situations where a seriously injured employee cannot return to the previous employment. Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997. Regrettably, an individual, such as claimant, with a 24% IR, generally cannot reasonably expect to be pain free and to be restored to the physical capabilities that he had before his injury. In this case, we affirm the hearing officer's finding of insufficient medical evidence of a total inability to work.

The medical records indicate that claimant is only 24 years old. While there is no doubt claimant sustained a serious injury and has had two spinal surgeries, that does not in itself show no ability to work. Claimant would be well served to heed the advice of Judge Kelley in her concurring opinion in Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996, which observes that income benefits do not continue forever and states that injured workers should make concrete plans to reenter the job market even though the available jobs may be limited or only part time because of the restrictions caused by the injury. Claimants are advised in that opinion to work with their doctors concerning what they can do rather than what they cannot do.

We affirm the hearing officer's findings that claimant had the ability to perform some work, that claimant had not attempted in good faith to obtain employment commensurate with his ability and that claimant was not entitled to SIBS for the second compensable quarter. The basis for our partial reversal is the hearing officer's finding that claimant's unemployment "was not a direct result of [his] impairment." That finding is against the great weight and preponderance of the evidence which supports a direct result finding in claimant's favor. Accordingly, we reverse that finding and render that claimant's unemployment was a direct result of his impairment.

The hearing officer's decision and order that claimant is not entitled to SIBS for the second quarter is affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

CONCUR IN THE RESULT:

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Judy L. Stephens  
Appeals Judge