APPEAL NO. 991296

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 27, 1999. The issue at the CCH was whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for her first compensable quarter, which ran from February 10, 1999, until May 11, 1999.

The hearing officer determined that the claimant failed to make a good faith search for employment commensurate with her ability to work, and therefore did not qualify for SIBS. The hearing officer also held that during most of the filing period, claimant's unemployment was not the direct result of her impairment. The hearing officer found that she could not work as of January 11, 1999, in anticipation of and recovery from surgery.

The claimant has appealed. She argues that she was unable to work and was not released by her doctor, so no search was all she was required to make. She argues that she was not well-represented by her attorney and was not allowed to testify. She argues that she made some job contacts during the filing period. The respondent (carrier) responds that the claimant had not met the strong burden of proving that she had no ability at all to work, and she in fact had been employed until four days into the filing period in a sedentary capacity.

DECISION

We affirm.

We note at first that our review is limited to the record and cannot include documents attached for the first time to the appeal. The claimant was employed at the time of her severe left ankle injury by (employer). She developed reflex sympathetic dystrophy, also known as chronic regional pain syndrome, as a result of this _____, injury. The employer had created a position for the claimant to accommodate her restrictions. However, the employer was no longer able to provide this position after November 16, 1998, and the claimant was therefore terminated.

The filing period for the first quarter ran from November 11, 1998, through February 9, 1999. Claimant did not seek employment during this period of time, according to her testimony at the CCH. At the time of the CCH, she said she had not been released to work by her doctor and would not likely be released before her next appointment in July 1999. Her referral doctor, Dr. P, recommended implantation of a spinal cord simulator for pain control; a trial simulator was implanted on November 24th. Although claimant's testimony was that this had little effect, her contemporaneous medical records show that by November 30th, she asserted to Dr. P that her pain was 90% reduced. Her daughter reported to Dr. P that claimant had been able to get out and do various activities. On January 11, 1999, her treating doctor, Dr. S, took her completely off work in anticipation of upcoming surgery to have a long-term spinal simulator implanted. This surgery was

performed on January 19, 1999, and her postoperative instructions detail restrictions on her movements (such as bending, stooping, twisting) for eight weeks following surgery.

On March 23, 1998, Dr. S had completed a work status form for claimant which stated that she was able to perform light duty, restricted work. There was no evidence admitted that this had been revoked during the filing period in issue.

The legislature has imposed the requirement to seek work commensurate with one's ability to work. Section 408.142(a)(4). In this case, although the claimant was employed at the beginning of the filing period, this lasted only a few days into the filing period. She was thus required to seek work commensurate with her ability. There is no requirement that this necessarily be full-time work--only that it be within any restrictions. The fact that such jobs may be few does not mean that they do not have to be sought. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee establishes 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. We have held that 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 that 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 injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. 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.

In reviewing the findings of the hearing officer against the record, we cannot agree that her decision lacks sufficient support. Concerning the direct result finding, the hearing officer could believe that the claimant would have remained employed had the employer not terminated the position. Although the claimant argues on appeal that she was terminated because she could not do the work, there was no testimony (as opposed to argument) during the CCH to this effect.

We affirm the decision and order of the hearing officer.

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Susan M. Kelley
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge