APPEAL NO. 991299

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 12, 1999, a contested case hearing (CCH) was held. With regard to the issue before her, the hearing officer determined that appellant (claimant) had not made a good faith effort to obtain employment commensurate with her ability to work and therefore claimant was not entitled to supplemental income benefits (SIBS) for the first and second compensable quarters. The hearing officer's finding that claimant's unemployment was a direct result of her impairment has not been appealed.

Claimant appeals the hearing officer's decision on entitlement, contending that the Social Security Administration (SSA), in considering claimant's "residual functional capacity, age, education and past work experience" has determined that claimant "was totally unable to work." Claimant's appeal summarizes factors that she believes we should consider and points to a medical report from Dr. K that she is unable to work in any capacity. Claimant urges us to consider that even if she could "work at a sedentary level, there are no jobs available . . . in light of her age, limited physical ability, limited education, and limited ability to communicate in the English language." Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (self-insured) responds, urging affirmance.

DECISION

Affirmed.

First, we will note that although claimant's attorney had requested a translator, and a translator was present, claimant testified at some length and in some detail entirely in English. Although claimant does have an accent, claimant responded to questions posed to her and was able to quite clearly make her points. The extent of claimant's "limited ability to communicate" in English was within the province of the hearing officer to judge.

Pursuant to Sections 408.142 and 408.143, 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 (head, neck, hip and back) injury on _____; that claimant reached maximum medical improvement on October 8, 1997, with a 20% IR; that IIBS have not been commuted; and that the first quarter filing period began on September 3, 1998, with the second quarter filing period ending on March 3, 1999. Claimant did not seek any employment during either filing period and earned no wages. Claimant proceeded 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. 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.

Claimant had been employed in a custodial capacity at one of the self-insured's facilities and on the date of injury, while shampooing a carpet, had tripped over an extension cord and fallen backward. Claimant testified that she has not had any surgeries for her injuries. Claimant's principal complaint is an inability to stand, walk, or sit for long periods of time. Although claimant's appeal states that her physical condition "has deteriorated since October 1997" claimant's testimony at the CCH was that her condition, at least during the last six months, had remained about the same. Claimant's 20% IR was based on her neck and lumbar spine injuries as assessed by Dr. M. In a decision of October 16, 1997, the SSA, while finding that "claimant has retained the residual functional capacity to perform a full range of sedentary work activity" nonetheless awarded benefits based on the "residual functional capacity, age, education and past work experience." That decision also references a functional capacity evaluation (FCE) performed in 1996.

In evidence are records of Dr. G, claimant's then treating doctor, which document claimant's complaints. Dr. G performed an FCE dated September 21, 1998. The hearing officer, in her Statement of the Evidence, sets out the various restrictions in that FCE which concludes by checking that claimant's pain is "slight" which constitutes interference with tasks requiring attention or concentration (as opposed to constituting "a significant handicap" or precluding such tasks). Claimant appears to have continued to see Dr. G through December 15, 1998, sometime after which she changed treating doctors to Dr. K, who performed an FCE dated February 25, 1999. The hearing officer notes the various test results of that FCE. In a note dated March 11, 1999, Dr. K referenced the February 1999 FCE and stated "it is my opinion that [claimant] was unable to work from 9-3-98 to the present. She is still unable to work." As the hearing officer notes, how or why Dr. K reached that opinion is not stated. Dr. K did not begin treating claimant until some time after December 15, 1998. Dr. M, apparently the original 1997 designated doctor, performed an FCE dated May 7, 1999, in which he indicated that claimant could return to work at a sedentary level.

The hearing officer, in the Statement of the Evidence, commented:

> The preponderance of evidence supports a finding that during the 1st and 2nd quarter filing periods, Claimant had the ability to work at least sedentary duty. It is clear that by August 25, 1998, Claimant had inquired about [SIBS] with [Dr. G], who subsequently performed his [FCE] on September 21, 1998. As Claimant made no effort to look for work, her evidence is insufficient to support a finding that she made a good faith effort to obtain employment commensurate with her ability to work.

It is clear from claimant's appeal and her position at the CCH, that claimant's position is that the total inability to work is based not only on a physical inability to work due to her impairment but also includes a number of other factors such as age (claimant at the CCH testified she was 59 years old and in her appeal she states she is 61 years old), education (eighth grade in Taiwan) and past work experience (as a custodian, cook and waitress). The Appeals Panel had held that the total inability to do any work at all will arise in only rare and unusual cases, as opposed to the fairly common situation where a seriously injured employee cannot return to his or her previous employment. Texas Workers' Compensation Commission Appeal No. 960714, decided May 20, 1996; Texas Workers' Compensation Commission Appeal No. 971900, decided October 31, 1997. In Appeal No. 971900, the Appeals Panel held that we have rejected consideration of extraneous factors, including age, lack of formal education, and a language barrier, in determining an employee's total inability to work as distinguished from situations where the employee has gone out and made job contacts in a good faith attempt to obtain employment. Texas Workers' Compensation Commission Appeal No. 962574, decided February 5, 1997; Texas Workers' Compensation Commission Appeal No. 962043, decided

November 27, 1996. In this case, claimant primarily relies on those extraneous factors in asserting that she cannot do even part-time sedentary work.

As claimant notes in her appeal, the SSA decision is not binding on the Texas Workers' Compensation Commission (Commission). Instead, we are obligated to follow the Texas Workers' Compensation Act, which in Sections 408.142(a)(4) and 408.143(a)(3) requires the employee to seek employment commensurate with the employee's ability to work. If the employee only has an ability to work part-time sedentary work, then the employee has an obligation to seek such part-time sedentary work. We find the hearing officer's decision to be supported by the evidence.

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:

Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

I concur in the result because I do not believe that the great weight and preponderance of the evidence is contrary to the decision of the hearing officer. However, I have most of the same concerns about this case as I did when I wrote a separate concurrence in Texas Workers' Compensation Commission Appeal No. 971197, decided July 31, 1997, and I still have the same views as when I wrote that concurring opinion. I see no reason not to consider factors like age, lack of formal education and language barriers in deciding whether or not the claimant has acted in good faith in the present case.

Gary L. Kilgore
Appeals Judge