APPEAL NO. 991451

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 24, 1999. With regard to the issues before him, the hearing officer determined that appellant (claimant) had "some ability to work," that claimant had not in good faith attempted to obtain employment commensurate with her ability to work, that claimant's unemployment was not a direct result of her impairment, and that therefore claimant was not entitled to supplemental income benefits (SIBS) for the second through fifth compensable quarters.

Claimant appealed, reciting her injuries and surgeries, her present condition, her treating doctor's report, the respondent's (carrier) doctor's report, and contending that she had been forced into retirement and that the combined effects of her injuries demonstrate that she had no ability to work during the filing periods at issue. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds, citing Appeals Panel decisions, and urges affirmance.

DECISION

Affirmed.

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 (neck, right arm, and shoulder) injury on _____; that claimant reached maximum medical improvement on October 16, 1996, with a 24% impairment rating; that impairment income benefits have not been commuted; and that the filing periods began on February 28, 1998, for the second quarter and ended on March 1, 1999, for the fifth quarter.

Claimant had been employed for 20 years as a production line worker at a large commercial bakery and sustained a repetitive trauma injury to her neck, right shoulder, and right arm on _____. Claimant had a right carpal tunnel release in December 1994, a cervical fusion at C5-6 and C6-7 in June 1995, and a right rotator cuff repair in December 1995. Claimant was released to return to light duty in January or February 1996 and did, in fact, return to light duty. It is undisputed that on (subsequent date of injury), claimant sustained another injury to her left shoulder and arm. Claimant testified that she was told that, if the left arm/shoulder injury required surgery, she would be fired. Claimant, instead, took early retirement and, subsequently, had surgery on her left shoulder/arm. Claimant testified in some detail regarding her present symptoms, the various medications that she was taking (including some which clearly had no relation to the compensable injury), and what she perceived was her ability or nonability to work. Claimant had no surgeries or hospitalizations during the filing periods at issue. In answers to carrier's interrogatories, claimant stated that there had been no change in her condition since March 1998 (during the filing periods at issue). Carrier had assigned a vocational rehabilitation counselor to work with claimant, but claimant testified that after meeting with the counselor one time in May 1998 she had retained an attorney who had declined further assistance from the rehabilitation counselor on claimant's behalf. Claimant is proceeding 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's treating doctor is (Dr. D) who, in a report dated May 15, 1998 (during the filing periods), stated:

> [Claimant] has had multiple surgical procedures on her neck, shoulder and upper extremities without resolution of her symptoms. She has also been tried on multiple medications. Further, she has been treated with physical therapy. None of these have resulted in improvement or resolution of her symptoms. She is unable to work due to her symptoms. The most she can do is minimal housework. Any activities result in pain in her neck and right shoulder and prevent her from functioning at work.
>
> It is my opinion that she completely and permanently disabled due to her neck strain and muscle strain as a result of her work related injury.

In another report dated November 30, 1998, Dr. D wrote:

> She continues to have pain and spasm in her neck and right shoulder which leave her unable to work. The most she has been able to do is minimal housework. Even this must be done in small amounts at spaced intervals. Any activities result in pain in the neck and in her right shoulder, preventing her from being able to function at work.
>
> Nothing has changed in this patient's situation which would change her level of functioning or her prognosis. It is still my opinion that she is completely and permanently disabled due to her neck strain and muscle strain as a result of her work related injury.

Claimant had also been evaluated by (Dr. C), carrier's independent medical examination doctor who, in a report dated March 23, 1998, recited claimant's work and medical history and concluded:

> The examinee could return to work full-time with significant restrictions. Based on her prolonged period of time away from work, she would need to be acclimated to a work environment in a gradual fashion. Based on the Functional Capacity Evaluation that was performed on March 12, 1998, her restrictions will be as listed below.
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> Her permanent restrictions are as follows: she could be involved in a sedentary occupation which would involve dynamic positioning, i.e. sitting and standing for comfort. She could perform no lifting greater than five pounds. There would be no work above shoulder level. She could not be in a position where her head would be static for any period of time.
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> Therefore, her status would be a light clerical type occupation, perhaps a cashier type occupation.

Claimant argued that Dr. C's report did not take into consideration the additional injuries claimant sustained in March 1996 to her left shoulder/arm. Claimant also contends that the hearing officer has the responsibility of considering all of claimant's injuries in determining eligibility for SIBS. We have no indication that the hearing officer failed to do so.

The medical evidence is clearly in conflict. Dr. D states that claimant "is completely and permanently disabled," while Dr. C says that claimant can gradually return to "work full-time" with certain restrictions and suggests "a light clerical type occupation, perhaps a cashier type occupation." (We are mindful that claimant testified that she could not perform that work.) As we have stated many times, the hearing officer is the sole judge of the weight and credibility to be given to the evidence, including medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). It is the hearing officer's responsibility to resolve inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer has done so in finding that claimant had some ability to work and therefore had not made a good faith effort to seek employment commensurate with her ability, no matter how slight or restricted that ability may be. 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.

We do, however, feel constrained to comment on two of carrier's arguments. First, carrier, both at the CCH and in response on appeal, argues that the March 1996 left arm injury was an "intervening injury [and] is the sole cause of claimant's . . . unemployment." The Appeals Panel has on numerous occasions quoted "as a direct result of the employee's impairment" in Sections 408.142 and 408.143 and stated that the unemployment need only be a direct result and not the direct result. The Appeals Panel stated that where there is an intervening injury, the issue remains whether the claimant's unemployment "was a direct result (not necessarily the only result) of the compensable impairment." In Texas Workers' Compensation Commission Appeal No. 971524, decided September 18, 1997, the Appeals Panel cited several decisions and stated that the impairment need not be the sole cause of the unemployment and that when evidence provides a link of the unemployment to the impairment from the compensable injury, the carrier has the burden of showing sole cause with respect to a subsequent injury. The only evidence of sole cause in this case is that claimant was released to light duty in January/February 1996, and worked some period of time until (subsequent date of injury), before sustaining the left side injury. That evidence falls short of carrier's sustaining its

burden of showing the second injury was the sole or only cause of claimant's subsequent unemployment.

Secondly, carrier cites Texas Workers' Compensation Commission Appeal No. 961046, decided July 18, 1996, and Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996, for the proposition "that claimants must work with their physicians to solicit recommendations of what the claimant can do rather than recommendations regarding what the claimant cannot do." We note that the oft cited comments in Appeal No. 951999, *supra*, were general suggestions in a concurring opinion in Appeal No. 951999 and were not then, nor are they now, to suggest or establish some new nonstatutory requirement.

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:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge