APPEAL NO. 991515

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 June 27, 1999. The issue at the CCH involved whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for the eighth and ninth compensable quarters, which ran from December 3, 1998, to June 1, 1999.

The hearing officer found that the claimant's underemployment was the direct result of his impairment, but that he had not made a job search commensurate with his ability to work. Although the hearing officer's findings agree that claimant has restrictions and takes medications affecting his ability to concentrate, he found that claimant had some ability to work during the applicable filing periods, but made no search at all for employment, and consequently failed to fulfill the requirement that he make a good faith search for employment commensurate with his ability to work.

The claimant has appealed, arguing that the medical evidence overwhelmingly shows that he has no ability to work, and that he should be judged as he is, not as if he were not taking his current medications. He argues that he does not have a home business, but has made an investment, in 900 number services. The respondent (carrier) responds that the decision is supported by the facts recited in the response, and asks that the decision be affirmed.

DECISION

Affirmed.

The claimant was a man in his early 20s when he injured his back on _____, during a lifting incident while employed by (employer). During the filing periods in question, the claimant's primary complaints related to debilitating pain in his thoracic area, which he said occurred when he was injured pulling a heavy cart during a functional capacity evaluation (FCE). Claimant also had scoliosis, which he said his doctor identified as a complicating factor in his back pain.

Claimant said he had had several FCE examinations. He was classified in an April 30, 1997, FCE report as having abilities at the medium-heavy level. The report itself does not document any accident at the FCE, or early termination of testing, although the claimant said he fell and this accident stopped the completion of the FCE. The test had been directed by Dr. S, whom claimant identified as his former treating doctor, from whom he had changed because Dr. S said he could do nothing more for him. The FCE noted that claimant did not test positive for symptom magnification. Claimant's treating doctor at the time of the CCH, and throughout the fling periods, was Dr. D, D.C.

On September 29, 1997, claimant was examined by Dr. O, who said that he did not believe claimant could as yet return to light duty. Dr. O found decreased range of motion

and exquisite tenderness in the facet joint region. The claimant did not have surgery. He was examined in December 1997 by Dr. CB, who reported inconsistency and symptom magnification, and opined that the claimant's pain complaints had a psychological component.

On December 8, 1997, claimant had another FCE; an office note from Dr. O noted that he had pain all the length of his back. The FCE report is not in evidence. Dr. O wrote on January 8, 1998, that claimant had a severe degree of scoliosis and for this reason could not return to his previous occupation. He said that claimant would need retraining and had suggested computer training, and that claimant and his mother seemed to agree. The claimant said at the CCH that he did not agree he could undergo computer training.

A medical report from Dr. D dated October 12, 1998, assessed radiculopathy and scoliosis, and recommended a referral to an orthopedic surgeon. Dr. SM, the surgeon referred by Dr. D, began treating claimant in September 1998. Dr. SM examined the claimant on December 2, 1998, and it is in this note that an injury from pulling a sled at an FCE (the date is not identified) occurred, characterized as a reinjury. Dr. SM said that claimant could not walk for more than a block, and had severe thoracic pain. Claimant's medical records did not indicate he had ever had surgery, nor did he so testify. Dr. SM recommended a myelogram, which had not been preauthorized by the carrier. His December 2nd letter emphasized that claimant's pain resulted from his injury, not his scoliosis, although the latter condition may have been aggravated by the lifting injury. On February 24, 1999, Dr. D wrote that claimant should continue in an "off work" status because he was currently unable to perform his regular duties due to his injury. Dr. D had completed earlier off-work "slips" in August 1998 and November 1998.

Beginning in May 1998 and throughout the filing periods in issue (which began in September 1998), the claimant was on a methadone program for pain control. Claimant explained that this is why he was fairly articulate and able to function at the CCH in a way that was not customary of his daily ability. The claimant said that he took his methadone at 6:00 in the morning, and was at his optimum level four hours later (around the time of the CCH, apparently). Claimant testified that the methadone, combined with Lortab (which he had taken since December 1998), caused problems in concentration. While the claimant also indicated that the medications caused some drowsiness, he also testified to an inability to sleep through the night due to pain. He had also used a cane to assist in walking since January or February 1999. The claimant said his methadone dosage had been steadily increased throughout the filing periods. He said that he was now required to report to the clinic three times a week to pick up his dosage because the clinic would not give out an accumulation of dosages. Originally, he had had to go on a daily basis to pick up his dosage. The claimant said he reported at 6:00 a.m. every day.

It was clear from numerous questions asked of claimant about his subjective abilities that he sincerely believed himself incapable of work, and was disinclined to return to anything that might cause further injury. He said that in 1998, during an earlier quarter, he had worked a part-time office job, but was physically unable to perform it after two months

and quit. He stated that he had not driven in three years and was unable to do so, primarily due to pain, secondarily due to the effects of his medication. The claimant said that four doctors had advised against even sedentary work because of his medication. The claimant said he had sought Social Security and Medicare, but had been denied because of insufficient medical information, according to the claimant's understanding.

The claimant testified about a "900" number business, the nature of which he characterized as "entertainment," that he had purchased three months before his injury. During his original testimony about this on cross-examination, he noted that he maintained one telephone line with four extensions, and that he lacked the money to advertise his business. Then claimant said he had tried to post free ads through the Internet (which service he had had only the last year) but briefly had his service suspended when there was a misunderstanding about the nature of his business. His service was reinstated but he had not posted any ads. The claimant denied he had computer skills and apparently did not so characterize his self-taught ability to navigate the Internet. He said he could sit at a computer terminal no more than 15 or 20 minutes at a time. He noted at this point that the methadone treatment of that morning had increased his ability during the CCH to sit.

Claimant indicated that the 900 business was operated in tandem with his parents, out of his house. On redirect examination, he characterized the 900 number business as an investment, the phone lines being answered at another location, and all he would have to do is wait for checks. He said there was no real "work" involved in this business as a result. He said that there were no calls coming in, and no money.

Claimant was examined on February 2, 1999, in a required medical examination by Dr. W. She noted that claimant had MRIs of his thoracic and lumbar spine, and the primary problems detected related to scoliosis. There was no evidence of spinal cord impingement and otherwise normal discs at all levels. There was a transitional lumbar vertebrae. There was no evidence of any disc protrusion in the thoracic spine. Although she said that claimant denied previous injury, his medical records reflected a 1991 injury with a five percent impairment rating, and that he was not completely resolved when he returned to work. Dr. W said that claimant told her he could only work 10 hours a week on his home business; claimant denied he had said he was working at all on his home business.

Dr. W found some limited and painful ranges of motions, except left lateral and left posterior rotational movements. Claimant had some positive Waddell's signs. Dr. W noted that claimant's pain was "diffuse, widespread, and not necessarily due to a mechanical, discogenic, or facet cause." She further found that his pain appeared to be disproportional to structural findings. She believed he could return to sedentary work, and noted a home-based business would be perfect. She stated that the primary restrictions from a return to work would be problems with mental concentration due to methadone. In conclusion, Dr. W recommended a psychologically based pain management program, as opposed to a narcotically based program, as an alternative to narcotically based management.

The legislature has imposed upon applicants for SIBS the requirement that work be

sought, in good faith, "commensurate" with the ability to work. Section 408.143(a)(3). The statute itself does not provide for exceptions to this requirement. However, in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated 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. 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.

Where, as here, it is clear that the injured worker has limitations, it is important to emphasize that "commensurate" with ability to work does not mean ability to return to full-time work. The fact that a claimant can only work part time, and that there are limitations on what he can do, might indeed limit the scope of available jobs; however, the fact that such jobs may be few does not mean that they need not be sought, with the possibility of identifying a position that could start an injured worker on the road toward reentering the workplace. As we review the record, we cannot agree that the hearing officer's decision is without support.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ.

App.-Amarillo 1977, writ ref'd n.r.e.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this was the case here, and affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

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Tommy W. Lueders
Appeals Judge