APPEAL NO. 991521

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 29, 1999. He determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 21st quarter. The claimant appeals this determination, expressing his disagreement with it. The appeals file contains no response from the carrier.

DECISION

Affirmed.

The claimant sustained a compensable low back injury on _____. He underwent two operations, including a failed fusion, and was assigned an 18% impairment rating. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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, "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 21st SIBS quarter was from March 3 to June 1, 1999, and the filing period for this quarter was from December 2, 1998, to March 2, 1999.

At issue in this case was whether the claimant made the required good faith job search. He testified that he did not work and made no efforts to find any employment during the filing period because his doctor had not released him to return to work and he did not believe he was able to work due to his pain and medications, which, he said, made him light-headed and dizzy. He said that he could stand for up to one hour and sit for up to one and one-half hours. 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 we have also stressed the need for medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 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.

The medical evidence in this case consisted of a series of letters from Dr. S, the treating doctor. Initially, Dr. S believed the claimant could return to work with a 35- pound lifting restriction and restrictions on standing, sitting, and bending. By August 12, 1998, Dr. S wrote that the claimant "can not do any type of work. I have recommended this patient lead a complete and total sedintary [sic] life. He is advised to avoid excessive bending, stooping and lifting. I do not recommend he lift over 15 pounds. He is advised to walk as tolerated." Dr. S essentially repeated this letter on February 10, 1999, which was during the 21st quarter filing period.

Other medical evidence consisted of an independent medical evaluation by Dr. P, in February 1997, in which he agreed with Dr. S that the claimant could return to some sort of modified duty. A functional capacity evaluation (FCE) on February 3, 1997, placed the claimant in a light-duty job classification. On January 12, 1999, Dr. P again examined the claimant at the request of the carrier. In his report of this visit, Dr. P stated that the claimant told him "he feels he has less capacity at this time than he did then," that is, at the time of the 1997 FCE. Dr. P concluded his report:

> A [FCE] was arranged for the patient today but he refused same. I would therefore be left with the conclusion that the patient is at similar functional capacity to that found in 1997. The patient would be capable of light duty work with a maximum lift of 20 pounds.

The hearing officer considered this evidence and found that the claimant had some ability to work during the filing period, and, because he made no effort to obtain work commensurate with this ability, he was not entitled to 21st quarter SIBS. In doing so, he found Dr. P's opinion more persuasive than Dr. S's. In his appeal, the claimant argues that Dr. S, the treating doctor, had more credibility than Dr. P, whom he described as "getting paid by" the carrier and "not qualified to override" Dr. S. He also suggested that Dr. P told him at the examination that he could not work, but reported something different to the carrier. As noted above, whether the claimant had some ability to work during the filing period was a question of fact for the hearing officer to decide. The hearing officer, as fact finder, was the sole judge of the weight and credibility of the evidence. Section 410.165(a). It was his responsibility to determine what facts the evidence established. In this case, he found Dr. P more persuasive than Dr. S. 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 doctors for that of the hearing officer. Rather, we conclude that the opinion of Dr. P, deemed credible and persuasive by the hearing officer, was sufficient to support the finding of some ability to work and the failure of the claimant to establish a good faith job search commensurate with that ability.

Two other matters require comment. The claimant asserts that the carrier paid SIBS without objection for at least two years preceding the dispute of the 21st quarter and he did nothing different in the filing period for the 21st quarter. We have noted that each quarter of SIBS entitlement is decided independently and a decision on a prior quarter is not binding on later quarters. Texas Workers' Compensation Commission Appeal No. 972302, decided December 15, 1997. The failure of the carrier to challenge a prior quarter does not preclude a challenge to a later quarter. The claimant also complains of the failure to admit his evidence because of lack of timely exchange, asserting that all of the carrier's evidence was admitted. Our review of the record of the CCH reveals that no objection was made to the carrier's evidence. The claimant, through his attorney at the CCH, also conceded that no timely exchange of the documents was made. We find no error in the hearing officer's ruling to exclude this evidence, which consisted mostly of letters virtually identical to Dr. S's February 10, 1999, letter. The other document concerned the claimant's prescription medication, matters about which the claimant testified. Under these circumstances, any error in the exclusion of this evidence was harmless at best. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge