APPEAL NO. 991535

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 30, 1999, a contested case hearing was held. With regard to the only issue before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 14th compensable quarter because she had not sought employment commensurate with her limited ability to work during the filing period. The hearing officer's determination on direct result was not appealed and will not be addressed further.

Claimant appeals, contending that the "overwhelming evidence supports her inability to work at any work no matter how light it may be." Claimant contends that she "should not be required to go against the advice of her doctors to qualify for SIBS." Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds, urging 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 back injury on _____; that claimant reached maximum medical improvement on December 4, 1994, with a 19% impairment rating (IR); that impairment income benefits were not commuted; and that the filing period was from January 4, 1999, through April 4, 1999. The parties also stipulated that claimant had no earnings and made no job search during the period at issue. Claimant proceeds 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 or "be so obvious as to be irrefutable." 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 testified that she is in constant pain, usually at a seven level (on a scale of one to 10) except when she has spasms and the pain becomes worse. Claimant testified that she cooks some "light meals," does dishes and walks for exercise one-half to one mile on a regular basis. Claimant said that she goes grocery shopping three times a week with the assistance of her husband who also does most of the household cleaning. Claimant said that she and her husband teach a Sunday school class at a retirement home each week and that outing lasts 45 minutes to an hour.

Claimant has seen a number of doctors and relies principally on the reports of Dr. C, her current treating doctor, and Dr. D. Claimant is currently about 65 years old. Claimant had been employed by a large retailer when a stack of boxes fell on her and she sustained neck and low back injuries. Claimant has declined spinal surgery and opted for conservative care. A March 30, 1998, report from Dr. C has an impression of multiple level lumbar degenerative discogenic disease with no discogenic desiccation at L1-2 and L2-3, "L-2 or L-3 retrolisthesis of 4 mm with progression of degenerative disc disease at L1-2" and perhaps lumbar facet joint disease at L4-5 and L5-S1. In a letter dated February 14, 1996, to claimant's attorney, Dr. D writes that because of claimant's spinal conditions "specifically lumbar spondylosis and disc herniation, that she is unable to perform any gainful employment no matter how light it may be." Dr. C, in a report dated August 7, 1998, states that claimant is considered "to be 100% totally, but temporarily, disabled." That phraseology is repeated in reports dated December 16, 1998, and April 28, 1999. In a report dated May 21, 1998, Dr. C recites claimant's pain level, results of his examination and concludes:

> [Claimant] continues to be totally and permanently disabled from engaging in any substantially gainful employment. This includes light or modified duty.
>
> This is due to her significant loss of lumbar ROM [range of motion] coupled with left lower extremity weakness. It is worsened by her ongoing burden of severe pain . . . .

Claimant testified that at one point (not clear whether it was during the filing period at issue or not) she was offered a job with a photography company (a former employer) but she turned the job down because it involved fairly extensive travel and claimant's doctors had advised her against taking the job. Claimant testified that her doctors had told her that working might jeopardize her health and/or result in paralysis. Claimant has applied for and is receiving social security disability benefits.

Carrier relies on two older functional capacity evaluations (FCE) (1993 and 1994) which indicate that claimant has an ability to work at least in the sedentary category with a "significant" amount of symptom magnification. Carrier also offers a report dated September 16, 1998, from Dr. F, a former treating doctor, who was of the opinion that claimant "should be able to return to some type of gainful employment. This would probably be classified in the light duty or even sedentary." Dr. F notes some lifting, bending and stooping restrictions, and that claimant should be allowed "to change positions frequently." The parties are in disagreement whether claimant's condition has remained static over the years (as carrier contends) or has grown worse due to "lumbar radicular symptomology" as claimant contends.

The hearing officer, in his Statement of the Evidence, comments:

> Carrier does not deny that Claimant has sustained a serious injury with lasting effects which preclude her return to her preinjury occupation. Nor does Carrier necessarily contend that Claimant should be able to return to full time employment. Carrier does contend, however, that Claimant has some ability to work and was obligated to seek some type of employment. Despite the numerous reports by Claimant's doctors, most recently [Dr. C], the Hearing Officer finds Carrier's arguments to have merit.

Claimant, in her appeal, contends that the overwhelming evidence is contrary to the hearing officer's decision, and contends that Dr. F's September 1998 report should be disregarded because it was done two filing periods prior to the current filing period and "was not supported by any [FCE] or other objective test." Claimant cites various medical reports and contends that there "is absolutely no objective medical tests from any treating physician which supports . . . that [claimant] is capable of doing some work." (Emphasis in the original.)

We have frequently noted that the total inability to 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 the previous employment. Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997. Regrettably, an individual, such as claimant, with a 19% IR, generally cannot reasonably expect to be pain free and to be restored to the physical capabilities that she had before her injury. In this case, the medical evidence is conflicting, and we note that the burden is on the claimant to prove by medical evidence her total inability to work while carrier can use both medical and other evidence to show claimant has some ability to work. The hearing officer apparently was not

persuaded that claimant's fear that a return to some kind of light or sedentary work would result in further injury established a total inability to work. *See* Texas Workers' Compensation Commission Appeal No. 970475, decided April 28, 1997.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We find that the hearing officer's decision is supported by sufficient evidence.

Accordingly, the hearing officer's decision and order are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge