APPEAL NO. 991680

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 July 13, 1999. He (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 12th quarter. The appellant (carrier) appeals this determination, contending that the decision was against the great weight of the evidence and that the hearing officer improperly failed to apply the "new" SIBS rules. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant, who was 66 years old at the time of the CCH, sustained a compensable low back injury on _____. He reached maximum medical improvement on September 1, 1995, and was assigned a 16% impairment rating.

Because this is a no-ability-to-work SIBS case, it was critical that the correct SIBS rules be applied. The new rules become effective for filing periods beginning on and after January 31, 1999. Under former Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101 (Rule 130.101), which dealt with definitions, the "filing period" was 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 definitions in the new Rule 130.101 do not include "filing period." In its place is "qualifying period," defined as "[a] period of time for which the employee's activities and wages are reviewed to determine eligibility for [SIBS]. The qualifying period ends on the fourteenth day before the beginning date of the quarter and consists of the 13 previous consecutive weeks." The effect of this rule change was to back up the start of the filing/qualifying period 14 days. The result in the case we now consider is that the filing period did not begin on January 31, 1999, as the parties seemed to stipulate, but 14 days before, that is, on January 17, 1999. This calculation explains the confusion at the CCH generated by Carrier's Exhibit No. 2, which advised the claimant that the "filing period for the 11th quarter is from January 17, 1999 through April 17, 1999." As a result of this rule change, the old rules apply for this quarter. *See* Texas Workers' Compensation Commission Appeal No. 991558, decided September 7, 1999 (Unpublished).

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. The entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the filing/qualifying period. The 12th quarter was from May 2 through July 31, 1999. The hearing officer found that the claimant

met both of these criteria. The carrier appeals only the finding that the claimant made the required good faith job search commensurate with his ability to work.

The claimant made no job search efforts during the relevant filing/qualifying period, asserting that he had no ability to do any work at all. 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, 1996. *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 submitted by the claimant to establish an inability to work consisted primarily of the opinion of his treating doctor, Dr. BT. In a letter of May 21, 1999, Dr. BT wrote that she began treating the claimant in July 1994. She wrote that since then the claimant

> has been unable to perform any type of work at any capacity since his injury. He cannot even do things around the house because of his back pain . . . Specifically at this time he cannot work because he is unable to bend, he is unable to stand still for more than 15 minutes, he cannot walk for more than two blocks or for more than 15 minutes at a time, he cannot sit for more than 30 to 45 minutes at a time. His legs are weak. He cannot exercise. He cannot hold his arms over his head for more [than] 3 minutes and he cannot lift over 10 pounds.

In a letter of June 29, 1999, the Texas Rehabilitation Commission declared "him inappropriate for Vocational Rehabilitation Services at this time." The claimant also suffers from a heart condition and diabetes. He testified that he does some routine car and yard maintenance.

On March 30, 1999, Dr. P performed an independent medical examination of the claimant at the request of the carrier. In Dr. P's opinion, the claimant "should not be

considered completely disabled and, if indeed a light or preferably sedentary job duty is available, then I think he could return to work on an immediate basis."

The hearing officer considered this evidence and concluded that the claimant established an inability to work. In its appeal of this determination, the carrier points to Dr. P's statement, which clearly is evidence of an ability to work, in support of its position and describes Dr. BT's opinion as conclusory and not persuasive. As noted above, whether the claimant had some ability to work was a question of fact for the hearing officer to decide. He was more persuaded by the opinion of the treating doctor on this question. The hearing officer as fact finder is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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 evidence for that of the hearing officer. While there was clearly evidence, including the claimant's testimony about what he could do around the house and the opinion of Dr. P, from which the hearing officer could conclude otherwise, Dr. BT's opinion supported the finding regarding no ability to work. The decision of the hearing officer is sufficiently supported by the evidence he deemed credible and persuasive.

One further comment is in order. The claimant testified that he did nothing different during the 12th quarter filing/qualifying period than in the other quarters for which SIBS were paid and that he was not aware of the requirement to look for work. The hearing officer commented on this in his decision and order. The carrier argues that these irrelevant considerations produced an improper result in this case. We agree that a claimant's ignorance of the law is no excuse for failure to comply with its requirements and that entitlement to SIBS for each quarter must be independently established regardless of decisions in prior quarters. Texas Workers' Compensation Commission Appeal No. 951487, decided October 19, 1995; Texas Workers' Compensation Commission Appeal No. 941053, decided September 20, 1994. Based on our review of the record in this case, we are unwilling to agree that his discussion of the evidence in the decision and order reflects that the hearing officer premised his decision on improper considerations.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge