APPEAL NO. 991811

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 15, 1999. He (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the third quarter. The claimant appeals this determination, expressing her disagreement with it. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

This is a no ability to work case to be determined under the so-called "new" SIBS rules.

The claimant sustained a compensable back injury on _____. She reached maximum medical improvement on July 12, 1998, and was assigned a 15% 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 § 130.101(4) (Rule 130.101(4)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." The third quarter was from May 25 through August 23, 1999, and the filing period for this quarter was from February 10 through May 11, 1999. The claimant had the burden of proving entitlement to SIBS for any quarter claimed.

The claimant inquired for employment through two telephone calls during the filing period. She said she did this only to satisfy the carrier because the carrier told her to and because she had no realistic hope of finding employment. She relies on an inability to work to establish her entitlement to SIBS in this case. The claimant said she was in daily severe pain and believed she was unable to perform any type of work. Rule 130.102(d)(3) provides that an employee has made the required good faith effort if during the qualifying period he or she "has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]" The medical evidence submitted by the claimant consisted of two letters from Dr. F, her treating doctor. On February 19, 1999, Dr. F described the claimant's condition of herniation at L5-S1 and bulging at L4-5 with significant scoliosis as well as neck pathology. He concluded that the claimant "certainly is totally disabled, unable to seek any type of gainful employment." On March 16, 1999, Dr. F wrote that the claimant had a "multitude of

problems" and "I just do not agree that she can go and be a gainfully employed person. It is just not going to be possible. She can barely take care of her own needs, much less being able to work eight hours a day, forty hours a week. She is not capable of it." This last letter of Dr. F was apparently in response to a report of Dr. FT, a carrier-selected doctor who examined the claimant on January 19, 1999, and concluded that despite her chronic pain, she was "probably physically capable of performing work in a sedentary to light category."

Whether the claimant had some ability to work was a question of fact for the hearing officer to decide. The hearing officer considered the evidence and found that the claimant had some ability to work. In her appeal, the claimant argues that more weight should be given to the opinion of Dr. F, her treating doctor, than to Dr. FT, who, she said, saw her only once for about 15 minutes. She also argues that the carrier had other evidence of her inability to work in addition to what was introduced at the CCH.[1] This case was decided on the basis of the evidence before the hearing officer. Dr. F's letters were in terms of claimant's ability to work full time in "gainful employment." The SIBS requirement is that the claimant seek employment commensurate with her ability to work. This does not necessarily mean full-time employment, nor does the use of the word "gainful" necessarily reflect that Dr. F was aware of the correct legal standard to establish entitlement to SIBS. See Texas Workers' Compensation Commission Appeal No. 970890, decided June 27, 1997, and Texas Workers' Compensation Commission Appeal No. 972231, decided December 8, 1997.

The hearing officer was 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. Rather, we find the opinion of Dr. FT that the claimant could perform sedentary work sufficient to support the hearing officer's determination that the claimant had some ability to work. Having failed to seek employment commensurate with this ability, she was not entitled to third quarter SIBS.

[1]The claimant said in her appeal that she was attaching to her appeal another letter of Dr. F dated June 7, 1999. Attached to her appeal, however, was Dr. F's letter of March 16, 1999, which was introduced into evidence and considered by the hearing officer. Even had she attached a June 7, 1999, letter to her appeal, we would not have considered it because it was not introduced at the CCH. See Section 410.203(a).

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge