APPEAL NO. 991838

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 (hearing officer) determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 21st quarter. Claimant appeals, contending that he was unable to work during the filing period in question and that he met his burden to prove that he acted in good faith. Respondent (carrier) responds that claimant had some ability to work during the filing period, that he did not act in good faith, and that the Appeals Panel should affirm the hearing officer's decision and order. The direct result determination in claimant's favor was not appealed.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he is not entitled to SIBS. He contends that he had no ability to work during the filing period in question, that he looked for work despite this, and that he met his burden to prove the good faith criterion.

It was undisputed that claimant sustained a compensable low back injury on _____. The parties stipulated that: (1) claimant had an impairment rating (IR) of 18%; (2) claimant did not commute any of his impairment income benefits (IIBS); and (3) the 21st quarter was from April 12, 1999, to July 11, 1999.

Claimant testified that he sustained a compensable injury on _____, while doing automotive work. He said he underwent a laminectomy and fusion in 1994 and later a discectomy and 360 degree fusion in 1996. Claimant testified that when he walks, he has a "popping" in his back that "pinches nerves" and that he has been approved for a procedure that will cut the nerves and decrease his pain. Claimant said that in 1998, he went through a spine stabilization program to build and strengthen his muscles.

Claimant asserted at the CCH that he is unable to return to gainful employment until after he has the rhizotomy. Claimant testified that, in any case, during the filing period in question, he sought work by calling employers in the phone book. He said he looked for jobs that he thought that he could do. He testified that he thought he could do part-time work if he could change positions while working. He said he has not worked since 1993. He said each call took approximately three to four minutes, that he did not send out any applications, and that he did not develop a resume. Claimant said he did not search for work in the larger town 50 miles away, but searched for work only in his own town, which he believed had a population of about 20,000. Claimant testified that he also looked for work in his town's newspaper and that he and his wife asked local people about jobs. Claimant said he thought he could do work as a dispatcher, but said that working doing pizza delivery would not "pay" because he would have to use his own car and pay for fuel.

In a June 26, 1998, report, Dr. B stated:

> I feel that if this patient's employer has work available within his working weights and limitations as documented in the FCE [functional capacity evaluation], the patient could most likely return to work. Prior to returning to work, the patient would need to be placed in some form of work hardening program in order to facilitate reconditioning his deconditioned lumbar spine.

In a July 17, 1998, letter, Dr. W stated that he discussed the case with Dr. B and that:

> We feel that this patient . . . has to be presented through a work hardening program in order to be able to consider going back to work. This patient is deconditioned and is not in a position at this time to return to *the type of work that he was doing previously without at least an opportunity to present himself through work hardening.* [Emphasis added.]

A December 8, 1998, FCE report states that claimant "is currently functioning at a heavy physical demand level." In a March 23, 1999, follow-up progress report, Dr. C stated that he suspects that claimant has facet dysfunction and ligamentous disruption. Dr. C stated that claimant's FCE indicated that he has permanent restrictions. A March 23, 1999, "injured worker status report" states that claimant's treating doctor is Dr. B, that the consulting physician is Dr. C, and that claimant is to remain off work "until injections." In a May 11, 1999, work status form, Dr. C indicated that claimant is "not job ready" and states that claimant should be referred to the Texas Rehabilitation Commission.

The hearing officer determined that: (1) claimant completed a work hardening program on November 6, 1998; (2) claimant's December 1998 FCE concluded that claimant could function at the heavy physical demand level; (3) claimant contacted 20 employers by telephone during the filing period but was unable to find work; (4) claimant did not make a good faith effort to seek work commensurate with his ability to work; and (5) claimant is not entitled to SIBS.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The Appeals Panel has held that if an employee established that he has no ability to work at all, then he may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal

No. 950173, decided March 17, 1995. 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*. The claimant has the burden to prove he has no ability to work because of the compensable injury. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. When a claimant alleges a total inability to do any work, that contention generally must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994.

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 great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

This is an "old rules" SIBS case. Claimant had the burden to prove he had no ability to work. Appeal No. 950582, *supra*. The hearing officer was the sole judge of the credibility of the medical evidence and determined whether the medical evidence showed that claimant had no ability to work. The hearing officer apparently found that claimant was capable of doing some work and that claimant's job search was not adequate to show that claimant met the good faith requirement. There was some evidence that claimant was capable of doing some work, although the evidence was in conflict in this regard. The claimant himself indicated that he thought he could do some work, although he wished to have a pain-reducing procedure which would increase his ability to work. The hearing officer made his determinations regarding good faith based on the evidence before him. Because the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for his. Cain.

Claimant contends that the Appeals Panel should consider certain medical evidence for the first time on appeal. Generally, we will not consider evidence not submitted into the record but offered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the party's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The evidence claimant asks us to consider is a letter from Dr. C that states that claimant's rhizotomy (nerve cutting) procedure has been approved and that claimant will undergo the procedure in the near future. Dr. C also states that claimant "is totally disabled at this time from all gainful employment." We conclude that this evidence is cumulative of other medical evidence that was admitted at the CCH. Therefore, we do not find that a remand is justified because this evidence is not so material that it would probably produce a different result. Appeal No. 93111.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge