APPEAL NO. 991900

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 August 16, 1999. The issue at the CCH involved whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for the 14th compensable quarter, which ran from May 8 through August 6, 1999.

The hearing officer found that the claimant's underemployment was a direct result of his impairment but that he had not made a job search commensurate with his ability to work. As a result, he was found not entitled to SIBS.

The claimant has appealed, arguing that his search was as much as he could physically do, because getting out and looking for a job from employer to employer would exceed his sedentary job restrictions. He argues that the great weight of the evidence proves that he made a good faith search. The respondent (carrier) responds that the decision of the hearing officer is supported by the record.

DECISION

Affirmed.

The qualifying period for the quarter of SIBS in issue ran from February 6 through May 7, 1999. Claimant had sustained a neck and back injury in _____. He started to take an English-as-a-Second-Language Course through the auspices of Texas Rehabilitation Commission in the summer of 1998, but quit the course after two months when his doctor proscribed sitting for so long. As a matter of fact, his doctor had also advised against the type of job search he had been doing at that time, ostensibly because climbing stairs or walking around was causing additional pain. However, claimant had been evaluated through a functional capacity evaluation in 1998 and found capable of functioning and working at the sedentary level. He agreed that he drove a car, and his job search during the period in question still involved driving to various employment agencies and placing applications, which would take as much as three hours due to testing.

Claimant said his job search during the qualifying period essentially consisted of reading the newspaper, noticing what employment agencies were offering jobs, and going to these agencies. He found this easier than contacting or visiting individual employers. The claimant contended that there were times when he was offered a job and reported for duty, only to find out that the job exceeded his abilities. He recalled this may have happened a couple of times. He was unable to recall the name of either employer. He also said that during the qualifying period for the 15th quarter he was offered and actually performed a light assembly job, but only worked for three to four hours at that job.

The testimony was lengthy but not very specific. Claimant said all of his job contacts were listed on the Statement of Employment Status (TWCC-52). He stated that he would follow up with employment agencies but would be told there was nothing available. As the hearing officer stated in his decision, there were only eight days for which claimant listed contacts with employment agencies. At one point, the claimant asserted that as it was winter, there were not many available jobs in the major city in which he lived.

The claimant's doctor, Dr. S, wrote in October 1998 that claimant could not return "to any gainful employment." In January 1999 Dr. S wrote that he could not return to "his occupation as a construction worker." On April 13, 1999, Dr. S issued a slip that says both "no work" and then enumerates various restrictions, such as no repetitive lifting over five pounds, no repetitive bending, stooping, or twisting, no prolonged standing, and suggests five breaks.

The legislature has imposed upon applicants for SIBS the requirement that work be sought, in good faith, "commensurate" with the ability to work. Section 408.143(a)(3). The statute itself does not provide for exceptions to this requirement. Where a worker contends complete inability to work, such that no search is a good faith search, we have held that 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 that a finding of no ability to work must be based on medical evidence. 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 injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. 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. However, effective January 31, 1999, new administrative rules became effective which affect the quality of evidence required to prove a total inability to work. *See* 28 TEX. ADMIN. CODE §130.102(d) (Rule 130.102(d)). Likewise, the evaluation of search efforts that are made is to be guided by the factors set out in Rule 130.102(e). Among other things, these rules provide for a search for every week of the qualifying period, and that the number of jobs sought and the number of jobs contacts made also be reviewed. The hearing officer may also consider the education and experience of the claimant.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The decision of the hearing officer will be set aside only if

the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). It is evident that the hearing officer did not, in this case, believe that the claimant proved a number of contacts, or a range of types of contacts, that were consistent with a good faith search for the 14th quarter of eligibility. The record sufficiently supports these inferences.

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

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge