APPEAL NO. 991903

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 3, 1999. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the second and third compensable quarters. The hearing officer determined that the claimant was not entitled to SIBS for either quarter and the claimant has appealed, urging that the medical evidence shows that he was not able to work at all and that he was entitled to SIBS for both quarters. The respondent (carrier) urges that there is sufficient evidence to support the decision of the hearing officer and asks that it be affirmed.

DECISION

Affirmed.

The claimant sustained a cervical injury on _____, from pushing some heavy machinery. He subsequently had cervical surgery, reached maximum medical improvement, and was certified with an impairment rating greater than 15%. He did not work or look for employment during the filing period for the second quarter and qualifying period for the third quarter, January 1, 1999, to April 1, 1999, and March 20, 1999, to June 18, 1999, respectively. The claimant asserts he had no ability to work at all during the relevant periods. The claimant testified that he has considerable pain, that he is on a number of medications, that his physical activity is limited, and that he does not believe he is capable of any work. Medical reports from the claimant's treating doctor, Dr. P, indicate that the claimant has not been released to work, that the claimant "remains medically and physically totally unable to engage in any gainful activity on a permanent basis" but, in part, indicates restrictions of not lifting, pulling, or pushing heavy objects of above10 pounds. A functional capacity evaluation (FCE) in June 1998 indicates that the claimant has a physical demand level of modified sedentary. A required medical evaluation by Dr. S on June 1, 1999, indicates some functional overlay and concludes that the claimant "could return to gainful employment as long as he engages in the use of proper body mechanics, and as per the request, an [FCE] will be obtained and further recommendations will follow, once I have an opportunity to review the [FCE]." There is no further FCE in evidence and the carrier's dispute of entitlement to SIBS notes that the claimant did not complete the FCE recommended by Dr. S.

Based on the evidence before him, the hearing officer determined that the claimant had some ability to work and did not attempt in good faith to obtain employment commensurate with his ability to work. Clearly, the claimant had a significant injury with continuing restrictions on his physical capabilities. However, even though there may be significant physical restrictions and only a few jobs that would meet those restrictions, the 1989 Act requires that such job search efforts be made to qualify for SIBS. Texas Workers'

Compensation Commission Appeal No. 94150, decided March 22, 1994; Sections 408.142 and 143. *See also* the opinion of Judge Kelley in Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996. While the two quarters in issue here were under different rules for qualifying periods after January 31, 1999, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) applies as stated in Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished), and the result is the same as there was a determination supported by sufficient evidence that the claimant had some ability to work and did not seek any employment. The burden of showing no ability to work at all, as established by the medical evidence, is on the claimant. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. This is a factual issue for the resolution of the hearing officer. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. From our review of the evidence, we cannot conclude that his determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Accordingly, the decision and order are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge