APPEAL NO. 991936

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 6, 1999. The issues at the CCH were whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the 11th and 12th quarters. The hearing officer determined that the claimant is not entitled to SIBS for the 11th or 12th SIBS quarters. The claimant appeals the hearing officer's determinations that he had some ability to work and did not attempt in good faith to obtain employment commensurate with his ability to work, urging that these determinations are not supported by sufficient evidence and are against the great weight and preponderance of the evidence. The respondent (carrier) replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement on October 2, 1995, with an impairment rating of 16%; that the claimant has not commuted any portion of the impairment income benefits; that the filing period for the 11th SIBS quarter was December 1, 1998, through March 1, 1999; that the claimant's 11th SIBS quarter was March 2, 1999, through May 31, 1999; that the filing period for the 12th SIBS quarter was February 14, 1999, through May 18, 1999; and that the 12th SIBS quarter was June 1, 1999, through August 30, 1999. Given the dates of the quarters, the "old" SIBS rules apply to the 11th and the "new" SIBS rules apply to the 12th. *See* Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (new SIBS rules apply if quarter starts on or after May 15, 1999). The claimant sustained a back injury on _____, and has elected not to have surgery. The claimant's treating doctor, Dr. K, has diagnosed a herniation at L4-5 with radiculopathy of the right leg and right sciatica. According to the claimant, Dr. K has not released him to return to work, he is completely unable to work, and he did not make an effort to look for any employment during the filing periods.

The claimant testified that during the filing periods, he saw Dr. G at least on a quarterly basis; he suffered from back pain, numbness and tingling in his right leg, and a limp; he could not sit for more than 15 minutes; he used a cane; and he was on pain medication. The claimant relies on Dr. K's reports to support his position that he had no ability to work during the filing periods. In February 1998, after completing a work conditioning program, Dr. K indicates that the claimant is not capable of entering the work force. On January 12, 1999, Dr. K notes that the claimant is symptomatic and has tightness in the lumbar spine; that his leg pain is persistent, radiating into the right lower

extremity; and that he may be a candidate for surgical management. In a letter dated June 14, 1999, Dr. K states in pertinent part:

> It is my opinion that this man is incapable of return to work. He has typical radiating pain and discomfort as a result of a massive disc herniation at the L4,L5 level. It was his decision not to have a back operation. The back operation would certainly not have guaranteed anything. He has done almost as well without an operation as I have seen some of the people do. All the same, episodes of pain and discomfort in the low back with restricted motion is often present.
>
> In conclusion, it is my opinion that this individual is not capable of returning to the labor market. We tried to get him into school. He was unable to sit for the length of time demanded by Texas Rehabilitation Commission, to pay his tuition.
>
> He made an honest attempt to return to light duty. His employer advised him that no light duty was available. I can vouch for the credibility of this individual.

The claimant testified that he never told Dr. K that he had looked for a light-duty job during the filing periods, that he had not looked for a light-duty job, and that his employer did not have light duty available.

The carrier argued that the claimant introduced no medical evidence demonstrating a change in physical condition and that the medical evidence is sufficient to show some ability to work. The carrier relies on medical records that precede the qualifying period by at least one year and the testimony of the claimant that his condition has basically remained the same since January 1998. A functional capacity evaluation (FCE) from October 1996 indicates that the claimant could work part time in a light capacity, lifting 10 to 20 pounds. On October 7, 1996, Dr. K reviewed the FCE, stated that the claimant was not released to work, but indicated that the claimant was willing to do light work on a part-time basis. A prior FCE performed in August 1995 indicated that the claimant was able to work in a light physical demand level. The document nearest to the filing period, the work conditioning report on January 9, 1998, indicates activities that the claimant was able to perform, but does not specifically address the claimant's work abilities.

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 Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she 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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), effective January 31, 1999 (a new SIBS rule), provides in pertinent part that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) 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; . . . ." Rule 130.102(e), effective January 31, 1999, provides in pertinent part that "[e]xcept as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts."

The hearing officer made findings that during the filing periods for the 11th and 12th quarters the claimant had some ability to work; that the medical evidence and the testimony of the claimant did not support the claimant's contention that he had a total inability to work, neither under the old rules for the 11th quarter, nor under the new rules for the 12th quarter; and that the claimant did not attempt in good faith to obtain employment commensurate with his ability to work. The claimant asserts that Dr. K's reports, taken as a whole, thoroughly explain how the injury has caused a total inability to work. The SIBS requirement is that the claimant seek employment commensurate with his ability to work. This does not necessarily mean full-time employment. Dr. K's statement that the claimant is "not capable of returning to the labor market" does not necessarily reflect that Dr. K was aware of the correct legal standard to establish entitlement to SIBS. *See* Texas Workers' Compensation Commission Appeal No. 970890, decided June 27, 1997. Additionally, Dr. K's statement that the claimant had "made an honest attempt to return to light duty" could be interpreted as indicating that the claimant is capable of light duty. Other records, although remote in time to the quarters at issue, indicate that the claimant is capable of returning to work in some capacity.

It was the hearing officer's responsibility to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. The hearing officer simply was not persuaded that the evidence presented by the claimant was sufficient to prove that he was totally unable to work. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly

wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant has not made a good faith search for employment commensurate with his ability to work and is not entitled to SIBS for the 11th and 12th quarters.

The hearing officer's decision and order are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge