APPEAL NO. 991958

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 20, 1999, a contested case hearing (CCH) was held. The issue concerned the entitlement of the appellant, who is the claimant, to his 14th quarter of supplemental income benefits (SIBS).

The hearing officer determined that the claimant was not entitled to SIBS because he had some ability to work but failed to make a good faith search for employment commensurate with this ability. He found that claimant's unemployment was the direct result of his impairment. The hearing officer stated that although the claimant was credible, the medical evidence fell "far short of the substance and detail necessary to support a finding of total physical inability to work."

The claimant has appealed. He emphasizes that his doctor advised him not to return to work, pending further tests, and that he was found to have a failed fusion. He points out that he has been paid the subsequent quarter of SIBS by the carrier. The respondent (carrier) argues in favor of affirmance.

DECISION

Not finding the decision of the hearing officer against the great weight and preponderance of the evidence, we affirm.

The claimant was injured on _____, when he fell while lifting up a calf. The claimant had back surgery on July 25, 1994. He returned to work for two years, but began to deteriorate. It was determined he had a failed fusion, and subsequently another surgery done on April 15, 1998, a re-fusion. The claimant had not worked since that time. He gave undisputed testimony that he had searched for employment for the filing period for the 13th quarter. The 14th quarter time period under consideration ran from February 4 through May 5, 1999. The claimant said he had been paid benefits for the 15th quarter.

The claimant agreed he had a functional capacity evaluation in September 1998 which ascertained he could work at the medium level. He said he searched for work during the 13th quarter filing period pursuant to this restriction. However, claimant said he began to feel distinctly worse in January and sought medical treatment and evaluation by Dr. T and Dr. L. He said that he was advised by Dr. T to remain off work pending scheduling of a myelogram to see if the fusion had once more failed. He said that Dr. T told him that his condition could deteriorate and it was best to refrain from work until they knew more about what was wrong. (After the record closed, the claimant sought to reopen to allow the off-work slip to be put into evidence and the hearing officer surprisingly refused; we cannot address any error because the claimant did not appeal the exclusion of this evidence.)

Dr. T completed monthly form reports for the period in controversy. They are, frankly, ambiguous on the matter of restrictions, and it appears that the bottom of the forms detailing work restrictions (or no restrictions) was not completed. Dr. T wrote on June 28, 1999, that these were form reports, and that if any work ability were contemplated, the bottom would have been completed. Dr. T wrote that if not completed, the claimant could not do "any type" of work. On August 2, 1999, Dr. T wrote that claimant was permanently disabled from any gainful employment. The claimant testified that he did not have the experience or ability to do desk work.

On April 15, 1999, Dr. L wrote that claimant's fusion was solid at L5-S1 and L4-5 anteriorly. A limited CT scan showed some foramina narrowing at L4-5. On June 8, 1999, Dr. L wrote that the more detailed myelogram/CT scan did not show any significant nerve root compression. Dr. L recommended no further surgery and that claimant should be treated with injections; the claimant testified he had injections scheduled for pain relief at some date after the CCH.

There are two eligibility criteria that must be met to continue after the first quarter to qualify for SIBS, set out in Section 408.143(a). The injured employee must prove that he or she has earned less than 80% of the employee's average weekly wage as a direct result of the employee's impairment and has in good faith sought employment commensurate with the employee's ability to work. The legislative requirement to look for work serves the objective of SIBS as a "bridge" benefit to support a reentry to employment.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. 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.

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). Although there is no rule precluding weight being given to "conclusory" medical evidence, the hearing officer is not required to give weight to reports that do not develop the examiner's opinion of a claimant's abilities.

We cannot agree that the decision does not have sufficient support in the record, and affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge