APPEAL NO. 992043

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 24, 1999. She (the hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the first quarter. The claimant appeals this determination, expressing his disagreement with it. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant, who was 31 years old at the time of the CCH, sustained a compensable cervical spine injury on _____. He reached maximum medical improvement (MMI) on March 26, 1998, and was assigned a 17% impairment rating (IR). Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(4) (Rule 130.101(4)) entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the "qualifying period." The "qualifying period" ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The first quarter was from June 11 to September 9, 1999, and the qualifying period was from February 26 to May 27, 1999.

The claimant did not commute any portion of his IIBS and was not employed during the qualifying quarter. At issue was whether he made the required good faith job search and established that his unemployment was a direct result of his impairment from his compensable injury. He testified that during this period he did not seek any employment and contends that he was unable to work at all during this time, but only became able to do some work after the close of the qualifying period when he completed a work conditioning program. Rule 130.102(d) provides that an employee has made the required good faith effort to obtain employment commensurate with the ability to work if the employee:

> 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 . . . .

Dr. A, the first treating doctor, referred the claimant to Dr. H for a series of trigger point injections. After the third injection on June 19, 1997, Dr. A stated that the claimant was to return to full duty the next day. According to the claimant, he did return to some form of work, but was terminated in August 1998 for excessive absences and was no longer able to perform the job. Dr. Z, in a report of May 12, 1998, wrote that the claimant "is to continue to be on Light Duty status at this time."

Mr. C, a vocational counselor hired by the carrier, testified that he contacted Dr. Z's office and approval was given to refer the claimant for a functional capacity evaluation. An appointment was set for March 23, 1999, and again for April 27, 1999, but the claimant did not report for either. The claimant testified that he did not recall the circumstances of his failure to attend the first appointment, but missed the second one because his neck and back were too stiff from a myelogram given in March. On March 23, 1999, the carrier asked Dr. Z the peculiarly worded question: "[w]ith respect to employability in general, has [claimant's] case reached an end result?" Dr. Z responded, "No. Will start conditioning program." The claimant said he started the work conditioning program on June 30, 1999, and finished it on July 31, 1999. He said the program was helpful and has given him some ability to work, but only after the qualifying period ended. The claimant did attend a work capacity evaluation on May 24, 1999, and was found able to work at the sedentary level. Meanwhile, in a report of April 13, 1999, Dr. Z wrote that the claimant needed work hardening before he returned to work and that he was "to remain off work status." His physical and neurologic examination showed hypoactive deep tendon reflexes and a normal cranial nerve examination. The diagnosis was cervical radiculopathy with protrusion at C5-6. On June 10, 1999, Dr. Z wrote that effective June 14, 1999, the claimant was "to be on sedentary work." By August 12, 1999, Dr. Z wrote that the claimant was "to continue off work." The report of the physical and neurological examination stated decreased cervical range of motion, hypoactive deep tendon reflexes, paravertebral muscle spasms, and no motor deficit.

The claimant had the burden of proving entitlement to SIBS and that he had no ability to work during the qualifying period. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Whether he had no such ability was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. In this case, the hearing officer considered the evidence and was not persuaded that the claimant met his burden of proving no ability to work under the criteria of Rule 130.102(d). The claimant appeals this determination, contending that none of the evidence showed an ability to work during the filing period and the carrier did not prove he had an ability to work. The claimant had the responsibility to prove he had no ability to work. The carrier was not required to prove the opposite. We have in the past noted that while it is best to have evidence directly addressing the qualifying period, other evidence outside the filing period may be considered by the hearing officer to the extent that it is deemed relevant to and reflective of conditions during the filing period. Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996. In this case, Dr. Z's reports during the filing period simply placed

the claimant in a no work status, without relating this conclusion to the much broader concept of whether the claimant had some physical ability to work. We have said that the absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith job search requirement, but is subject to varying inferences on the question of no ability to work. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we cannot conclude that the claimant's evidence compelled a conclusion that the claimant had no ability to work. For this reason, we decline to reverse the hearing officer's finding of some ability to work.

Given the undisputed evidence that the claimant made no effort to seek employment during the qualifying period despite some ability to work, we also conclude that the hearing officer's finding that the claimant did not establish that his unemployment was a direct result of his impairment from the compensable injury is supported by sufficient evidence.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge