APPEAL NO. 992065

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 24, 1999. On the single issue of entitlement to supplemental income benefits (SIBS) for the 10th compensable quarter, the hearing officer determined that the appellant (claimant) was not so entitled. The claimant has appealed urging that the hearing officer did not properly apply the rules (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102)) for entitlement to SIBS to the evidence in this case and that the evidence supported a determination that the claimant made a good faith effort to seek employment commensurate with the ability to work although no job search was made. The claimant seeks a reversal or, alternatively, a remand of the case. No response is on file.

DECISION

Affirmed.

The claimant sustained a cervical/shoulder injury on _____; subsequently had cervical surgery; and was assessed an impairment rating of 15% or greater. She is seeking SIBS for the 10th compensable quarter, the qualifying period for which ran from February 17, 1999, to May 18, 1999. During this period of time she did not seek any employment at all, asserting that she had no ability to work, thus satisfying the requirement to attempt in good faith to seek employment commensurate with her ability to work. Section 408.143(a)(3). The new implementing rules, Rule 130.100 *et seq.*, apply in this case.

A good faith effort to obtain employment commensurate with one's ability to work can be shown 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." Rule 130.102(d)(3). In the case under review, the claimant produced pertinent reports from her doctor, Dr. G, which state that, in his opinion, the claimant "is permently [sic] and totally disabled from any employment due to cervical, myelopathy, left hip and shoulder pain, and sphere neck pain, she also has hypertension, malignant stomach cancer [not asserted as a part of the injury] due to non sterodial anti-inflammatory drugs." The doctor states in a report that the claimant cannot use her hands; extend her arms; is unable to lift, push, pull, carry, stoop, bend, or squat; and is not able to write extensively noting severe neck pain and migraines.

The claimant was evaluated by Dr. B in November 1998. Dr. B noted that the claimant was 5 years postinjury with recovery from her cervical diskectomy and fusion and that she complains of residual intermittent pain in her neck radiating to her shoulder and some numbness in the upper extremities. He did not note any evidence of radiculopathy,

past or present, and opined that the claimant should have recovered from her stomach surgery at that time. He references a functional capacity evaluation (FCE) from January 1998 which showed light-work capability and concluded that the claimant has a capacity for light-work activity, with occasional lifting to 20 pounds and comparable carrying, pushing, and pulling.

Good faith was not shown under the specific provisions set out in Rule 130.102(d)(3), as Dr. B's report and the FCE he cites in his report are "other records" showing some ability to work. Further, the hearing officer found as fact that the claimant had some ability to work. Evidence to support this finding of fact is found, again, in Dr. B's report and the FCE. While there was contrary evidence, namely in the report and opinion of Dr. G, this merely sets up a conflict in the evidence before the hearing officer, a matter for his resolution. Garza v. Commercial Insurance Company of Newark, New Jersey , 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Whether there is an ability to work is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. From our review of the evidence, we cannot conclude that the hearing officer's finding of fact that the claimant had an ability to work is 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). Since the claimant had an ability to work and did not seek any employment at all during the qualifying period, she has not met the requirements to qualify for SIBS for the 10th compensable quarter. Section 408.143(a)(3). Accordingly, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge