

APPEAL NO. 000004

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 December 8, 1999. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 16th and 17th quarters. The claimant appeals these determinations, contending that they are against the great weight and preponderance of the evidence and that the hearing officer erroneously excluded important evidence of the claimant's. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

We address the evidentiary point of appeal first. The claimant offered into evidence numerous reports of his treating doctor, Dr. C, to establish a claimed inability to work. The carrier objected on the grounds that the documents were not exchanged within 15 days of the benefit review conference (BRC). The BRC was on October 12, 1999, and the documents were due to be exchanged by October 28, 1999. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1) (Rule 142.13(c)(1)). Section 410.161 allows for a late exchange based on a finding of good cause. The claimant's attorney conceded that the documents were not timely exchanged, but did not otherwise explain the failure to disclose except to say that the carrier on its own had the evidence a "long time ago." We review evidentiary rulings on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. The fact that the opposing party may already have the document from another source does not excuse the moving party from the obligation to timely exchange that document in order for it to be admissible. Under our standard of review, we find no abuse of discretion on the part of the hearing officer in refusing to admit these documents (Claimant's Exhibit No. 4 for identification).

The claimant sustained a compensable injury on \_\_\_\_\_, and underwent a two-level cervical fusion.

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 16th SIBS quarter began on April 11, 1999, and ended on July 11, 1999. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), in effect for the 16th quarter, the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed

to determine entitlement to, and amount of, [SIBS]." The 16th quarter filing period was from January 11 to April 10, 1999. The 17th quarter was from July 12 to October 10, 1999. Pursuant to Rule 130.102(b), in effect for the 17th quarter, the entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "qualifying period." Under Rule 130.101(4), 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 qualifying period for the 17th quarter was from March 29 to June 27, 1999.

The claimant's position at the CCH was that he had no ability to work during the 16th quarter filing period. He submitted a Statement of Employment Status (TWCC-52) for this quarter with numerous job contacts listed, only one of which was in the filing period. The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, 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. 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 we have also stressed the need for medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. 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 the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. 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.

In the case we now consider, virtually all the claimant's medical evidence relevant to the question of his ability to work was excluded. The carrier introduced a functional capacity evaluation which was reviewed by Dr. X, who concluded that the claimant "could perform sedentary work." As noted above, whether the claimant had some ability to work was a question of fact for the hearing officer to decide. He found that the claimant had some ability to work and that he failed to make the required good faith job search commensurate with this ability. 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 find the evidence sufficient to support this determination.

With regard to the direct result element of SIBS eligibility for the 16th quarter, the hearing officer found that the claimant's unemployment "cannot be ascribed to any factor

beyond his failure to seek employment, and is not a direct result of the compensable injury." Finding of Fact No. 6. We find the evidence, more particularly the lack of evidence from the treating doctor, sufficient to support this determination, though normally a finding of direct result in a case such as this would have sufficient evidentiary support in the record. See Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

For the 17th quarter qualifying period, the claimant submitted a TWCC-52 in which he again listed some 29 job contacts, none of which were in the qualifying period. The new Rule 130.102(d)(3) in effect for this quarter provides that an employee has made a 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[.]" Given the exclusion of Claimant's Exhibit No. 4, there was no medical narrative in evidence showing an inability to work. At the same time, Dr. X's report could be construed as an other record showing an ability to return to work. The hearing officer found, consistent with the evidence and this rule, that the claimant had some ability to work. Under our standard of review, we affirm that determination. Cain, supra; Pool, supra.

Rule 130.102(d)(4) and (e) further requires that an employee with some ability to work shall look for employment commensurate with this ability during each week of the filing period and document this effort. The TWCC-52 was the only documentation of a job search for the 17th quarter. It reflected no search efforts during the qualifying period. From this, the hearing officer found as a separate basis for denying 17th quarter SIBS entitlement that the claimant "did not make a weekly search for employment." We find the evidence sufficient to support this determination.<sup>1</sup>

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<sup>1</sup>The hearing officer also found that the claimant's unemployment during the 17th quarter qualifying period was a direct result of his impairment. This finding has not been appealed and we only note the apparent logical inconsistency with the finding of no direct result for the 16th quarter.

For the foregoing reasons, we affirm the decision and order of the hearing officer that the claimant was not entitled to 16th or 17th quarter SIBS.

Alan C. Ernst  
Appeals Judge

CONCUR:

Robert W. Potts  
Appeals Judge

Gary L. Kilgore  
Appeals Judge