APPEAL NO. 000041

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 9, 1999, a contested case hearing (CCH) was held. At issue was whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his first quarter of eligibility. The hearing officer held that the claimant's unemployment was the direct result of his impairment but that he had some ability to work and had not made a good faith search for employment commensurate with his ability to work and was therefore not entitled to SIBS.

The claimant appeals and argues that his medical evidence proved his complete inability to work and his entitlement to SIBS. The claimant argues that there is no requirement to produce a special medical narrative commenting on work ability, and that the requirement of a narrative can be supplied through review of all of the treating doctor's reports in evidence. He argues that if a specific narrative is required each quarter, then this will effectively eliminate people who are unable to work from SIBS entitlement because doctors are "simply not willing to put forth the extra time to draft a supplementary report." The respondent (carrier) responds that the claimant did not follow through on work conditioning training, that he has objectively normal indicators accompanied by merely subjective reports of pain, and that medical evidence that merely asserts a total inability to work, without explanation, is not sufficient to uphold SIBS where no job search is made.

DECISION

We affirm.

The qualifying period in issue ran from April 1 through June 30, 1999. The claimant was injured on _____. He had cervical surgery in the middle of 1997, at three levels. He said that since then, no doctor had stated that he could return to "gainful employment". He said his treating doctor, Dr. M told him he had no ability to return to employment because of the possibility of a second operation. Dr. M said that it was possible such surgery would be performed during the period under review, but it in fact was not. The claimant said he had not had any new test which showed a ruptured disc, although he had been told that is why he would need more surgery.

The claimant testified that he took Vicodin, Soma, Naprosyn, and Ultram. He said they made him drowsy, sleepy, and a little uncoordinated. The claimant was also treated for high blood pressure and took medication for that. The claimant also had a cardiac condition for which he took nitroglycerin as needed.

The claimant went through a functional capacity evaluation (FCE) on September 20, 1999, and was not able to perform all of the tests. He said the evaluator stopped the test. The only function he completed was lifting. As noted by the hearing officer, the report is equivocal in that the claimant was assessed at light duty based on the portion of the test he

was able to complete. He agreed he had been sent to a work conditioning program by his treating doctor, but had failed to keep all the appointments. The claimant said that Dr. M had urged him to go back but that he "just couldn't" do it because it hurt his neck and arms. He said that he was capable of driving but only did so when he went to see the doctor. He had constant numbness in his hands, and migraine headaches.

The claimant said he had applied and, been turned down for Social Security disability. He had contacted the Texas Rehabilitation Commission (TRC) but could not recall whom he met with. The claimant had an eighth grade education. He said he could read a little English but could not write it.

Although the claimant argues that Dr. M's records as a whole comprise a sufficient narrative from which the hearing officer could conclude he had the inability to work, in fact these reports document the claimant's history of his complaints. Dr. M then comments that the claimant will remain off work. Dr. M had apparently been asked his opinion about the claimant's ability to work, because he wrote to the claimant's attorney on September 23, 1999, and stated that he felt the claimant's "employability" should not be at issue and that he was not capable of seeking employment while using narcotic medication which caused sedation. He said that the claimant had limited range of motion of the cervical area. The impairment rating in evidence shows that five percent of the 15% rating was for limited range of motion.

There are four eligibility criteria that must be met to qualify for SIBS, set out in Section 408.142(a): that the employee "(1) has an impairment rating of fifteen percent or more . . . .; (2) has not returned to work or has returned to work earning less than eighty percent of the employee's average weekly wage as a direct result of the employee's impairment; (3) has not elected to commute a portion of the impairment income benefit . . . ; and (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work." Regarding the return to "gainful employment," in Texas Workers' Compensation Commission Appeal No. 970890, decided June 27, 1997, the Appeals Panel stated that: "Section 408.143 does not require the employee to seek 'gainful employment', rather it requires a search for employment commensurate with claimant's ability to work, even if that ability is only light sedentary work on an intermittent basis."

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.

The new SIBS rules lend some uniformity to these considerations by requiring medical evidence that specifically explains how the impairment makes the claimant unable to do any work. Contrary to what the claimant argues, it is clear that the Commission no longer intends the determination of an inability to work to be made from a patchwork of various statements put together from a range of medical evaluations performed for purposes other than an evaluation of work ability. We simply cannot agree with the claimant's assertion that the ability to evaluate the extent to which an injured worker can work is beyond the capability or the inclination of most treating doctors. In fact, the doctor in this case was responsive to an apparent request for information by the claimant's attorney, and we cannot conclude that, were Dr. M familiar with the requirements of the rule, he would decline to furnish his opinion.

The hearing officer is the sole judge of the relevance, the 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). We cannot agree that the hearing officer does not have sufficient support for her decision and, accordingly, affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge