APPEAL NO. 000125

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 9, 1999. With respect to the sole issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fourth quarter. The claimant appeals the hearing officer's finding that he did not attempt in good faith to obtain employment commensurate with his ability to do sedentary work, asserting that he has no ability to work and is entitled to SIBS for the fourth quarter. The claimant argues that the hearing officer improperly admitted videotapes and testimony regarding the videotapes. The respondent (carrier) replies that sufficient evidence supports the hearing officer's decision and the record reflects that the hearing officer excluded the videotapes from evidence.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, with an impairment rating of 16%; that the claimant has not commuted any portion of the impairment income benefits; that the claimant's fourth SIBS quarter was from September 29, 1999, through December 28, 1999; and that the qualifying period for the fourth SIBS quarter is from June 17, 1999, through September 15, 1999. Given the dates of the fourth quarter, the "new" SIBS rules effective January 31, 1999, apply. The claimant, a mechanic, injured his left knee on _____, when he was hit with a muffler. The claimant had arthroscopic surgery on his left knee on January 15, 1999, was diagnosed with a torn medial meniscus, and a medial femoral condyle chondroplasty was performed. The claimant testified that he continues to suffer from knee pain and uses a cane at times. The claimant's treating doctor, Dr. A, has recommended a total knee replacement which the claimant has declined.

The claimant testified that he had no ability to work during the fourth quarter qualifying period and was not released to return to work by Dr. A. The claimant said that he went to the Texas Rehabilitation Commission (TRC), spoke with a counselor, and was told that they could not help him because of his medical prognosis. The claimant testified that during the qualifying period, he looked for one job referred to him by the Texas Workforce Commission, but he was not qualified. The claimant's Application for Supplemental Income Benefits (TWCC-52) does not document any job search efforts for the fourth quarter qualifying period. According to the claimant, the carrier paid him for prior SIBS quarters based on the same facts and circumstances.

The carrier presented the testimony of a private investigator, Mr. H, who testified that he conducted surveillance of the claimant on August 21 and 23, 1999, and November 17 and 18, 1999. Mr. H testified that he observed the claimant walking without his cane and sitting for prolonged periods on August 21 and 23, 1999. According to Mr. H, he observed

the claimant on November 17 and 18, 1999, at a medical facility, getting out of his vehicle and taking steps without his cane or crutches, and then turning around and retrieving his cane from the vehicle. Mr. H testified that he never saw the claimant use a cane or crutches at his home, that the claimant went to the grocery store and loaded and unloaded groceries without any physical difficulty without a cane or crutches, that the claimant did not appear to be in any discomfort when observed around his home, and that a neighbor said that the claimant mows his own grass. The claimant testified that he has an identical twin brother, is sometimes able to walk a short distance without a cane, and does occasionally mow his grass with a riding lawnmower which does not require the use of his left leg.

The carrier argues that the overwhelming weight of the evidence shows that the claimant had an ability to perform some type of work during the qualifying period. The carrier had the claimant examined by Dr. R to determine whether the claimant had an ability to work. Dr. R opined that the claimant is a candidate for knee replacement surgery and cannot return to work as an mechanic. On May 27, 1999, Dr. R issued a report stating that the claimant could work at a sedentary job, and recommended that the claimant seek vocational retraining. On June 21, 1999, Dr. A wrote that he agreed with the work restrictions outlined by Dr. R, a sedentary job with no lifting more than 20 pounds, no squatting or climbing, and with time on feet limited to 30-60 minutes. Dr. A referred the claimant for a functional capacity evaluation (FCE). On June 22, 1999, Dr. A issued a report stating "[a]t this time you are unable to return to any line of work. In fact, I do not anticipate you will ever be able to return to work without some form of surgical intervention." An FCE was performed on July 14, 1999. The physical therapist who performed the FCE opined that the claimant could work at a sedentary job that would allow the claimant to change positions from sitting to standing as necessary, and have a lifting limitation of 20 pounds with a lifting range limitation from his waist to his shoulders. Dr. R agreed with the physical therapist who performed the FCE assessment that the claimant could return to work in a sedentary position with a lifting restriction of 20 pounds. In a letter to the claimant dated September 24, 1999, Dr. A states:

> It is my opinion that you are *currently* unable to return to any line of work. In fact, I do not anticipate that you will *ever* be able to return to work. I base this opinion on the results reported in a previous FCE that you underwent showing you able to sit or stand for only 15 minutes.
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> * * * *
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> At no time did I release you to light duty. I am unaware of any job description that would meet the limitations you demonstrated on your FCE.

After the qualifying period, Dr. A issued several reports reiterating that the claimant was unable to return to any kind of work. On October 6, 1999, Dr. A indicated that vocational rehabilitation should be completed before determining whether the claimant could return to work. On October 29, 1999, Dr. A wrote a letter to the claimant which states "I do not think you will be able to find a job that can meet those [FCE] restrictions. Consequently, it is my

opinion that you are unemployable." On November 2, 1999, the physical therapist who performed the FCE opined that, based on the claimant's representations that his knee pain was getting worse, the claimant's limitations may be more severe, but that this could not be determined without performing another FCE.

The claimant argues that the videotapes and testimony regarding the videotapes were improperly admitted over his objection. The record reflects that the hearing officer did not admit two videotapes (the subject of Mr. H's testimony) based on the claimant's objection. The hearing officer's decision and order incorrectly indicates that the videotapes were admitted, and the hearing officer does refer to the videotapes in her Statement of the Evidence and Discussion. However, it does not appear that the hearing officer improperly considered the excluded evidence considering that Mr. H testified as to his observations which he videotaped. The record reflects that the claimant did not object to the testimony of Mr. H, and the claimant has failed to preserve whatever objection he may have had for appeal. The claimant's contention on these points is without merit.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), effective January 31, 1999 (a new SIBS rule), provides in pertinent part that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) 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(e), effective January 31, 1999, provides in pertinent part that "[e]xcept as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts."

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3), the hearing officer had to judge the credibility of the evidence before her. The hearing officer found that during the qualifying period for the fourth SIBS quarter, the claimant did not attempt in good faith to obtain employment commensurate with his ability to do sedentary work. The record contains contradictory narrative reports from Dr. A concerning the claimant's work status. Those records indicating that the claimant was unable to work do not specifically explain how the injury caused a total inability to work. Other records, the FCE and the medical reports of Dr. R, indicate that the claimant is capable of returning to work in some capacity. The claimant testified that if an employer could meet his restrictions, he could go back to

work, but only after retraining. The hearing officer resolved contradictions in the evidence and found that the claimant's evidence was insufficient to prove that he had a total inability to work as required by Rule 130.102(d)(3). We note that in SIBS cases in which the "new" rules apply, findings of fact should address the criteria imposed by those rules.

As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant did not attempt in good faith to obtain employment commensurate with his ability to do sedentary work, and is not entitled to SIBS for the fourth quarter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge