

APPEAL NO. 000151

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 January 4, 2000. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the second and third compensable quarters. The hearing officer determined that the claimant was not entitled to SIBS for either quarter and the claimant has appealed. Claimant urges that the evidence shows that she had no ability to work and, further, there is not a substantial change in the factual situation from the first quarter, when SIBS were awarded, and the second and third quarters. No response is on file.

DECISION

Affirmed.

Claimant, a bus driver, sustained injuries to her knees, back and other areas when she fell at work on _____. She reached maximum medical improvement on June 16, 1998, and was assessed a 16% impairment rating. She is seeking SIBS for the second and third compensable quarters which run from August 18, 1999, to February 15, 2000. The qualifying periods for the second and third quarters ran from May 7, 1999, to November 4, 1999, during which time the claimant asserts she was not able to work at all and did not look for any employment. Earlier medical records, particularly from the claimant's treating doctor, Dr. M, indicated she was disabled and not able to return to work. However, a report dated June 24, 1999, does not state any disability or inability to work, but does recommend a work hardening program for the claimant. Dr. M notes that although needed, the claimant is not taking her medication (Celebrex) even after being assured it was not addicting. She apparently has not seen Dr. M since June. Claimant testified that she was taking herbal medication that gave her some relief. She also indicated she had undergone both physical and water therapy.

When asked how she has been feeling over the past year and at the present time, claimant responded "well, I feel better" but as far as what she can do, she is limited in lifting (improved from five pounds to ten pounds), and cannot stand or sit for prolonged periods (over 20 minutes). She states she can drive but not for more than 20 minutes or so without walking around. When asked if she felt she could do any work, she responded "it would have to be something that I'm not confined to any one space like my office jobs." She stated she had been working with the Texas Rehabilitation Commission and that she was due to get a computer she could use at home.

A functional capacity evaluation (FCE) in 1998 indicated an ability to work, and an FCE completed early in the qualifying period for the second quarter (May 13, 1999) by Dr. B indicated that there appeared to be very little in the way of her current functional residual which resulted out of the injury date of _____, and indicated "there does not

appear to be any medical reason which would preclude the [claimant] from traveling to at [sic] work, being at work, and performing appropriate tasks and duties, if they [sic] wished to do so." Functioning at the sedentary level was stated.

One of the requirements to qualify for SIBS is to attempt in good faith to seek or obtain employment commensurate with the ability to work. Section 408.142 and Section 408.143. 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 a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." 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 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.

Regarding good faith, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) effective November 28, 1999, provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's 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." In the case under review, the requirements of Rule 130.102(d)(4) regarding no ability to work have not been met. Not only does Dr. M's June 24, 1999, report not specifically explain how the injury causes a total inability to work, there is an FCE from Dr. B on May 13, 1999, that specifically indicated that the claimant has an ability to work, albeit at a restricted level. Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000. While the claimant may not have the ability to return to the type of work being done when injured, that does not establish a total inability to work. Texas Workers' Compensation Commission Appeal No. 992403, decided November 29, 1999 (Unpublished). And, both Dr. M's report and Dr. B's FCE were matters within the qualifying period for the second compensable quarter which could reasonably serve as a factual and legal basis for disputing entitlement to SIBS for the two quarters in issue.

Finding sufficient evidence to support the determinations of the hearing officer and a correct application of the 1989 Act and rules, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Dorian E. Ramirez
Appeals Judge