APPEAL NO. 000323

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 25, 2000. The issues at the CCH were whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 9th and 10th compensable quarters. The hearing officer determined that the claimant was unemployed as a direct result of the claimant's impairment; that the claimant attempted in good faith to obtain employment commensurate with his ability to work, which was none; and that the claimant is entitled to SIBS for the 9th and 10th quarters. The appellant (self-insured) appeals the hearing officer's good faith determination, urging that the claimant is not entitled to SIBS for the 9th and 10th quarters because there were other records "showing" that the claimant could work, and the claimant did not search for employment. The self-insured also asserts that the hearing officer "could not consider the [10th] quarter because the [10th] quarter has not yet expired, to do so would go directly against Rule 130.102(a) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(a)]." The appeals file contains no response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, with an impairment rating (IR) of 19%; that the claimant has not commuted any portion of the impairment income benefits (IIBS); that the 9th quarter began on September 7, 1999, and ended on December 6, 1999; and that the 10th quarter began on December 7, 1999, and will extend through March 7, 2000. Given the dates of the quarters, the qualifying period for the 9th quarter was from May 26, 1999, through August 24, 1999; and the qualifying period for the 10th quarter was from August 25, 1999, through November 23, 1999. On _____, the claimant was involved in a motor vehicle accident and sustained an injury to his knees, right ankle and low back. The claimant testified that he has had two surgeries on his right ankle, two surgeries on each knee, and that surgery is pending for a total left knee replacement.

The claimant testified that he had no ability to work during the qualifying periods for the 9th and 10th quarter's and that his doctors, Dr. S, and Dr. G, have said that he is unable to work in any capacity. The claimant testified that he has chronic pain in his knees and back and can perform only minimal tasks at home. The medical records indicate that the claimant has chronic low back pain, inoperable, and chondromalacia in both knees. On April 16 and 17, 1998, the claimant completed a functional capacity evaluation (FCE) which indicates that the claimant gave maximum consistent effort, and that the claimant did not currently meet the functional requirements to perform even sedentary work tasks for the standard eight-hour day. At the request of the self-insured, the claimant had another FCE performed on November 17 and 18, 1999. The 1999 FCE report states that the claimant had demonstrated improvement since his first FCE of 1.5 years ago; that he possessed an

increased ability to tolerate some activities when blended for a three to six-hour time period; that any efforts to return to work should be directed to jobs which would occur primarily in the seated position and only use his upper extremity; and that ideal work tasks would be individually paced to allow breaks for changes of body position. The 1999 FCE identifies the claimant's lower extremity weakness as a limiting factor, and states that a work conditioning program may increase the claimant's lower extremity strength.

In a letter dated September 14, 1999, Dr. S states that the claimant has had no significant change in his condition since April 1998, and that the claimant cannot tolerate, even at a sedentary level, a work schedule that is more than a few minutes to maybe an hour a day. The claimant testified that since August 1998, the pain in his knees has increased; his right knee has given out several times, causing him to fall and break his collarbone; and his abilities have decreased. Throughout the 9th and 10th quarter qualifying periods, Dr. S's records state that the claimant is unable to sit, stand, walk, lift, drive, or do any other significant functional activity for more than a few minutes and then must rest. Dr. G concurs with Dr. S's opinion.

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. Rule 130.102(d), the version then in effect, 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), 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." It is undisputed that the claimant made no attempt to seek employment during the qualifying periods.

The carrier argues that the hearing officer "could not consider the [10th] quarter because the [10th] quarter has not yet expired, to do so would go directly against Rule 130.102(a)." Rule 130.102(a) states that an injured employee "shall not be entitled to [SIBS] until the expiration of the [IIBS] period." Based on the designated doctor's certification that the claimant reached maximum medical improvement on August 5, 1996, with a 19% IR, the claimant's IIBS period expired on September 8, 1997. Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the claimant met the criteria during the qualifying period. "Qualifying period" is defined as "[a] period of time for which the employee's activities and wages are reviewed to determine eligibility for [SIBS]. The qualifying period ends on the fourteenth day before the beginning date of the quarter and consists of the 13 previous consecutive weeks." Rule 130.101(4). The CCH was held after the qualifying period for the 10th quarter ended on November 23, 1999. The hearing officer did not err in determining whether the claimant was entitled to SIBS for the10th quarter.

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 this case, the claimant presented evidence tending to demonstrate that he has no ability to work and the self-insured presented evidence tending to demonstrate that the claimant has some ability to work. The hearing officer had to judge the credibility of the evidence before him in order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3). The question of whether another record shows an ability to work is a factual question, just as the questions of whether the claimant is unable to work and whether a narrative report specifically explains how the injury caused a total inability to work are factual questions. *See* Texas Workers' Compensation Commission Appeal No. 000302 decided March 27, 2000. The hearing officer weighed the opinions of Drs. S and G against those of the physical therapist who administered the 1999 FCE, and determined that the claimant had no ability to work during the qualifying periods. In so determining, the hearing officer states that "[g]iven the etheral [sic] quality of the conditions under which the physical therapist said that the Claimant could work, it is clear that the opinions of [Dr. G] and [Dr. S] preponderate." The hearing officer also considered whether the 1999 FCE report constituted a record showing an ability to return to work and determined that it did not.

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 attempted in good faith to obtain employment commensurate with his ability to work, which was none, and that the claimant is entitled to SIBS for the 9th and 10th quarters.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge