APPEAL NO. 000374

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 13, 2000. The hearing officer determined that the appellant (claimant) is not entitled to SIBS for the eighth quarter, but is entitled to SIBS for the ninth and tenth quarters. The claimant appeals the denial of eighth quarter SIBS, contending that this determination is against the great weight and preponderance of the evidence. The respondent (carrier) replies that this determination is correct, supported by sufficient evidence, and should be affirmed. The determinations of entitlement to ninth and tenth quarter SIBS have not been appealed and have become final.[1] A fourth issue of carrier recoupment of prior overpayment of SIBS was resolved by agreement of the parties.

DECISION

Affirmed.

This is an old rule SIBS case. The claimant sustained a compensable lower back injury on _____. He underwent failed back surgery in 1995 and was assigned an impairment rating of 15% or greater. 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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), 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 eighth SIBS quarter was from February 19 to May 20, 1999, and the filing period was from November 21, 1998, to February 18, 1999.

At issue in this case is the good faith job search requirement.[2] The claimant did not work during the filing period and asserted that he had no ability to work in any capacity. 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

[1]Nothing in this decision should be construed as in any way endorsing the rationale of the hearing officer in arriving at these determinations.

[2]The direct result determination has not been appealed.

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.

According to the claimant, he was found to have some ability to work for purposes of seventh quarter SIBS and testified that his condition worsened in the eighth quarter filing period. In evidence was a February 22, 1999, letter from the Texas Workers' Compensation Commission (Commission) stating that the spinal surgery second opinion process had resulted in approval. There was no other evidence, testimonial or documentary, that this surgery was actually undertaken. The claimant relied on two statements of Dr. G on January 26, 1999, and February 17, 1999, in which he concluded that the claimant "is to remain off work at this time" and that the claimant "is unable to work at this time." No mention is made of pending or proposed surgery in either statement. Also in evidence was a functional capacity evaluation (FCE) done on October 28, 1999, which concluded that the claimant gave less than maximal effort and that he could perform in a sedentary job category.

The hearing officer considered this evidence and commented that there was no medical evidence "to confirm" the spinal surgery letter of February 22, 1999; that she did not consider Dr. G's statements persuasive of no ability to work because they were "conclusory"; and that the FCE itself was unpersuasive because of "multiple errors" identified in the testimony of Ms. L, a vocational rehabilitation counselor. The hearing officer found the claimant's evidence insufficient to establish no ability to work. Because he failed to look for any work, she concluded he was not entitled to eighth quarter SIBS.

The claimant appeals these determinations, contending essentially that because the hearing officer discounted the FCE, she was compelled to find no ability to work based on Dr. G's two statements whether they were "conclusory" or not. What the hearing officer did in this case was find no evidence persuasive one way or the other on the question of the claimant's ability to work. Because the claimant had the burden of proving no ability to work, the failure of his evidence was fatal to his claim. Because the carrier bore no burden of proving an ability to work, the failure of its evidence was essentially meaningless in light of the claimant's failure to prove his case. We also construe the hearing officer's use of the

word "conclusory" in describing Dr. G's statements as reflecting the reason she found them nonpersuasive; that is, that they did not include compelling reasons on which to find that the claimant had no ability to work. Additionally, these statements were in terms of off-work status, which as noted above, is not necessarily synonymous with no ability to work at all.

The claimant also asserts that the claimant's approval for spinal surgery should have been considered and should be determinative of a decision in the claimant's favor. We observe that the hearing officer did consider the document in evidence, but noted that it was supported by no other documentation or evidence confirming actual surgery.

In Texas Workers' Compensation Commission Appeal No. 962495, decided January 22, 1997, relied on by the claimant, the Appeals Panel reversed the hearing officer's decision that the claimant was not entitled to SIBS and rendered a decision, stating:

> Even if claimant had undergone a search for employment, a truthful disclosure of pending surgery and the need for recuperative time off could well have impacted the ability of claimant to accept offered employment. We believe that the hearing officer's decision that claimant had some ability to work and therefore did not undertake a bona fide search is against the great weight and preponderance of the evidence, as well as not sufficiently supported by the record.

In Texas Workers' Compensation Commission Appeal No. 991570, decided September 8, 1999, we stated that Appeal No. 962495, *supra*, stood for the proposition that "a claimant with pending surgery should not be put to a meaningless job search exercise when surgery has been accepted as an option, and is, in fact, pending, such that a claimant would know going into an interview or when filling out an application that he or she would have to start the job only to take leave time." *See also* Texas Workers' Compensation Commission Appeal No. 990940, decided June 17, 1999, for a discussion of cases involving the impact of pending surgery on the SIBS good faith job search requirement.

In the case now before us, the hearing officer clearly considered what evidence there was of surgery connected to the February 22, 1999, letter from the Commission. There was no evidence or indication that any surgery had taken place after the Commission's February 22, 1999, letter up to the time of the CCH. It was questionable whether the claimant even speculated in his testimony about surgery. This lack of evidence of pending surgery distinguishes this case from those relied on by the claimant. See also Texas Workers' Compensation Commission Appeal No. 982505, decided December 7, 1998 (Unpublished), where we affirmed a finding of no entitlement to SIBS where the claimant made no attempt to obtain employment even before surgery was scheduled.

Ultimately, whether the claimant had no ability to work was a question of fact for the hearing officer to decide. 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 decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge