APPEAL NO. 000390

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 February 1, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) had a limited ability to work during the qualifying periods and, since he did not seek work commensurate with his ability to work, claimant was not entitled to supplemental income benefits (SIBS) for the first, second, and third compensable quarters from April 2 through July 1, 1999, July 2 through September 30, 1999, and October 1 through December 30, 1999, respectively. The claimant appeals, contending that he had no ability to work at all based on reports of his treating doctor. Claimant further contends that he is still employed by the employer and, therefore, has no duty to look for other work. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant had been employed as a "passenger service agent" by (employer) and sustained a back injury assisting in lifting a heavy disabled passenger out of a gurney chair into an airplane seat on _____. Claimant sustained injuries to his cervical, thoracic and lumbar spine. Although claimant has had some epidural injections, claimant has apparently not had any spinal surgery. The parties stipulated that claimant sustained a compensable injury on _____, with an impairment rating (IR) of 34%, that impairment income benefits (IIBS) have not been commuted and the dates of the respective quarters. There were no stipulations or hearing officer's findings regarding the applicable filing/qualifying periods, although the parties appear to have considered the filing period for the first quarter to have been from January 1 through April 4, 1999, and the qualifying periods for the second and third periods from March 20 through September 17, 1999. Although not mentioned by the parties or the hearing officer, we note that the "old" SIBS rules (those in effect prior to January 31, 1999) are applicable to the first quarter filing period and the "new" SIBS rules, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100 *et seq.*) (Rule 130.100 *et seq*.), effective January 31, 1999, applicable to the second and third compensable quarters.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

Claimant proceeds on a theory that he has a total inability to work. Regarding the qualifying quarters beginning after January 31, 1999, Rule 130.102(d) addresses the good

faith effort requirement of the 1989 Act and Rule 130.102(d)(3) (the version then in effect) 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 "(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 record shows that the injured employee is able to return to work." The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3) must be satisfied. *See* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000. The Appeals Panel has also encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3) when that rule is applicable. *See* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

We first address the first quarter filing period. 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. 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.

Claimant's treating doctor is Dr. R, who, in a report dated December 2, 1998 (just prior to the first quarter filing period), stated that claimant's pain "has fairly much stabilized," and that claimant has "good days and bad days," ambulates with a cane and "remains unfit to return to work." That assessment was substantially repeated in a Specific and Subsequent Medical Report (TWCC-64) dated January 18, 1999. In a physical capacity report dated March 22, 1999, Dr. R indicates that claimant can sit, stand and/or walk one to two "hours per work shift," that claimant had no lifting or carrying capability, and that claimant could "frequently" have "interpersonal relationships" and only occasional "[s]tressful situations." Claimant was assessed as being able to operate a motor vehicle. A detailed report dated April 12, 1999, deals mostly with claimant's IR, but Dr. R does comment that claimant's "activities of daily living and level of function have been greatly affected by this injury." Carrier contends these reports in themselves do not show a total

inability to work. The hearing officer, in his Statement of the Evidence, comments that the medical record "does not show the regular treatment reports of the Claimant to support the total inability of the Claimant to work," that total inability of a claimant to work is a rare situation and that "[o]n balance, the record shows that the Claimant has some ability to work. . . ." The hearing officer found that claimant had a limited ability to work during the "qualifying" period of the first quarter. As we have previously indicated, whether the claimant has no ability to work at all is essentially a question of fact for the hearing officer to resolve. He did so, finding that claimant had a limited ability to work. 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 for that of the hearing officer.

As we have indicated, the standard of good faith effort to obtain employment was tightened and specifically addressed after January 31, 1999, in Rule 130.102(d)(3), which requires the employee (claimant) to prove three elements, namely, (1) that he is unable to perform any type of work in any capacity; (2) that a narrative from a doctor specifically explains how the injury causes a total inability to work; and (3) that "no other records show that the injured employee is able to return to work." The hearing officer does not address Rule 130.102(d)(3), but makes a finding that claimant "had a limited ability to work during the qualifying periods of the . . . second and third quarters." That finding addresses the first of the three elements of Rule 130.102(d)(3). The hearing officer's failure to address the other two elements, namely whether Dr. R's reports provide a sufficient narrative which explains a total inability to work and whether Dr. B functional capacity evaluation is such a record which shows claimant is able to return to work, would normally invite a remand for specific findings on those elements. However, in this case, the hearing officer, having found that claimant had a limited ability to work, and that finding being supported by the evidence and being dispositive, we will affirm the hearing officer's decision on any theory supported by the evidence. Daylin, Incorporated v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied).

We have not summarized in detail a report dated August 27, 1999 (half way through the qualifying period for the third quarter), from Dr. B because we are able to affirm the hearing officer's decision based on other evidence in the record. Dr. B concludes that claimant could perform "light" work based on the "DOT" standards and that there "does not appear to be any medical reason which would preclude [claimant] from traveling to at [sic] work, being at work, and performing appropriate tasks and duties." Dr. B opines that there is no clinical basis for the severe restrictions "imposed by [Dr. R]" and that claimant is limited only in "his current lift capacity."

Claimant, both at the CCH and on appeal, contends that he is still employed by the employer, that he continues to receive pay (it appears that claimant periodically cashes in accrued vacation time and sick leave) and benefits from the employer and that if he were to seek and obtain other employment he would forfeit his position, seniority and other benefits with the employer. In addition to the accrual of vacation and sick time, claimant also continues to receive "flight privileges," health and life insurance and a "personal policy" of

group long-term disability benefits that he "took out" as an option. Claimant admits that one of the considerations of not looking for a job elsewhere is that he would lose those benefits. To that end, claimant offers a letter from his customer service manager that states claimant would "jeopardize his 24 year career by requiring him to go through any job search for new employment" and that carrier "continues to harass [claimant] by asking him to breach his employment contract with [employer]." In evidence is the employer's "Injury on Duty Leave of Absence" (IDLOA) policy which allows employees to remain in this status for up to five years without loss of job or seniority. Carrier called Mr. M, employer's senior human resources representative, to explain the IDLOA. Mr. M testified that claimant was not precluded from seeking or obtaining outside employment, provided that it was approved by two levels of employer's management as not exceeding claimant's restrictions. Mr. M did not address the fact that claimant was presently drawing group long-term disability income benefits and had applied for Social Security income benefits. Mr. M did confirm that claimant could seek and obtain other employment commensurate with his ability (within his restrictions) without the loss of his job, seniority or other benefits such as flight privileges and insurance benefits provided the employment is approved by employer's management. Presumably, claimant may have to make an election of whether he wishes to seek employment commensurate with his limited ability to work and receive SIBS benefits or continue to receive the group long-term disability benefits and possibly Social Security benefits.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge