APPEAL NO. 000418

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 2, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the fourth and fifth quarters. The claimant appeals, requesting that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant tripped and fell while working as a salesperson in a department store on _____. The resulting compensable injury included her spine. She reached maximum medical improvement on December 29, 1997, and was assigned a 15% impairment rating. 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 "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The fourth quarter was from August 10 to November 8, 1999, and the qualifying period for this quarter was from April 27 to July 26, 1999. The fifth quarter was from November 9, 1999, to February 7, 2000, and the qualifying period for this quarter was from July 27 to October 25, 1999.

We note initially in her appeal that the claimant asserts she was unaware of the applicable rules for establishing entitlement to SIBS. Ignorance of the law does not excuse noncompliance with it. Texas Workers' Compensation Commission Appeal No. 951487, decided October 19, 1995. We find no merit in this point on appeal.

The position of the claimant at the CCH was that she had no ability to work in any capacity in either qualifying period. She nonetheless listed five job contacts on five different days of the fourth quarter filing period. The hearing officer found that the claimant did not make the required good faith job search in either quarter. Finding of Fact No. 11. The claimant appeals this finding, asserting that she did undertake a job search in the fourth quarter filing period. We agree that the undisputed evidence was that she made these five job contacts. Nonetheless, a finding of a lack of a good faith job search is not inconsistent with the evidence of five job searches. It is further worth pointing out that Rule 130.102(e)

requires that a claimant look for employment each week of the filing period and document that job search. Neither the Application for [SIBS] (TWCC-52) submitted by the claimant nor any other evidence documents a weekly job search in this qualifying period. Thus, these five listed searches would not as a matter of law entitle the claimant to fourth quarter SIBS. *See* Texas Workers' Compensation Commission Appeal No. 992247, decided November 23, 1999.

We address the remainder of the appeal in terms of whether the claimant established a total inability to work. Rule 130.102(d)(3), in effect at all applicable times, provides that an injured employee has made a required good faith effort to obtain employment commensurate with the 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[.]

Dr. K, claimant's treating doctor, placed the claimant in an off-work status throughout the qualifying periods based largely on range of motion limitations and pain. Dr. B, wrote on August 10, 1999, that the claimant was "still not suitable to return to work in retail sales and remains disabled from any type work on a consistent basis." He attributed this to her "unresolved pain syndrome." On September 8, 1999, Dr. B wrote that the claimant was "not suitable to confront public in a sales position," but did say she could return to work "now" if she could find "some sort of home-base job, part time." On November 17, 1997, Dr. M wrote that the claimant should not return to work. However, in a letter of August 27, 1998, based on a functional capacity evaluation (FCE), Dr. M changed his mind and concluded she could return to light duty. On November 2, 1999, she underwent another FCE from which Dr. M concluded she could perform light work. In a letter of December 18, 1999, Dr. K wrote that on the basis of the FCE and a videotape surveillance of the claimant in April and May 1999, he concluded she was able to work light duty and was "exhibiting secondary gain disorder without a concurrent physical abnormality." This essentially confirmed his August 27, 1998, opinion that she could return to work.

We have observed that a claimant must establish by a preponderance of the evidence all the elements of Rule 130.102(d)(3) to be entitled to SIBS on the basis of a total inability to work and the hearing officer should make specific findings on each of these elements. Texas Workers' Compensation Commission Appeal No. 000318, decided March 29, 2000. In this case, the hearing officer expressly found that Dr. B's letter of August 10, 1999, quoted above, which stated that the claimant could not work "on a consistent basis" and Dr. M's letters of August 27 and November 2, 1999, discussed above, were records which "show that Claimant was able to return to work during the relevant periods." Finding of Fact No. 9. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. 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 find the evidence sufficient to support the hearing officer's determination that there were other records which showed the claimant had an ability to return to work during the qualifying periods. Having failed to undertake and document the required job search in each qualifying period, the claimant was not entitled to SIBS for the fourth and fifth quarters.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge