APPEAL NO. 000469

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 31, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the third and fourth quarters. The claimant appeals, urging error as a matter of law. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

This is a "no ability to work" SIBS case. The claimant, a construction worker, sustained a compensable injury on _____, which included the lower back and left knee and for which he was assigned a 27% 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)), effective January 31, 1999, 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 third SIBS quarter was from August 1 to October 30, 1999, and the qualifying period for this quarter was from April 19 to July 18, 1999. The fourth SIBS quarter was from October 31, 1999, to January 29, 2000, and the qualifying period for this quarter was from July 19 to October 17, 1999.

The claimant testified and submitted Application[s] for [SIBS] (TWCC-52s) for these quarters which reflected that he made no efforts to obtain employment in either qualifying period, asserting that he was unable to work in any capacity at all relevant times. Rule 130.102(d)(3) then in effect provides that an injured employee has made a good faith effort to obtain employment commensurate with his 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[.]"

On November 23, 1999, Dr. G, who treated the low back injury, wrote the ombudsman that the claimant "possessed no working ability as he is totally disabled" during both qualifying periods because of a "significant amount of pain from his back, right hip, and left leg." He said that walking for the claimant was "very difficult" and that the claimant cannot bend and cannot sit or stand "for a long period of time." He further described the claimant as "totally incapacitated from doing any type of employment activity." On April 7,

1995, Dr. P, who was treating the knee, recommended an osteotomy of the left proximal tibia with corrective valgus osteotomy, which was performed on September 10, 1999. On September 20, 1999, Dr. P wrote that because of his "injuries" the claimant was "unable to work" from April 2 through July 3, 1999." Curiously, though the letter mentions the surgery, it does not address the claimant's ability to work in the time leading up to or after the surgery. On September 23, 1999, Dr. P wrote the carrier to advise that the claimant could return to "gainful" employment in three months. Thereafter, the claimant was seen by Dr. GM, D.C., who referred him to Dr. B, neither of whom addressed the claimant's inability to work.

Other evidence submitted by the carrier included a report of a functional capacity evaluation (FCE) done on December 1, 1999, at the direction of the Texas Workers' Compensation Commission. Signed by the physical therapist, the report stated that the claimant said "he does not plan to return to work." He was placed in a sedentary category of work. Notes of an office visit with Dr. G on March 12, 1999, reflect that the claimant was doing "better" although he still had severe left leg problems. On July 13, 1999, Dr. G described the claimant as "doing very well" with "really no complaints of radiculopathy." The claimant was discharged to return as necessary. Apparently this was the last treatment given by Dr. G.

In an extended discussion of the evidence, the hearing officer commented that although Dr. P indicated the claimant could return to gainful employment three months after his September 1999 knee surgery, the FCE report reflects the claimant as saying he did not intend to return to work. He also commented that Dr. G, in the summer of 1999, stated that the claimant was improving, but then in November 1999, after he had not seen the claimant for several months, expressed a significantly different picture of the claimant. The hearing officer also noted that during the time Dr. G was saying the claimant was improving Dr. P was stating the contrary at least as of late August 1999. He also observed that Dr. P was commenting on the claimant's ability to work prior to the date he initially began treating the claimant. As we noted above, Dr. P did not address the claimant's ability to work during the qualifying period in which he had the knee surgery. From his analysis of the evidence, the hearing officer determined that the claimant had the ability to do some work during each qualifying period and because he did not seek employment commensurate with this ability was not entitled to third and fourth quarter SIBS.

In his appeal, the claimant contends that it was error as a matter of law to consider the FCE because it was outside either qualifying period, did not expressly refer to the claimant's ability to work in the qualifying periods, "and is therefore in no way a relevant document with regards to work ability within the time period in question." In doing so, the claimant nonetheless concedes that medical evidence from outside the qualifying period may be considered insofar as the hearing officer finds it probative of conditions in the qualifying periods. *See* Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996; Texas Workers' Compensation Commission Appeal No. 941696, decided February 8, 1995. We cannot agree that the hearing officer erred as a matter of

law in considering the FCE. The other medical evidence could be interpreted as reflecting a trend toward improvement in the claimant's condition in the summer of 1999, only to be contradicted by Dr. G's later opinion (itself outside the fourth quarter qualifying period). Under these circumstances, in order to determine what weight to give the respective pieces of evidence and what facts had been established, the hearing officer could properly consider all the admissible evidence.

The claimant also challenges on appeal the hearing officer's acceptance of an FCE as more persuasive than the records of the claimant's treating doctors. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. As reflected in his decision and order, the hearing officer was not satisfied that Dr. G's November 1999 letter should be taken at face value in light of his earlier treatment notes which suggested continuing improvement and no explanation for the lack of other records to explain what happened between the last appointment and the November 1999 letter. In any case, we feel it important to stress that the hearing officer did not find that the FCE was another record showing an ability to work, but rather that the claimant failed to produce a persuasive narrative report of a doctor specifically explaining how the injury caused a total inability 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 find the evidence sufficient to support the determination that the claimant had some ability to work.

One final matter requires comment. We have discussed in the past under the prior rules for SIBS entitlement whether surgery in a filing period may preclude the need to search for employment. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 971058, decided July 21, 1997. Without expressing an opinion as to whether this notion has survived the new SIBS rules, we stress that in his letter after the knee surgery, Dr. P addressed only the third quarter qualifying period and said nothing about the claimant's inability to work during the fourth quarter qualifying period. From this, a hearing officer could conclude that the surgery did little to impede the claimant's ability to work in the fourth quarter and inevitably raises questions why Dr. P would speak to the third, but not the fourth quarter qualifying period.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Dorian E. Ramirez
Appeals Judge