APPEAL NO. 000625

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 February 8, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first, second, and third quarters. The appellant (carrier) appeals, urging that the hearing officer=s decision should be reversed because the hearing officer erred in finding that the claimant had a total inability to work during the first, second and third quarter qualifying periods, and erred in finding that the claimant=s unemployment was a direct result of his impairment from the compensable injury. The claimant replies that sufficient evidence supports the hearing officer=s decision and it should be affirmed.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant has not elected to commute any portion of his impairment income benefits (IIBs); that the claimant reached maximum medical improvement with an impairment rating (IR) of 15% or greater; that the qualifying period for the first quarter was from January 12, 1999, through April 12, 1999; that the qualifying period for the second quarter was from March 31, 1999, through June 29, 1999; and that the qualifying period for the third quarter was from June 30, 1999, through September 28, 1999. The issues as agreed to by the parties identified the beginning and ending dates of the quarters. We observe that the "new" SIBs rules, effective January 31, 1999, provide for a "qualifying period" (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.101(4) (Rule 130.101(4)) whereas the "old" SIBs rules (Rule 130.101) provided for a "filing period" and that the two are not synonymous. Given the dates of the quarters, the "old" SIBs rules apply to the first quarter and the "new" SIBs rules apply to the second and third quarters. We note because of the effective date of the "new" SIBs rules, there is an overlap in the filing/qualifying periods.

On _____, the claimant sustained an injury to his lower back when a bulldozer that he was driving ran into a piece of concrete. The claimant testified that he had no ability to work during the filing/qualifying periods for the first through third quarters and that his treating doctor, Dr. W, has said that he is unable to work in any capacity. The claimant testified that he is not a surgical candidate; that he suffers excruciating pain in his lower back and left leg; that he is on pain medication which makes him drowsy; that he can sit only 15 or 20 minutes at a time; that he is unable to drive or perform any household chores; that it is difficult for him to lie down, stand up or sit; and that his condition is worsening. The medical records indicate that the claimant has degenerative disc disease at multiple levels of the spine.

On January 29, 1997, the claimant was examined by Dr. D, who opined that the claimant could return to work with no repetitive twisting, bending or lifting of more than 10 pounds. On October 28, 1997, the claimant had a functional capacity evaluation (FCE) which concluded that the claimant Ais currently functioning at no safe work capacity level and previous job as a heavy equipment operator required 8 hours light level per client report.@ The Texas Workers= Compensation Commission appointed Dr. L to evaluate the claimant=s ability to work. Dr. L examined the claimant on November 30, 1998, and stated that A[b]ased on objective criteria, I cannot see why this man cannot return to work as a bulldozer operator or do a light duty job with lifting of less than [45] pounds on a regular basis.@ On January 20, 1999, the claimant had another FCE performed which indicated that claimant was functioning at an undetermined safe physical demand level; that the claimant had numerous functional limitations; that the claimant followed instruction throughout the evaluation; and that the claimant was consistent with reported and demonstrated symptomatology.

In a letter dated November 21, 1999, Dr. W indicates that he examined the claimant on September 21, 1999, that the claimant had no change in his condition and that he continued to have significant pain and limitations due to the injury. Dr. W states:

> An FCE dated January 20, 1999 determined [the claimant] to be at an undetermined safe work level and this combined with his physical condition renders him completely and permanently disabled as a result of the above noted injury. His condition has very little probability for improvement to the degree that he could be considered for even very sedentary type work, thus he will most likely never be capable of any type of gainful employment.

Dr. W further states that the claimant is not able to maintain any sort of body positioning for any period of time without exacerbation of pain and he is unable to enter any type of work environment. The carrier forwarded additional medical records from Dr. W and FCEs to Dr. L for his review. In answers to a Deposition on Written Questions, Dr. L states that he believes that the claimant is capable of returning to light duty work and/or sedentary work.

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 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. It is undisputed that the claimant made no attempt to seek employment during the filing/qualifying periods.

Pertaining to the filing period for the first quarter, 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." The burden to establish no ability to work is "firmly on the claimant." Texas Workers'

Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. 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.

Rule 130.102(d)(3) applies to the qualifying periods for the second and third quarters. Rule 130.102(d)(3) 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 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 work.

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 carrier 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 her in order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3) for the second and third quarters. Whether another record "shows" an ability to work is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 992920, decided February 9, 2000; Texas Workers' Compensation Commission Appeal No. 000098, decided March 3, 2000; Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000; and Texas Workers' Compensation Commission Appeal No. 000323, decided March 29, 2000. The question of whether a record "shows" an ability to work is a different question than the question of whether the record states that the claimant has some ability to work. In this instance, the reports of Dr. L and Dr. D state that the claimant can work in a restricted capacity. However, the mere existence of those reports does not resolve the issue of whether the claimant is entitled to SIBs for the second and third quarters. Rather, the hearing officer, as the fact finder, must determine if she is persuaded that such reports "show" that the claimant had some ability to work. The hearing officer determined, based on Dr. W=s reports and the two FCEs, that the claimant had a total inability to work during the first through third quarter filing/qualifying periods; that no other credible records in evidence showed that the claimant was able to return to work during the qualifying periods; that the report of Dr. L dated November 30, 1998, was not credible when compared to the January 20, 1999, FCE and contradicted his answers to a Deposition on Written Questions; and that the report of Dr. D was too remote in time to be credible in light of the two FCEs performed after his exam.

We briefly consider the carrier's assertion that the hearing officer erred in finding that the claimant's unemployment during the qualifying period for the first through third quarters was a direct result of his impairment. The claimant's testimony, in conjunction with the medical evidence of the claimant's restrictions, reveal that the claimant cannot return to the work of a heavy equipment operator that he was performing at the time of his injury. As such, we find sufficient evidence to support the hearing officer's determination that the claimant's unemployment was a direct result of his impairment.

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 put forth a good faith job search commensurate with his ability to work, since he had a total inability to work; that the claimant's inability to find work commensurate with his ability to work was as a direct result of his impairment from the compensable injury; and that the claimant is entitled to SIBs for the first, second and third quarters.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge