APPEAL NO. 001407

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 May 19, 2000. The hearing office determined that the appellant=s (claimant) impairment rating (IR) is 15%; that the claimant was not entitled to supplemental income benefits (SIBs) for the first through the seventh quarters; that the claimant failed to timely file an Application for [SIBs] (TWCC-52) for the second through sixth quarters; that the claimant has permanently lost entitlement to SIBs; and that the respondent (self-insured) was entitled to reduce the claimant's impairment income benefits (IIBs) by 40% based on contribution. The claimant appealed, expressing her disagreement with these determinations. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable spine and bilateral knee injury on _____. Dr. S was appointed by the Texas Workers' Compensation Commission (Commission) to serve as designated doctor in this case. On November 19, 1997, he completed a Report of Medical Evaluation (TWCC-69) in which he certified a date of maximum medical improvement (MMI) of August 26, 1997, and assigned a 15% IR. The parties agreed that this was the correct date of MMI. The IR consisted of 11% for specific disorders of the lumbar, thoracic, and cervical regions of the spine and two percent for a specific disorder of each lower extremity. No IR was given for loss of range of motion (ROM).

The claimant contended both at the CCH and on appeal that her correct IR was 21% as certified by Dr. B, a referral doctor from the treating doctor, on September 8, 1997, and that the hearing officer "failed to properly consider" his report. The 21% IR consisted of specific disorder impairments of the lumbar and cervical spine, but not for the thoracic spine, and seven percent each for loss of cervical and lumbar ROM. Dr. B found no loss of knee ROM and awarded a zero percent IR for the knees.

Section 408.125(e) provides that the report of a Commission-selected designated doctor, such as Dr. S, is entitled to presumptive weight and the Commission shall base its determination of IR on this report unless the great weight of the other medical evidence is to the contrary. Only medical evidence can be considered in determining whether the presumptive weight afforded the report of the designated doctor has been overcome. This presents a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. In this case, the hearing officer determined that Dr. S's examination of the claimant was thorough and that the claimant failed to establish that Dr. B's opinion constituted the great weight of the other medical evidence to the contrary. Clearly, the hearing officer considered the difference in the IRs to amount to no

more than a difference in medical opinions.[1] 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 affirm this determination of the hearing officer.

Pursuant to Section 408.142, an employee is entitled to SIBs if, on the expiration of the IIBs period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee=s average weekly wage as a direct result of the employee=s impairment; has not elected to commute a portion of the IIBs; and has attempted in good faith to obtain employment commensurate with the employee=s ability to work. The quarterly entitlement to SIBs depends on whether the employee meets the criteria during the prior quarter or "filing period" for the first through the fourth quarters and the "qualifying period" for the fifth through the seventh quarters. The first SIBs quarter began on July 8, 1998, and the seventh SIBs quarter ended on April 6, 2000. The filing and qualifying periods began on April 8, 1998, and ended on December 23, 1999.

At issue in regard to SIBs entitlement is whether the claimant made the required good faith job search commensurate with her ability to work. She did not seek any work during any filing or qualifying period and contended that she had no ability to work. Whether the claimant had the ability to work presented a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. With regard to the first four SIBs quarters, the Appeals Panel 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 or "be so obvious as to be irrefutable." 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*. New rules in effect for the fifth through the seventh quarters provide that an employee has satisfied the

[1]There was other evidence of ratings substantially less than Dr. S's 15%.

good faith effort requirement 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[.]" Rule 130.102(d)(4), as then in effect.

The hearing officer found that the claimant did not establish an inability to work for any quarter in issue. The claimant appeals this determination, but does not specify what medical evidence she is relying on to establish this inability. Dr. N, a treating doctor, wrote on January 9, 2000, that because of the claimant's injuries and chronic pain, she is unable to work. In an earlier letter he wrote that the claimant "cannot go up and down stairways at all." In a report of examination on June 9, 1998, Dr. SG, a carrier-selected doctor, concluded that the claimant's return to work was "important," that she demonstrated suboptimal effort, and that she could work in a light- to medium-duty capacity. The hearing officer considered this evidence and concluded that Dr. SG's opinion that the claimant could and should return to work more persuasive and credible than Dr. N's conclusory statements that the claimant was unable to work. The claimant argues on appeal that Dr. SG was "biased due to his affiliation with the insurance company" and that his opinion was given before her four knee surgeries. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). Under our standard of review, we find the evidence sufficient to support this determination. Cain, *supra*; Pool, *supra*.

The claimant also appealed the determination of the hearing officer that she failed to timely file her application for second through sixth quarter SIBs and for this independent reason was not entitled to SIBs for these quarters. From the limited evidence adduced at the CCH, it was established that the Commission made the initial determination that the claimant was entitled to first quarter SIBs. Dispute Resolution Information System (DRIS) contact data reflect that on July 6, 1998, a letter of first quarter entitlement was sent to the claimant by the Commission. Shortly thereafter, on July 9, 1998, the carrier disputed entitlement to first quarter SIBs. Also on July 9, 1998, according to the DRIS data, the claimant called the Commission, stated that she no longer wished to pursue SIBs for the first quarter, and that she was withdrawing her application.[2] On July 13, 1998, the carrier inquired about the status of its request for a benefit review conference (BRC) and was told the claimant was no longer pursuing SIBs. The carrier then withdrew the request for a BRC. The claimant then completed a TWCC-52 for the second through seventh quarters on January 10, 2000, and forwarded them to the Commission. The claimant's only explanation of what happened during this 18 months was that she had not received TWCC-52's from the carrier. What motivated her actions on January 10, 2000, was not clear.

[2]Apparently this was done under the mistaken belief that the receipt of SIBs would jeopardize her pension from her employer.

Generally speaking, a carrier is required to forward to the claimant a TWCC-52 to complete for timely payment of the following quarters of SIBs only in cases of continuing entitlement. *See* Rules 130.104(b) and 130.105(a) as in effect for each quarter in issue; *see also* Texas Workers= Compensation Commission Appeal No. 992605, decided January 6, 2000. Failure to supply the form tolls the deadline for its submission. Clearly, the carrier did not send any TWCC-52 to the claimant. This would resolve the matter of timely filing only if this were a case of continuing entitlement. The claimant stated in her appeal that the Commission "made an initial determination that I was entitled to SIB's, so I should at least receive SIBS for that quarter." In light of the DRIS data discussed above, we conclude that any entitlement determination by the Commission for first quarter SIBs was voided in response to the claimant's request to withdraw her application for these SIBs. This is especially true in light of the absence of evidence of any effort to correct or change the Commission's interpretation that the purpose of the claimant's call was to withdraw her request for SIBs. Thus, there was no determination of first quarter SIBs entitlement and none of the subsequent quarters involved cases of continuing entitlement which would have required the carrier to timely forward a TWCC-52. For these reasons, we affirm the determination of the hearing officer that the claimant did not timely file applications for second through sixth quarter SIBs.

Section 408.146(c) provides that "an employee who is not entitled to [SIBs] for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury." Having affirmed the determination that the claimant was not entitled to first through seventh quarter SIBs, we also affirm the determination, consistent with this section of the 1989 Act, that the claimant has permanently lost entitlement to SIBs.

There remains the issue of contribution. Section 408.084(a) provides that at the request of the carrier, the Commission may order IIBs and SIBs reduced "in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries." In arriving at a contribution determination, the Commission is to consider "the cumulative impact of the compensable injuries on the employee's overall impairment . . . ." Section 408.084(b). In response to the carrier's request for contribution, a Commission official determined that the carrier was entitled to contribution of four percent for a specific disorder IR for a prior documented compensable cervical injury of September 14, 1993, and two percent for a December 9, 1987, compensable right knee injury. This yielded a figure of six percent of the current 15% IR, or 40% contribution.

These calculations of contribution were based on Dr. SG's examination and evaluation of the claimant. He considered the current injury to be more in the nature of a "flare up of the continuing conditions from the prior injuries . . . ." In his opinion, the claimant had right knee chondromalacia as a result of the earlier injury and the entire rating for the right knee (two percent) reflects the effects of the prior condition. He similarly concluded that 100% of the four percent cervical IR represented the effects of the prior cervical injury. This yielded the six percent contribution figure, which the hearing officer found was the cumulative result of the prior injuries on the current IR. In her appeal, the claimant describes this amount of

contribution as "excessive" without specifying how or providing medical rebuttal evidence. Whether and, if so, how much of a cumulative effect of prior injuries exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94578, decided June 22, 1994. Under our standard of review of factual determinations of the hearing officer, we find the evidence sufficient to support her determination of contribution in the specified amount. Cain, *supra*; Pool, *supra*.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge