APPEAL NO. 011469
FILED AUGUST 6, 2001

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 June 6, 2001. With regard to the issues before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first, second, third, and fourth compensable quarters. The claimant appeals the determination that she is not entitled to SIBs, apparently contending, for the first time on appeal, that she was not timely provided the applications for SIBs, and challenging the sufficiency of the evidence. The respondent (carrier) responds and urges affirmance.

DECISION

Affirmed.

The claimant points out in her appeal that the carrier initially disputed her impairment rating (IR) of 30% which made the determination of if, or when, she would qualify for SIBs undecided.

While the claimant asserts that the applications for SIBs were not mailed to her until January 2000, which is after all the filing periods and qualifying periods, the claimant did not raise this issue at the CCH. The Appeals Panel has held we generally will not address issues raised for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 960716, decided May 8, 1996.

> An employee is entitled to [SIBs] if on the expiration of the impairment income benefits period computed under Section 408.121(a)(1) the employee:
>
> (1) has an [IR] of 15 percent or more as determined by this subtitle from the compensable injury;
>
> (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
>
> (3) has not elected to commute a portion of the impairment income benefits under Section 408.128; and
>
> (4) has attempted in good faith to obtain employment commensurate with the employee's 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 prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBs] for any quarter claimed." On January 31, 1999, Rule 130.102 was changed with the passage of the "new" SIBs rules. However, pursuant to Rule 130.100(a), entitlement or non-entitlement to SIBs shall be determined in accordance with the rules in effect on the date a qualifying period begins. We addressed the question of how to calculate a quarter subject to the old as opposed to the new SIBs rules in Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999. Applying the precepts set out in that case, the "old" SIBs rules apply in this case.

The fact that the claimant met the first and third of the requirements of Section 408.142(a) was established by stipulation. The hearing officer found that the claimant failed to make a good faith effort to seek employment during the filing periods for the first, second, third, and fourth compensable quarters. The claimant admitted that she had no job searches during any of the quarters in question. We have previously held in regard to cases considered under pre-1999 rules, that the question of whether the claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is "firmly on the claimant" and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred." We have likewise noted that medical evidence affirmatively showing an inability to work is required, if a claimant is relying on such inability to work to meet the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275,

decided November 3, 1994. Finally, we have emphasized that a finding of an ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool, *supra*; Cain, *supra*. Applying this standard, we do not find that the hearing officer erred in finding that the claimant did not make a good faith job search during the filing periods for the first, second, third and fourth compensable quarters.

Accordingly, the hearing officer's decision and order are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Michael B. McShane
Appeals Judge