

APPEAL NO. 950146

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing was held in (city), Texas, on December 30, 1994, (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) did not establish that he made a good faith effort to find employment commensurate with his ability to work during the qualifying period and was not entitled to supplemental income benefits (SIBS) for the third compensable quarter. The claimant appeals urging that the great weight of evidence showed that he made a good faith search for employment and that the medical evidence conclusively shows he was unable to perform any type of work. The respondent (carrier) urges that the appeal is untimely and that there is sufficient evidence to support the decision of the hearing officer.

DECISION

Affirmed.

The appeal was timely filed in this case, the dispatch of the decision of the hearing officer plus mail time giving the claimant until February 2, 1995, to file an appeal. The appeal was filed on January 26, 1995.

The claimant sustained a compensable back injury in a fall on (date of injury), and has not worked since. He sustained a back injury in 1980 which resulted in surgery. He has been under conservative, nonsurgical treatment for his back since the (date of injury), incident. Medical records in evidence indicate he has a herniation of the disc at L3-L4 and osteoarthritis and that his condition improves at times and regresses at other times. One of the medical reports in evidence indicates that the claimant's disability status is "total/permanent." During the course of his treatment, the claimant's doctor recommended he seek vocational retraining since the claimant would not likely be able to return to heavy truck driving which was the type of employment he had always held. The claimant testified that he felt that he could do light delivery work that does not involve significant lifting. He testified that he has applied for several truck driving jobs that he knew he could not perform but that he had not sought any such light employment during the period in issue. For the past year and a half, the claimant has lived in (city), (state), a small community that is remote from urban areas of any size. He indicated that there were limited opportunities for jobs within a close range although he had made some inquiries.

Regarding the issue of entitlement to SIBS for the third compensable quarter, the hearing officer determined that the claimant's testimony indicated that he did not make a good faith effort to search for employment commensurate with his ability to work. While the evidence was not particularly well developed, we cannot say the hearing officer's determination was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). And while there was some indication that the claimant was significantly limited in the type of work he

had the ability to perform, we have stated that where an assertion is made that there was no need for a job search because of no ability to work, the burden is on a claimant to prove that he indeed has no ability due directly to the physical injury. Texas Workers' Compensation Commission Appeal No. 941559, decided January 5, 1995. To satisfy the job search requirement in a case of no ability at all, "the claimant's inability to any work must be supported by medical evidence or must be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994. The comment in the one medical record that disability is "total/permanent" does not necessarily or compellingly show no ability to work, particularly when viewed with the total medical evidence of record and the testimony of the claimant.

The decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge