APPEAL NO. 950280

On January 13, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The appellant (claimant) disagrees with the hearing officer's decision that he is not entitled to supplemental income benefits (SIBS) for the first compensable quarter. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Pursuant to Section 408.142 an employee is entitled to SIBS if on the expiration of the impairment income benefits (IIBS) period the employee has an impairment rating (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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the claimant during the prior 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]." According to the interlocutory order attached to the benefit review conference (BRC) report, the first quarter for SIBS was from September 20, 1994, to December 19, 1994. The BRC report also states that the designated doctor assigned the claimant a 20% IR. The parties stipulated that the claimant did not commute any portion of his IIBS.

The claimant testified that he was injured on (date of injury), while working as an apartment maintenance worker. He did not describe his injury, however, the BRC report indicates he injured his back. He did not describe the treatment he received for his injury but did testify that he was treated by several doctors and that his current treating doctor is (Dr. C) whom he has seen for about a year. The claimant testified that he did not attempt to apply for any work prior to filing for SIBS for the first quarter, because he is unable to work and because Dr. C told him he "cannot work" and that he is "unable to work." He said he has not looked for work because he "cannot do anything." He said he uses a cane to walk and wears a plastic brace on some unspecified part of his body. He said he has back pain for which Dr. C gave him an injection on August 26, 1994. He testified that when he saw Dr. C in August 1994, Dr. C told him that he would not be able to work in the future and that he was "incapacitated." He said he last saw Dr. C in December 1994. The claimant further testified that he cannot sit or stand for a long period of time. He testified that he can do some light housekeeping work but that his son helps him with that. He testified that he has not gone to the Texas Employment Commission or the Texas Rehabilitation Commission.

In a letter dated August 29, 1994, Dr. C stated that the claimant "is disabled and it is unlikely that he will be able to return to gainful employment in his previous activity."

The carrier asserted that the claimant is not entitled to SIBS for the first quarter because he did not make a good faith attempt to obtain employment commensurate with his ability to work. The claimant asserted that he did not have to attempt to look for work because he is unable to do any work. The hearing officer found that the claimant did not attempt in good faith to obtain employment commensurate with his ability to work and he concluded that the claimant is not entitled to SIBS for the first quarter.

The claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, we noted that the employee's treating doctor's notes indicated she was unable to work at all, and we commented as follows: "If this is true, the claimant had an inability or no ability to work. Seeking employment commensurate with this inability to work would be not to seek work at all." However, in Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994, we stated:

> It is important to emphasize, however, that Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, did not do away with the requirement in Section 408.142(a)(4) that a claimant for SIBS must demonstrate that he or she attempted "in good faith" to obtain employment commensurate with an employee's ability to work. That case stands for the proposition that where it is demonstrated that a claimant's "ability" is "no ability," compliance with this requirement is effectively met by no search. However, we believe the burden is firmly on the claimant to prove that he indeed has "no ability" due directly to the physical injury.

In regard to a claimant's inability to do his previous job, in Texas Workers' Compensation Commission Appeal No. 94882, decided August 18, 1994, we stated:

> We point out that the requirements of Section 408.142(a) and [Rule 130.103] require good faith efforts to obtain any employment commensurate with claimant's physical ability to work. The key is commensurate with the ability to work. The requirements are not to go back to one's previous employment or employment at a particular pay scale.

In Texas Workers' Compensation Commission Appeal No. 941559, decided January 5, 1995, we stated the following in regard to a claimant's ability to work:

> The hearing officer appears to view as significant to the job search requirement the fact that claimant has never been "released" by Dr. B. The long-range interests of this claimant, let alone her future qualification for SIBS, would best

> be served by appraisal of her abilities vis-a-vis the job market as a whole, not just her previous job. The SIBS statutes arguably contemplate that the claimant will not be able to return to the prior employment and wage level, because what SIBS compensates for is unemployment or "underemployment."

In the instant case the hearing officer noted in his decision that Dr. C's letter of August 29, 1994, does not "confirm the testimony of Claimant that he is unable to perform any type of work." Indeed, the letter simply addresses the claimant's ability to "return to gainful employment in his previous activity." The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence and determines what facts have been established. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The claimant contends that the hearing officer erred in not admitting into evidence a letter from Dr. C dated December 12, 1994. The carrier objected on the basis that the letter had not been exchanged with it prior to the hearing. The claimant's attorney acknowledged that he had not made an exchange of documents with the carrier prior to the hearing. We find no error in the hearing officer's ruling. Rule 142.13(c). Even if it were to be established that the hearing officer erred in his evidentiary ruling, we cannot conclude that such would amount to reversible error, because the letter in question refers only to the claimant's ability to return to employment "in the future" and does not address the claimant's ability to work during the filing period for the first compensable quarter, which was the 90 day period prior to the beginning of the first quarter on September 20, 1994.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge