APPEAL NO. 961483

In Texas Workers' Compensation Commission Appeal No. 960801, decided June 11, 1996, the Appeals Panel reversed and remanded the decision and order of the hearing officer to reconsider the question of the appellant's (claimant) entitlement to supplemental income benefits (SIBS) for the first, second and third compensable quarters. The hearing officer, (hearing officer), determined that it was unnecessary to further develop the evidence and, thus, she did not reconvene the hearing. The hearing officer determined that the claimant was not entitled to SIBS for the quarters at issue. In his appeal, the claimant essentially argues that the hearing officer's determination that he is not entitled to first, second and third quarter SIBS is against the great weight and preponderance of the evidence. In addition, the claimant argues that the respondent (carrier) waived its right to contest SIBS in this instance by failing to timely request a benefit review conference under Section 408.147. We affirmed that portion of the hearing officer's decision in our decision in Appeal No. 960801 and we will not discuss that issue again. In its response, the carrier urges affirmance.

DECISION

We reverse and render.

It is undisputed that the claimant, who is 66 years old, sustained a compensable injury to his back on (date of injury), in the course and scope of his employment with (employer) for whom the claimant had worked since 1966. The claimant testified that, when he was in the fourth grade, he left school to get a job and assist his family. He stated that, as a result of leaving school at that time, he has limited literacy skills and is not able to complete a job application or read the newspaper. The claimant testified that he had no plans to retire at the time of his injury, noting that he had purchased a new home several months before the injury. He also stated that he attempted to return to work in a light-duty position with the employer after his injury, but he was not able to perform the duties of the position and he left it. The claimant testified that he has subsequently retired from his employer, at the age of 65, because he was not physically capable of working and that he thereafter began receiving retirement benefits. *See* Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, where the Appeals Panel stated that although retirement is a factor that can be considered in determining SIBS eligibility it does not, in and of itself, end SIBS entitlement where the injury and resultant impairment caused the retirement.

On April 15, 1993, the claimant had back surgery, a decompressive laminectomy from L2 to the sacrum. (Dr. G), an orthopedic surgeon, performed that surgery. The claimant continued treating with Dr. G until November 2, 1993, at which time Dr. G certified that the claimant reached maximum medical improvement (MMI), as of that date, with a 20% impairment rating (IR). Dr. G also released the claimant from his care, on November 2, 1993, advising the claimant that there was nothing else that could be done for him. The carrier disputed the claimant's IR and (Dr. S) was selected as the designated doctor. In Texas Workers' Compensation Commission Appeal No. 941607, decided January 10, 1995

(unpublished), the Appeals Panel affirmed the hearing officer's determination giving presumptive weight to the designated doctor's 10% IR.

The claimant filed suit in the District Court of County on the IR issue. On August 11, 1995, the District Judge signed a judgment on the jury's verdict awarding the claimant a 20% whole body IR as a result of his compensable injury. That judgment was not appealed and has become final.

The claimant testified that he has not worked since his surgery. He stated that he improved somewhat after his back surgery; however, he does not believe that he has ever gotten to the point that he "could give a man a day's work like I would before I got hurt." The claimant said that he has severe limitations on his activities since his injury. He stated that he cannot lift more than 15 to 20 pounds, that he can only sit or stand for about 20 to 30 minutes, that he can only drive for short distances, that he can wash dishes for about five to 10 minutes before he has to sit down and rest, and that he can go grocery shopping, buying things a little bit at a time. Finally, the claimant stated that he attempted to rake leaves shortly before the hearing and, after 10 minutes of raking, he had to stop and lay down because of the pain, which was so intense he was unable to sleep that night.

The claimant testified, and his testimony was uncontroverted, that in February 1996, he returned to Dr. G for the first time since he had been released from Dr. G's care in November 1993. In a letter dated February 27, 1996, Dr. G stated, as follows:

> [Claimant] has had multiple spinal surgeries in the past. He underwent a total laminectomy from L2 to the sacrum in April of 1993. He has done reasonably well following the surgery, but unfortunately, is unable to perform any gainful employment.

The only medical evidence offered by the carrier was a Report of Medical Evaluation (TWCC-69) from (Dr. W), whose involvement in the claim is unexplained, stating that the claimant reached maximum medical improvement (MMI) on September 8, 1992, with an impairment rating (IR) of zero percent. On the TWCC-69, Dr. W also states that the claimant could return to light-duty work. We note that this report precedes the claimant's spinal surgery by some seven months.

At issue in this case is the claimant's entitlement to SIBS in the first, second and third compensable quarters. The dates of those quarters are December 28, 1994, to March 28, 1995; March 29 to June 27, 1995; and June 28 to September 26, 1996, respectively. The claimant maintains on appeal, as he did at the hearing, that he is entitled to SIBS for those quarters despite his not having looked for work because he had no ability to work during the filing periods for those quarters. 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 replace the requirement 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 no 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. Appeal No. 951204, *supra*; Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that claimant had some ability to work in the filing period. Specifically, she stated:

> Although Claimant's argument in this vein is legally correct, and the Hearing Officer is sympathetic to the likelihood that Claimant's extensive surgery, advanced age, and limited education would substantially hinder an employment search, the Hearing Officer is not persuaded that these factors would completely preclude all gainful employment, notwithstanding the contrary letter of Claimant's treating doctor, since that letter constitutes a merely conclusory opinion, and does not state Claimant's physical limitations with specificity, indicating how those limitations would be expected to preclude all forms of gainful employment. See Appeals Panel Decision #'s 960106 and 941696.

As we have previously noted, an assertion of no ability to work must be supported by medical evidence or be so obvious as to be irrefutable. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995. The only medical evidence presented in this case are Dr. G's records and the TWCC-69 dated some seven months before the claimant's surgery stating that he could return to light-duty work. Dr. G's February 27, 1996, report states that the claimant "is unable to perform any gainful employment." With the record so developed and particularly given the absence of medical evidence indicating that the claimant could work at any point except seven months prior to his back surgery, we find the hearing officer's determination that the claimant retained some limited capacity for gainful employment in the filing period to be so contrary to the great weight and preponderance of the evidence, the uncontroverted evidence from Dr. G that the claimant was unable to work, as to be clearly wrong or manifestly unjust. Pool, *supra*; Cain, *supra*. Accordingly, the hearing officer's determination that the claimant is not eligible to receive first, second and third quarter SIBS because he did not make a good faith effort to find employment commensurate with his ability to work likewise does not find sufficient evidentiary support in the record, in that the claimant's uncontradicted medical evidence established that he had

no ability to work in the filing periods for those quarters. We reverse the determination that the claimant did not make a good faith job search and find that the claimant was excused from making a job search in this instance because he had no ability to work in the filing periods. *Compare* Texas Workers' Compensation Commission Appeal No. 961333, decided August 19, 1996.

Finally, we briefly comment upon the hearing officer's apparent belief that the evidence from Dr. G was "suspect" because it appears that it "was prepared solely for the purpose of assisting the Claimant in prevailing at the Contested Case Hearing." The hearing officer noted that she did not believe that Dr. G's report was worthy of credence because it was prepared at a time that Dr. G had not seen the claimant for at least a year. As we noted above, the uncontroverted evidence in this case is the claimant's testimony that he had an appointment with Dr. G in February 1996 before the February 27th report was prepared and that Dr. G examined him at that time and discussed with the claimant the fact that he was not capable of working. We cannot agree that the fact that the claimant developed evidence prior to the hearing somehow calls that evidence into question. To the contrary, that is standard practice in litigation. It does not seem unusual in this instance that a party with the burden of proof on an issue would gather his evidence prior to the hearing where that issue was to be decided. We have specifically stated that where, as here, a claimant is alleging that he had no ability to work in the filing period, it is incumbent upon the claimant to present medical evidence in support of that claim in order to establish his SIBS entitlement. We note that, in June 1995 at the end of the filing period for the third compensable quarter, the claimant's 10% IR had not yet been overturned in the District Court; therefore, he did not meet the threshold requirement for SIBS of at least a 15% IR. In addition, the claimant had been released from Dr. G's care in November 1993 and had been advised by Dr. G that there was nothing else he could do for the claimant. At that point, there was no issue concerning the claimant's ability or inability to work in existence. And, as such, there was no reason for the claimant to develop evidence on a nonissue, particularly in light of the fact that he was not receiving ongoing medical treatment. Where no additional treatment options are available to the claimant, it is unreasonable to expect that the claimant would continue to go to the doctor, at the expense of the carrier, on the outside chance that medical evidence from that period might later become necessary. Accordingly, we find no merit in the basis given by the hearing officer for rejecting the uncontroverted evidence from Dr. G that the claimant did not have any ability to work in the filing periods for the first, second and third compensable quarters.

We reverse the hearing officer's determination that the claimant is not entitled to SIBS in the first, second and third compensable quarters and render a new decision that the claimant is entitled to those benefits.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge