

APPEAL NO. 94150

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 13, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The record closed on January 24, 1994. The single issue at the hearing was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the initial quarter commencing on September 29, 1993. The hearing officer determined that the claimant was not entitled to SIBS because he failed to prove by a preponderance of the evidence that he made a good faith effort to seek employment commensurate with his ability to work as required by the 1989 Act. The claimant appeals, arguing essentially that the requirement to make a good faith effort to find employment is satisfied once the claimant establishes that he was totally unable to work. The respondent (carrier) replies that the decision of the hearing officer is supported by sufficient evidence and should be affirmed.

DECISION

The decision and order of the hearing officer are affirmed.

The facts of this case are essentially undisputed. The claimant injured his back in the course and scope of his employment on (date of injury), while picking up a dock plate on a receiving dock. He reached maximum medical improvement (MMI) on October 27, 1992, with a 16% impairment rating (IR). His entitlement to impairment income benefits (IIBS) ended on September 28, 1993. The claimant has not returned to work and has not commuted any portion of IIBS. His initial SIBS quarterly entitlement, if established, would begin on September 29, 1993.

On August 25, 1993, the claimant completed a Statement of Employment Status (TWCC-52) on which he indicated that he had not returned to work, but did not indicate a good faith attempt to find employment during the previous 90 days. On August 31, 1993, a disability determination officer completed the Notice of Entitlement or Nonentitlement portion at the bottom of this form indicating that the claimant was entitled to SIBS. On September 13, 1993, the carrier requested a benefit review conference (BRC) to contest the claimant's entitlement to SIBS.¹ The only evidence introduced by the claimant at the hearing to support his entitlement to SIBS was his own testimony and a one-page, form statement from (Dr. C), the claimant's treating doctor, which was dated October 21, 1993, and contained only a checkmark for an entry on the form "NOT ABLE TO WORK," and a return for evaluation again in six months.

¹We note that Section 408.147(b) requires a carrier to contest entitlement to SIBS within 10 days of the receipt of the employee's TWCC-52. There is no evidence in the record of when the carrier received the employee's statement and the claimant has not raised the issue of timely contest. For purposes of this appeal, we consider the carrier to have timely disputed the claimant's entitlement to SIBS.

The claimant testified that he has been under the continuing medical care of Dr. C since the injury. His visits are scheduled every six months. The last time he saw Dr. C for medical care was six months before the October 21, 1993, duty excuse, or in May 1993. He testified that Dr. C told him he was not to do any work. According to the claimant, there were no discussions about work restrictions or limitations, "just no work." He never received a partial release to duty. When asked by the hearing officer if he had any other medical evidence that would assist the hearing officer in understanding the full extent of his medical condition, both the claimant and his attorney responded that they had trouble getting more information from Dr. C other than the duty excuse already in evidence. The claimant also stated he was presently receiving Social Security Administration disability payments, but they were based on more than the compensable injury that is the premise of his request for SIBS.

The claimant admitted that he had no other medical evidence covering the period of the calendar quarter immediately preceding his initial SIBS entitlement period and that he never looked for a job during that quarter. He stated that he has a ninth grade education and his only skill is that of a truck driver. He testified that, both at the time of the hearing and during the preceding quarter when the potential SIBS entitlement would have been established, he had problems walking, sitting, bending and sleeping, with numbness in his hip and left leg. He declined to take any prescription pain medication. Though he succinctly stated "I wasn't able to do nothing, period," he admitted that he mowed the lawn on a riding lawn mower, but with frequent rests. He also, again with frequent rest periods, said he assisted with the household chores of washing dishes and vacuuming the floor. He testified that he feeds the chickens he keeps, but insisted this required only a very light effort. He admitted that he could drive a car and that he and his wife had recently driven to Arkansas. He does not read the want ads in the local newspapers and said he never has sought the assistance of the Texas Employment Commission (TEC) or a private employment agency and only visited the Texas Rehabilitation Commission (TRC) one time, about a month before the hearing. He unsuccessfully applied for two jobs (one at a gas station, the other at a hardware store) after the BRC (held on October 28, 1993) and after his attorney suggested he start looking for employment. He testified that prior to the BRC he did not know he had to make an effort to find employment and misunderstood the law in this regard. He said that when his TWCC-52 was approved, he thought he had nothing else to do.

The carrier introduced into evidence a statement of November 29, 1993, in which Dr. C describes limited work capabilities of the claimant but does not say when these limits took effect. The claimant expressed disagreement with this statement. The hearing officer left the record open for a week to enable the parties to submit additional medical information, if any, relevant to their positions. The only additional evidence submitted by the claimant was another duty release dated May 10, 1993, essentially identical to the release of October 21, 1993, which contains a next appointment date of October 21, 1993. The hearing officer did not mention this report in his decision or list it as part of the evidence.

The hearing officer made the following pertinent findings of fact and conclusions of law from which the claimant appeals:

FINDINGS OF FACT

6.The Claimant's job search efforts during the quarter ending September 28, 1993, were not reasonable in light of his physical abilities and constituted no effort or insufficient effort to seek employment.

CONCLUSIONS OF LAW

2.The Claimant failed to prove, by a preponderance of the evidence, that he made a good faith effort to seek employment commensurate with his ability to work as required by [Section 408.142(a)(4)].

3.The Claimant is not entitled to supplemental income benefits for the initial quarter beginning September 29, 1993, and concluding December 28, 1993.

Section 408.142(a) provides:

An employee is entitled to supplemental income benefits if on the expiration of the impairment income benefit period . . . the employee:

(1)has an impairment rating 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 benefit . . . and

(4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

SIBS are calculated quarterly and paid monthly. The entitlement for the initial period of SIBS is determined prospectively, based on whether the employee met all the requirements listed above upon termination of his entitlement to IIBS. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.102(b) (Rule 130.102(b)) and 130.103 (Rule 130.103). See also Texas Workers' Compensation Commission Appeal No. 931160, decided February 1, 1994.

The claimant contended both at the hearing and on appeal that he was unable to work at all due to his compensable injury and that he therefore was relieved of the statutory obligation to attempt in good faith to obtain employment because any such attempts on his

part would be futile. We disagree. In Texas Workers' Compensation Commission Appeal No. 93636, decided September 3, 1993, the claimant was denied SIBS because he had not made a good faith effort to find employment. The claimant in that case admitted he had not looked for employment because he considered himself disabled in reliance on a disability determination made by the Social Security Administration. The evidence showed that the claimant was released by his doctor to light duty, that his employer offered certain accommodations, and that the claimant admitted he was able to do light chores at home. The Appeals Panel in affirming the decision of the hearing officer held that under these circumstances, the claimant must make some good faith effort to find employment, but went on to note that "[t]his is not to say that in all cases the employee must seek employment, regardless of the employee's physical condition or how futile that effort might be. . . ." The good faith effort to find employment need only be commensurate with the ability to work. For example, in Texas Workers' Compensation Commission Appeal No. 94063, decided February 22, 1994, the claimant did not assert that she made a good faith attempt to find work, but simply stated "I am still under doctor's care." Though the case was decided on the basis that the carrier did not timely dispute SIBS, the Appeals Panel noted that "[i]f such a statement sufficed to negate the statutory requirement to have `attempted in good faith to obtain employment commensurate with the employee's ability to work' [citations omitted], a significant number of claimants otherwise qualifying for SIBS would similarly need to make no attempt." Compare Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993, in which apparently "minimal" job search efforts were considered sufficient evidence for a hearing officer to find a good faith effort. And most recently, in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the claimant relied on a statement from her doctor that read, in part, "[w]as found not able to go back to previous type employment," along with other reasons, to excuse her from the requirement to make a good faith effort to find employment. The hearing officer evaluated conflicting evidence and concluded that the claimant was in fact unable to work. The Appeals Panel affirmed this finding of fact as not contrary to the great weight and preponderance of the evidence and concluded that, given this finding, "it follows that . . . the claimant sought employment commensurate with her ability to work or rather did not seek employment commensurate with her inability to work."

The claimant in the case now under appeal admitted an ability to perform light household chores and described various activities that he performed, however painfully and slowly, around the house. He offered no medical opinion about his inability to work other than duty excuses which were contradicted by Dr. C's November 1993 evaluation that the claimant has some, though limited, work capabilities. Under these circumstances, in light of our previous decisions on this question, we are unwilling to find as a matter of law that the claimant in this case was excused from the requirement to make a good faith effort to find work commensurate with his ability, or that such efforts would be futile in his case.

Whether the claimant has made the required good faith effort commensurate with his ability to work is a question of fact. The claimant admitted that he had not looked for work at any time in the calendar quarter immediately preceding his initial potential SIBS

entitlement. Nor did he did seek the help of TEC or TRC. He also admitted that Dr. C was uncooperative when asked by him and his counsel for statements to support his contention that he could not work. On the contrary, as noted above, Dr. C submitted a statement to the carrier that the claimant could work under certain restricted circumstances.² The claimant's only other evidence of an inability to work was his own testimony. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165. His determination that the claimant failed to prove by a preponderance of the evidence that he made a good faith effort to seek employment commensurate with his ability to work is sufficiently supported by the evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Therefore, we will not disturb it on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

²Although not listed as evidence or mentioned by the hearing officer in his decision, the claimant, pursuant to the hearing officer's request, submitted on January 14, 1994, after the hearing ended but before the record closed, a second unlimited work excuse signed by Dr. C on May 10, 1993, with no return to work date. This was identical to the duty excuse of October 21, 1993, introduced into evidence. We find no error in the hearing officer's failure to mention this evidence in his decision, see Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993. The claimant testified that his disability continued at least from the date of this duty excuse through his next appointment with Dr. C on October 21, 1993. Failure, if any, of the hearing officer to consider this document, we believe was harmless. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge