

APPEAL NO. 980152
FILED MARCH 6, 1998

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 18, 1997, a contested case hearing (CCH) was held. The issues at the CCH were whether appellant (claimant) was entitled to supplemental income benefits (SIBS) for the seventh, eighth, and ninth quarters. The parties agreed and the hearing officer determined that claimant is not entitled to SIBS for the seventh quarter. The hearing officer also determined that claimant did not meet the good faith requirements and that she is not entitled to SIBS for the eighth and ninth quarters, from which determinations claimant appeals. The parties did not appeal the direct result determination. Respondent (carrier) responds that sufficient evidence supports the hearing officer's determinations and requests affirmance.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that she is not entitled to SIBS for the eighth and ninth quarters. The parties stipulated that: (1) claimant's impairment rating (IR) is 16%, (2) claimant did not commute any of her impairment income benefits (IIBS), (3) the eighth quarter was from July 15, 1997, to October 13, 1997, and (4) the ninth quarter was from October 14, 1997, to January 12, 1998.

Claimant testified that she was working for (employer) on _____, when she injured her shoulder and back moving tables. Claimant said she has been treating with Dr. (Dr. BI) since 1994 for her injury. A September 1994 report from the designated doctor, (Dr. O), stated that claimant's diagnoses for her _____, injury were back sprain, right shoulder sprain, and factitious syndrome, and said that she is not a surgical candidate. Claimant agreed that she listed 37 job searches regarding the eighth quarter and 22 for the ninth quarter on her Statement of Employment Status (TWCC-52) filed for each quarter. She said that 11 of the 37 and 12 of the 22 job contacts were contacts with those to whom she wanted to sell flower arrangements. She said one contact was with a person who wanted her to buy a home-based business "kit" for selling (name brand 1) and (name brand 2) products to various stores. She said she looked for sales jobs and agreed that she could do the work if, when her back hurts, she is allowed to work only a few hours, and if she is permitted to lie down when she is in pain. Claimant said that there were days when she did not look for work because of her back pain. She testified that she earned about \$150 during the filing period for the eighth quarter and \$490 during the filing period for the ninth quarter selling flower arrangements. Claimant said that she was taking Soma and a form of Vicodin during the filing periods for the eighth and ninth quarters. She said that while she was driving and looking for work during the filing period for the ninth quarter, she "overdid" it and that her leg swelled and became painful. She said her back becomes very painful if she stands or drives very long. Claimant testified that she also looked for work during the

filing period for the ninth quarter, in addition to doing flower arrangements. She said that there was a period of two weeks during the filing period for the ninth quarter when her foot and leg were very swollen from tenosynovitis. She said that during the filing periods she applied for work as a receptionist or clerk, and that she learned of the jobs through word of mouth or from newspaper advertisements. Claimant said she has been treating with Dr. BI for a number of years and said that her condition is progressively growing worse.

A November 25, 1996, work performance report signed by (Ms. S), an occupational therapist, states that the report shows an invalid representation of claimant's physical capabilities due to the fact that she "manipulated" her effort. Ms. S wrote that claimant "states she has no plans to return to work and is applying for social security disability insurance benefits." A February 11, 1997, report from (Dr. LE) stated that claimant is 47 years old, that her 1994 MRI was "normal" but it showed a disc protrusion at L5-S1, and that claimant has "progressed" from having a normal EMG in 1994 to having an EMG in January 1996 that shows abnormality of the L5-S1 nerve root distribution. Under "impression" Dr. LE wrote "lumbosacral radiculopathy bilaterally" and "herniated disc" at L5-S1. Dr. LE said that claimant is unable to do any type of vocational rehabilitation training and that she is "100% disabled from any work." A January 1996 EMG report is signed by Dr. BI and states that it is "suggestive of abnormality." A March 1997 MRI report states that claimant has mild degenerative changes at L5-S1 with no evidence of herniation or spinal stenosis. A March 10, 1997, letter from Dr. BI states that he strongly feels that claimant may not be able to ever work again "due to her disabilities and her age."

The hearing officer determined that: (1) claimant looked for work on less than 25 days of the filing period for the eighth quarter; (2) claimant looked for work on less than 20 days during the filing period; (3) claimant's participation in her work performance evaluation was "invalid," and (4) claimant did not meet the good faith requirements for the eighth and ninth quarters.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Good faith is a subjective notion and generally means honesty of purpose, freedom from intent to defraud and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the

evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the hearing officer apparently determined that claimant did not make an effort to look for work that was commensurate with her ability. The hearing officer resolved the conflicts in the evidence and determined that claimant did not act in good faith during the filing periods in question. We have reviewed the record and we conclude that the hearing officer's good faith determinations regarding these two quarters are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, we will not substitute our judgment for his in this regard. Cain, *supra*.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge