

APPEAL NO. 980161
FILED MARCH 10, 1998

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 5, 1997, a contested case hearing was held. With respect to the issues before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the eighth and ninth compensable quarters because claimant failed to make a good faith attempt to obtain employment commensurate with his ability to work. The hearing officer also determined that claimant's unemployment/underemployment was a direct result of his impairment. The direct result determination has not been appealed and has become final. Section 410.169.

Claimant appealed the good faith determinations, arguing that he "went on 10 interviews and or calls" in the eighth quarter and that he made "22 applications," worked part time and went to school two days a week to learn to read and write in the ninth compensable quarter. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) suggests that claimant's appeal is not timely and, in the alternative, urges affirmance.

DECISION

Affirmed.

Regarding timeliness of claimant's appeal, claimant, in his appeal, states that he received the hearing officer's decision on January 2, 1998 (it had been mailed on December 29, 1997). Claimant recites that the appeal was required to be filed by January 17, 1998 (since the 17th was a Saturday, and January 19th was a holiday, the appeal actually was required to be filed by January 20, 1998). See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 102.3 and 102.7 (Rules 102.3 and 102.7). The post mark on claimant's appeal is completely illegible, but the appeal was actually received on Monday, January 26, 1998. Since claimant could have mailed his appeal as late as Tuesday, January 20, 1998, to be timely, five days from that date would be Sunday, January 25, 1998. It is conceivable that claimant's appeal was received on Saturday, January 24, 1998, and not logged in until the next business day, January 26th. See Rules 102.3 and 102.7. Claimant's appeal was timely.

On the merits, Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Rule 130.104. Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling 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]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

It is undisputed that claimant sustained a low back injury on _____, and claimant testified that he has had two spinal surgeries. The parties stipulated that claimant "had at least a 15% impairment rating," and that claimant had not commuted impairment income benefits. There was no stipulation or determination of the filing periods, but the parties and the hearing officer appeared to agree that the filing period for the eighth compensable quarter began on March 4, 1997, and the filing period for the ninth quarter ended on September 1, 1997.

Claimant testified that he had a ninth-grade education and that during the filing period for the ninth quarter he was going to school, apparently under Texas Rehabilitation Commission auspices, to improve his reading and writing skills with an eventual goal of obtaining a general equivalency diploma (GED). Claimant testified that he was an automobile body repairman and that at some point he began working in his cousin's body shop learning how to do automobile repair estimating. On his Statement of Employment Status (TWCC-52) for the eighth quarter filing period, claimant listed or attached a list of nine or 10 employers where he had sought employment. Carrier's investigator testified that some of those employers did not have an application on file; for others, the telephone number was apparently incorrect; and on one employer with multiple locations, claimant had failed to specify with which location he had applied. At times, claimant testified, he would contact the employers by telephone and at other times, he said, he applied in person.

For the filing period for the ninth quarter, claimant testified that he worked about 15 hours a week at his cousin's body shop, went to school five hours a week and submitted an attachment with photocopies (largely illegible) of 22 help wanted ads that claimant said he called. Most of those calls appear to have been made in June and July of 1997. Claimant testified that he is in constant pain, requires medication and that additional spinal surgery is scheduled for December 18, 1997.

In addition to the investigator who had followed up on claimant's job contacts, carrier also provided still pictures and a video showing claimant working on various cars, apparently doing some estimating and generally walking around, and getting in and out of cars. A functional capacity evaluation (FCE) performed on January 23 and 24, 1997, by (Dr. N) indicates that claimant is capable of performing sedentary work not to exceed lifting 10 pounds and "sitting the majority of the day." An independent medical examination dated June 18, 1996, performed by (Dr. S), (but apparently erroneously identified as (Dr. G) in the hearing officer's discussion), indicates "symptom amplification" and positive Waddell's signs. The hearing officer, in his Statement of the Evidence (discussion), comments:

A surveillance video tape and a[n] [FCE] performed by [Dr. G] reveal that Claimant has made a gross exaggeration of his inabilities and impairment

related to each of the subject qualifying periods. Carrier's investigation also revealed that Claimant did not apply for jobs at all of the places he claimed. It is extremely difficult to give credibility to anything Claimant asserts. The video tape accurately portrays a worker who is able to bend, stoop and move with the agility of someone who could have been successful in obtaining numerous jobs during the qualifying periods. Claimant's efforts to seek employment were not calculated to result in success.

We have many times held that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In this case, the hearing officer was obviously persuaded by the video and photographs showing claimant performing various activities of daily living. While it is commendable that claimant is working toward his GED, that fact alone does not allow us to reverse the hearing officer's determinations that claimant was exaggerating both his limitations and his job search. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We do not so find.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge