

APPEAL NO. 990042

Following a contested case hearing held in Lubbock, Texas, on December 16, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the sixth compensable quarter, that he is not entitled to SIBS for the seventh and eighth quarters, and that, as of the date of the hearing, he has not permanently lost entitlement to SIBS. The appellant (carrier) appeals for evidentiary insufficiency the determinations concerning claimant's sixth quarter entitlement and his not having permanently lost entitlement to SIBS. Claimant's response urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury (_____) resulting in an impairment rating (IR) of 15% or greater and that he has not commuted any portion of his impairment income benefits (IIBS). The hearing officer took official notice of the fact that claimant was not entitled to SIBS for the fourth compensable quarter. The parties further stipulated that claimant is not entitled to SIBS for the fifth compensable quarter; that the carrier is not liable for payment of SIBS for the sixth and seventh quarters due to claimant's failure to timely file the Statement of Employment Status (TWCC-52) for each respective quarter; that the filing period for the sixth compensable quarter began on September 29, 1997, and that the filing period for the eighth compensable quarter ended on March 29, 1998; and that during the filing periods claimant was employed but earned less than 80% of his average weekly wage (AWW). The carrier has not appealed a finding that claimant's underemployment is a direct result of his impairment. Claimant has not appealed the adverse determinations concerning SIBS for the seventh and eighth compensable quarters. Accordingly, these determinations have become final by operation of law. Section 410.169.

Since only the sixth quarter entitlement is appealed, our discussion of the evidence will be confined to the filing period for that quarter. Claimant testified through a Spanish language interpreter that on _____, he "fell off a scaffolding seven floors high," injuring his back and left leg and that he can barely hear out of one ear. The July 12, 1995, report of Dr. B, the designated doctor who assigned a 27% IR, states that claimant was trying to stop a scaffold from collapsing when he injured his lower back and left leg and femur region. Dr. B's IR included a rating for a heart valve condition caused by the treatment of claimant's back. Claimant stated that he had surgery on his back and stomach, apparently alluding to a 360 degree lumbar fusion, that he cannot bend or lift more than 10 pounds, and that he has continuing back and leg pain for which he takes pain medication and sees Dr. P. He said he has no training for office work and has no Social Security or any other financial assistance other than the wages he has been able to earn. He stated that during the sixth

quarter filing period, Ms. MR, a lady who helps him out by providing him with a room and food, gave him a job assisting her in cleaning rooms at Sam's Motel; that she was paid \$2.00 per room and she paid him \$1.00 per room to help her; that he did only light work such as replacing the towels and toilet paper and cleaning the sinks; and that he could work for only two hours a day and even that was very difficult because he had a lot of pain. Claimant indicated that the motel job ended and that he looked for light work at restaurants and eventually obtained a job from Ms. ER cleaning tables and ashtrays at the Restaurant. Claimant again indicated he could not work for more than two hours a day because of his back and leg pain. A written statement from Ms. ER stated that claimant began working at her small restaurant on December 14, 1997, that he wipes off tables, fills salt and pepper shakers and so forth, and that he can only work one to two hours a day and some days does not work at all when he feels sick.

Concerning his job seeking efforts in the sixth quarter filing period, claimant's TWCC-52 reflects that he contacted 10 businesses, apparently all restaurants, in the month of October 1997. Claimant said he cannot speak, write or read English; that he has no car and had no money for bus fare; that he could not read the English language newspapers and signs in windows; that he could only walk to places looking for jobs which were nearby because he cannot walk far; and that some friends would drive him to places to look for work on their days off, several times a month. Claimant further testified that he contacted the Texas Rehabilitation Commission (TRC) and the Texas Workforce Commission (TWC) and that neither agency could help him. A TWC pre-registration document is dated October 29, 1997, and a TWC work application with that document reflects that claimant was working as a laborer for a drywall company when injured and had previously worked as a laborer for a cement contractor. Claimant indicated he had previously done only heavy labor work and had no training for office work. A TRC letter of October 1, 1997, states that due to claimant's limitations, lack of education, and inability to speak English, he is a very poor candidate for retraining.

Dr. P's report of June 2, 1997, stated that with appropriate education, claimant "would be capable of office work, sedentary occupations, etc." but that claimant is essentially uneducated and he does not expect claimant to ever work again at the level of work he performed just prior to his injuries. Dr. P's records of September 22, October 13, and December 17, 1997, indicate that claimant got virtually no relief from injection of the lateral femoral cutaneous nerve with Lidocaine; that Dr. P feels that the lateral femoral cutaneous nerve is entrapped somewhere along its course and that claimant has meralgia paresthetica (a disease marked by paresthesia, pain and numbness in the outer surface of the thigh due to nerve entrapment) and not a nerve root problem; and that surgery is not indicated unless one is "absolutely desperate" because the surgical outcomes are "dismal."

Dr. P wants to try a series of injections and look into a neuroelectric blockade. He stated that there is no "magic drug" that is going to abort this condition and that most cases resolve in three to five years. A March 6, 1998, operative report of Dr H, an anesthesiologist, reflects the pre- and post-operative diagnoses as post-traumatic, intractable, mechanical low back pain with left leg pain; status post 360 degree lumbar spine fusion; left lateral femoral cutaneous nerve entrapment with scar neuroma; and left

superior cluneal nerve entrapment with neuromas. The report reflected that Dr. H performed cryotherapy lesioning of the left lateral femoral cutaneous nerve and neuroma and cryotherapy lesioning of the left superior cluneal nerve branches.

Dr. P reported on May 13, 1998, that while claimant's lateral femoral cutaneous nerve condition seems improved and while he has a solid fusion, these are just technical successes in view of his low back and pelvic girdle pain. Dr. P stated he was going to consider an implanted pain control device.

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 employee's average weekly wage (AWW) 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. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The hearing officer found that during the filing period for the sixth compensable quarter, claimant attempted in good faith to obtain employment commensurate with his ability to work. After setting forth the evidence of claimant's job search efforts for that quarter, the hearing officer commented that claimant established "by a minimal margin" that he was entitled to SIBS. We are satisfied that this finding 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could consider not only claimant's testimony concerning the extent of his pain during the filing period but also the corroboration found in his medical records and could also consider the efforts he made to find employment given his lack of transportation and inability to walk for long distances. The Appeals Panel has indicated that good faith "is a subjective state of mind that denotes honesty of purpose, lack of intent to defraud and being faithful to one's obligations," and that "the good faith effort necessary for SIBS must be to obtain employment commensurate with the ability to work, not to return to the previous employment or to employment at a certain wage scale." Texas Workers' Compensation Commission Appeal No. 951779, decided December 11, 1995 (Unpublished).

Since we are affirming the hearing officer's determination that claimant is entitled to SIBS for the sixth compensable quarter, we find no error in the other appealed issue,

namely, that claimant had not, as of the date of the hearing, permanently lost his entitlement to further SIBS. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.106.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge