APPEAL NO. 990079

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 10, 1998, a contested case hearing (CCH) was held. With respect to the only issue before her, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter because claimant had not made a good faith effort to seek employment commensurate with his ability. (The hearing officer's finding of a direct result of the impairment was not appealed.)

Claimant appeals, contending that a functional capacity evaluation (FCE) indicated that he was unable to work but that he, nonetheless, made several job contacts within his physical limitations with the intent to find employment and that he, in fact, did obtain full-time employment after the end of the filing period. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The file does not contain a response from the respondent (self-insured).

DECISION

Affirmed.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing 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 parties stipulated that claimant sustained compensable low back and ankle injuries on _____, that claimant had a 17% IR, that IIBS were not commuted and that the filing period for the fifth compensable began on June 25 and ended on September 23, 1998. Claimant testified that he slipped and fell while carrying a computer.

Claimant's Statement of Employment Status (TWCC-52) indicates that claimant earned no wages during the filing period and claimant explained "I don't have doctor's release. I'm looking for a job as you instructed me." Attached to the TWCC-52 are listings of job contacts for sales, school district transportation director, maintenance director and county housing director. Claimant, at the CCH and on appeal, points to an FCE performed on November 17, 1997 (seven months prior to the beginning of the filing period), as

showing he "was unable to work." Some of the validity testing suggests symptom magnification. The FCE, under the heading of recommendations, states:

> RETURN TO CURRENT POSITION RECOMMENDATION: Unable to return to work, but based upon performance should benefit [sic] from further treatment.

The hearing officer could believe that meant only that claimant could not return to his preinjury employment. As the reason for the recommendation, the FCE stated that a major limiting factor was a "perception of pain" and goes on to say:

> His subjective pain rating was too high to be considered valid and the strength coefficient of variation was too high & the lift scores too low to be considered valid. Even considering these inconsistencies, there is tightness & weakness that would respond to therapy & correction would help function.

The hearing officer's comment that the "medical evidence did not support a total inability to perform any type of work, but rather, established that Claimant was able to perform sedentary work" is supported by the evidence and is not against the great weight and preponderance of the evidence.

As an alternative, claimant contends that he had made a good faith effort to seek employment commensurate with his ability. As noted previously, as part of his TWCC-52, claimant lists some seven job contacts that he says he made on seven different days during the filing period. The Appeals Panel has defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994. While good faith is not established simply by some minimum number of job contacts, we have also noted that good faith encompasses the manner in which the job search is undertaken with respect to timing, forethought and diligence. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. Whether a claimant has made the required good faith job search is generally a question for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. In this case, the hearing officer commented that, in her view, the preponderance of the evidence demonstrated that claimant lacked the subjective intent to seek employment "rather, it tended to show that [claimant's] primary objective was to qualify for SIBS." Claimant, in his appeal, contends otherwise, arguing his intent was to find employment. The hearing officer, however, is the sole judge of the weight and credibility that is to be given to the evidence (Section 410.165(a)), and we decline to substitute our judgment for that of the hearing officer.

Claimant also testified, and advanced on appeal, that he was successful in obtaining employment with a loan company as a collector, where he does about half of his work from the office over the telephone, on November 1, 1998, about six weeks or so after the end of the filing period. While this was a factor that the hearing officer could consider, the hearing

officer apparently did not find it persuasive. We also note that position is substantially different than the supervisory positions that claimant sought during the filing period.

Upon review of the record submitted, we find no reversible error and 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 clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge