

APPEAL NO. 990150

Following a contested case hearing held on January 4, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 13th compensable quarter. Claimant has appealed this determination, contending that the hearing officer erred in finding that claimant did not make a good faith attempt to obtain employment during the filing period. The respondent (carrier) urges that the evidence is sufficient to support the factual finding on claimant's lack of good faith which, in turn, sufficiently supports the dispositive conclusion that he is not entitled to SIBS.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement with an impairment rating (IR) of 15% or greater; that the 13th compensable quarter began on September 19 and ended on December 19, 1998, and the filing period began on June 20 and ended on September 18, 1998; that claimant did not elect to commute any portion of his impairment income benefits (IIBS); that claimant did not have any earnings during the filing period; and that during the filing period claimant was unemployed as a direct result of his impairment.

Claimant testified that following his compensable low back injury of _____, he twice underwent spinal surgery, with the most recent operation being performed on December 7, 1994; that he takes six or seven pills in the morning and at night for pain and for other conditions such as high cholesterol and blood pressure; that the medications make him sleepy and he usually sleeps several hours after taking them; that he last saw Dr. M, who performed the second surgery, in 1995; and that he has been told he is "totally disabled." In evidence is the July 24, 1998, report of claimant's chiropractor, Dr. P, which states that claimant is "totally disabled at this time" and will be seen on an as-necessary basis. Claimant also stated that in 1996 or 1997 he commenced psychiatric treatment with Dr. T. The report of a functional capacity evaluation performed on August 25, 1998, concludes that claimant is functioning at a light physical demand level. Claimant stated that he can sit for up to 15 minutes, walk for up to 45 minutes, and stand for up to 30 minutes; that he was told by the doctor not to drive because his left leg goes out and because of his medications; and that he has restrictions against bending, climbing, kneeling, squatting, and crawling. He said he believes he can work and that he needs a job. Claimant also acknowledged that he felt he was competent to testify at the hearing.

Claimant further testified that he is 47 years of age; that after dropping out of high school, he later obtained a General Equivalency Diploma; that he earlier took two bookkeeping and two Lotus (computer software) courses under the auspices of the Texas Rehabilitation Commission; that during the filing period, he was registered with the Texas

Workforce Commission but received no job leads; that he has had "no checks" since May 1998; and that his telephone was disconnected in May 1998. A telephone company record in evidence indicates claimant was threatened with loss of service in late August 1998. Claimant also said he has been threatened with the loss of electrical service to his apartment and that he has pending an application for Social Security disability benefits.

Claimant also testified that during the filing period, he obtained the Sunday newspapers, reviewed the classified ads sections for employment ads, cut out the job ads he felt qualified for and entered them into his computer, printed out resumes with cover letters, addressed the envelopes, and mailed them to the prospective employers. Claimant indicated that he averaged one such letter per day and would sometimes mail several at a time after getting money for postage. He indicated that at some time, apparently late in the filing period, he was allowed to use the rental office fax machine when it was not in use and that he has since been "faxing" the resumes to spare himself the walk to and from the store for stamps as well as the money for postage. Claimant estimated that during the filing period he mailed or faxed approximately 55 to 60 resumes in response to the newspaper ads he cut out. He said that he would receive some acknowledgment letters from some of the prospective employers and would send follow-up letters to those who did not respond. Claimant attached to his Statement of Employment Status (TWCC-52) typewritten lists of employers reflecting that he sent resumes to 22 in June, 23 in July, 21 in August, and 21 in September, 1998, and, apparently, that he prepared not more than one letter and resume per day during these months. Claimant estimated that he spent approximately 30 hours per week with these efforts to obtain employment. He acknowledged making no personal visits to any prospective employer, pointing out that he had no means of transportation. He also said he did not know if any of the 55 to 60 prospective employers called back but did say he had no interviews during the filing period.

Not appealed are findings that, during the filing period, claimant had an ability to work light duty; that he applied to close to 66 employers; that all potential employers were found in the newspapers and were sent letters and resumes generated by his computer; that he expended about 12 hours per week compiling lists, entering data on his computer, generating letters, and mailing them; and that he completed about five follow-up letters, all about September 12, 1998, which was the end of the filing period. In addition to the dispositive conclusion of law, claimant appeals the finding of fact that, based on a totality of the evidence, he did not make a good faith effort to seek employment commensurate with his ability to work during the filing period.

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 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.

Claimant had the burden to prove he met the "good faith attempt" criterion to be entitled to SIBS. The hearing officer's discussion of the evidence took note of a number of discrepancies in claimant's testimony and indicated she did not find his testimony credible. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge