

APPEAL NO. 990178

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 28, 1998. The issue at the CCH was whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his 13th and 14th quarters of eligibility. The parties agreed that the claimant was not eligible for the 13th quarter, and the CCH proceeded on the issue of the 14th quarter. It was agreed that the filing period for that quarter ran from June 30 through September 28, 1998.

The hearing officer found that the claimant's unemployment was not the direct result of his impairment and that he failed to make a good faith search for employment commensurate with his ability to work.

The claimant has appealed, arguing generally that the decision is against the great weight and preponderance of the evidence. The respondent (carrier) responds by reciting the evidence in support of the hearing officer's decision.

DECISION

Affirmed.

The claimant was injured on _____, while employed as a janitor by (employer). He testified that he had gotten much worse since a videotape that was taken of him on November 5, 1997. The videotape shows claimant normally performing various tasks, such as shopping for a vehicle, and getting down to look underneath a car at home. He is also shown on his feet for a long period of time. Claimant now contended he had trouble walking or staying on his feet for very long, and required the use of a cane.

Claimant said he could not remember if he followed up on job leads provided by a vocational rehabilitation counselor. He said he could not contact the English as a Second Language courses for which she provided leads because they were too far away or not on the bus lines. Claimant said he contacted prospective employers during the qualifying period, most of whom were not hiring or required some English comprehension. He said that he would take advantage of the bus and contact two or three employers a day.

The objective testing performed around the time of the injury, or shortly thereafter, shows an essentially normal cervical area. There was no lumbar herniation although there was a nerve root conjoined at S1-2. There were a number of functional capacity evaluations (FCEs) in the record. The most recent to the qualifying period in issue was July 14, 1998. The earlier FCEs found some ability to work, generally light duty. The recent one found high symptom magnification and less than maximum effort. Many tasks were not completed. The evaluators contended in an addendum that based upon what had been tested and their review of the surveillance tape, the claimant would be capable of handling at least a sedentary level of work, although the tape itself was indicative of light level work.

The Statement of Employment Status (TWCC-52) that claimant submitted attached a list of prospective employers, purportedly contacted by the claimant, with no dates of contact listed. There were 18 businesses listed. A follow-up investigation by the carrier showed that some of the listed businesses were not in existence, had different names for the last several years, or were not hiring. There was one who recalled that the claimant had stopped by to inquire about employment, on an unrecalled date. Claimant agreed he had a heart problem, but denied it was a factor in any inability to work.

There are two eligibility criteria that must be met to continue after the first quarter to qualify for SIBS, set out in Section 408.143(a). The injured employee must prove that he or she has earned less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment and in good faith sought employment commensurate with the employee's ability to work. Good faith is a subjective concept 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 hearing officer evidently evaluated the evidence and believed that any contacts made by the claimant were made not to obtain employment but to qualify for SIBS. He evidently disbelieved that claimant's testimony of a decline in his physical condition since the normal appearing activities undertaken in the videotape was not credible. These are the factual determinations that must be made by the finder of fact.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The decision is sufficiently supported by the record, and we accordingly affirm the decision and order. We cannot agree that the hearing officer's decision is against the great weight and preponderance of the evidence, and affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Elaine M. Chaney
Appeals Judge