

APPEAL NO. 990250

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 4, 1999, a contested case hearing (CCH) was held. In response to the issue at the CCH, the hearing officer determined that the respondent (claimant) had some ability to work, that he acted in good faith, and that he is entitled to supplemental income benefits (SIBS) for the 15th quarter. Appellant (carrier) appeals, contending that claimant did not make a good faith effort to find work commensurate with his ability to work. Carrier also challenges the direct result determination in claimant's favor. Claimant replied that the hearing officer's determination is supported by the record.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant is entitled to SIBS for the 15th compensable quarter. Carrier contends that there is no medical evidence showing that claimant is able to work only part time, that there is no medical evidence that claimant's treating doctor approved of his part-time work, and that the only medical evidence from claimant's treating doctor is that claimant cannot work at all.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than 80% of the 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. Although the claimant's good faith effort must, generally, span the filing period, the Appeals Panel has stated that a claimant's job search does not have to encompass a certain length of time. Texas Workers' Compensation Commission Appeal No. 961454, decided September 11, 1996; Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. There is no requirement that a claimant look for work every day of the filing period. Texas Workers' Compensation Commission Appeal No. 960818, decided June 3, 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 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant's IR was 18%; (3) claimant did not elect to commute his IIBS; and (4) the 15th compensable quarter was from approximately October 18, 1998, to January 16, 1999.

Claimant testified that he sustained a compensable injury at work on _____, when he twisted his back while carrying heavy iron bars. He said he has treated with Dr. P since that time. Claimant said that during the filing period in question, he did not look for work until September 2, 1998, because his doctor had not released him to return to work. There are off-work slips in the record that state that claimant is to remain off work, dated during July, August, and September 1998, which was during the filing period. A May 1998 Specific and Subsequent Medical Report (TWCC-64) states that claimant has discogenic pain syndrome, chronic pain syndrome, and that one of his diagnoses is "post traumatic lumbar (annular tear)." Claimant said he has not undergone surgery. Claimant testified that "in August," he asked his doctor if he could return to work and Dr. P replied that claimant could not work a "regular" job but that he could work light-duty for three hours per day.¹ Claimant said he went to work at a family member's grocery store beginning on September 2, 1998, and that he is still working there. He testified that he works three hours per day at the store cleaning shelves. Claimant said he had worked "on and off" at the grocery since March 1998 and said that he had obtained a prior release for part-time, light-duty work. Although the record does contain a part-time, light-duty release dated in August 1997, there are off-work slips dated after that date contained in the record, including the off-work slips dated during the filing period. The record contains a letter from Dr. B to carrier stating that claimant is medically stable and capable of performing sedentary and light activities eight hours per day and moderate activities eight hours per day.

The hearing officer determined that: (1) claimant had some ability to work during the filing period; (2) during the filing period in question, claimant looked for work and began working at a part-time job that "he could perform"; (3) claimant worked only part time because "he could not work for more than a few hours per day"; (4) claimant acted in good faith; (5) claimant's underemployment is a direct result of his impairment; and (6) claimant is entitled to SIBS.

In this case, our review of the record does not indicate that the hearing officer's good faith and SIBS determinations regarding the 15th compensable quarter are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain, supra*. Therefore, there is no basis for disturbing his decision on appeal. The hearing officer heard claimant's testimony about the work he is doing and reviewed the medical evidence in determining what work claimant was able to perform. The hearing officer could consider the medical evidence from Dr. P that claimant was to remain off work during the filing period, in determining how much work claimant could do and at what level. Further, carrier's own doctor indicated that claimant had some limitations on his ability to work. Whether there was evidence that claimant's treating doctor approved of claimant's job was merely a factor for the hearing officer to consider in making his determinations. The fact that the evidence could have allowed different inferences under the state of the evidence does not provide a sufficient basis for reversing the hearing officer's decision. Texas Workers' Compensation Commission Appeal

¹It is not clear whether claimant meant August 1997 or August 1998, but appeared to mean August 1998.

No. 92308, decided August 20, 1992. We also affirm the hearing officer's direct result determination in this case. The evidence that claimant continues to have work restrictions supports the hearing officer's direct result determination. Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCUR IN RESULT:

Joe Sebesta
Appeals Judge