

APPEAL NO. 990399

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 October 15, 1998, and January 26, 1999. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the ninth and 10th compensable quarters. The hearing officer determined that the claimant was entitled to SIBS for both quarters and the appellant (carrier) appeals. Carrier asserts that the determinations that claimant made a good faith effort to obtain employment commensurate with his ability to work and that his unemployment was a direct result of his impairment are supported by insufficient evidence or, alternatively, are contrary to the great weight and preponderance of the evidence. The claimant responds that the hearing officer's determinations are supported by the evidence and are certainly not against the great weight and preponderance of the evidence.

DECISION

Affirmed.

Not in issue were the facts that the claimant sustained a compensable injury on _____, and that he was assessed a 22% impairment rating by a Texas Workers' Compensation Commission-selected designated doctor. He is seeking SIBS for the ninth and 10th compensable quarters which ran, respectively, from August 6 to November 4, 1998, and from November 5, 1998, to February 3, 1999. Statements of Employment Status (TWCC-52) for the filing periods in issue were in evidence, and together with the claimant's testimony, indicated that the claimant had made, respectively, 49 job contacts and 38 job contacts. He testified that he was not able to drive because of his cervical injury, that this limited his ability to look for a job, and that his daughter took him to places to look for a job. He looked in two small towns, one where he stayed with his daughters and another where he had a house. He testified that he has continuing pain as a result of his injury and indicated that surgery had been recommended in the past, that he wanted to wait, that his condition has gotten much worse, that he cannot lift his left arm and two fingers are not functional, and that he has been approved for surgery which he intends to have when it is scheduled.

Although there are earlier functional capacity evaluations that suggest the claimant demonstrated symptom magnification and reduced effort, a medical report dated December 2, 1998, refers to an MRI which demonstrated an "enormous disk herniation at C6-7 with 50% canal compromise," describes the claimant as being in "really pathetic condition" and states that at this point he has no option but to have the herniation taken care of. There is a concurring opinion for surgery dated January 11, 1999.

The hearing officer found that the claimant has restricted ability to work, that his unemployment was a direct result of his impairment, and that he did make a good faith effort to obtain employment commensurate with his ability to work during the filing periods

for the ninth and 10th compensable quarters. We conclude from our review of the record that there is sufficient evidence to support the hearing officer's determinations, and that they are not 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). While there may be, as suggested by the carrier, some evidence indicative of a pattern of doing only what is necessary to qualify for SIBS as opposed to making a good faith job search, we cannot, under the circumstances, conclude that this is the overwhelming weight of the evidence requiring reversal. Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ). Clearly, the pattern of a search is a very important factor in determining whether good faith is shown as we have repeatedly held. See Texas Workers' Compensation Commission Appeal No. 971209, decided August 11, 1997. However, given the evidence of the claimant's circumstances and physical limitations, his injury and progressively worsening condition, and the number of job contacts made during the filing periods, there is no sound basis in this record for us to second guess the factual determinations of the hearing officer regarding either good faith or direct result, basic factual questions. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 980993, decided June 12, 1998; Section 410.165(a). Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge