

APPEAL NO. 990464

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 11, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 13th and 14th quarters. In her appeal, the claimant essentially argues that the hearing officer's determinations that she did not make a good faith job search in the relevant filing periods, that her unemployment was not a direct result of her impairment, and that she is not entitled to 13th and 14th quarter SIBS are against the great weight of the evidence. In its response, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; that she reached maximum medical improvement on October 12, 1994, with an impairment rating of 16%; that she did not commute her impairment income benefits; that the 13th quarter of SIBS ran from September 10 to December 9, 1998; that the 14th quarter of SIBS ran from December 10, 1998, to March 10, 1999; and that the claimant earned no wages during the filing periods for the 13th and 14th quarters. The filing periods were identified as having run from June 11 to September 9, 1998, and September 10 to December 9, 1998, respectively. The claimant testified that she is 66 years old and that she was employed as a custodian for the school district for 16 years prior to her injury. She stated that on \_\_\_\_\_, she was stacking tables and chairs and was struck on the head by a falling chair, knocking her unconscious. She maintained that she injured her head, back, and right shoulder and that she still has constant, strong pain as a result of her injury "from the top of her head to her toes."

The claimant testified that she is not currently working; however, she stated that she does look for work. Specifically, she testified that she contacted 40 employers in the filing period for the 13th quarter and approximately 100 employers in the filing period for the 14th quarter. She stated that none of the employers she contacted had a job for her and that none of them had her complete an application; rather, a few of the employers told her to return at a later time to see if they had work available and she maintained that she did so. She testified that she takes the bus to look for work and that she goes to a commercial area and attempts to contact as many employers as possible at a given time because she has good days and bad and cannot always count on being able to look for work every day.

The claimant acknowledged that she had gynecological surgery in May 1998 and again in September 1998 and that her gynecologist, Dr. D, completed a "To Whom it May Concern" letter of September 4, 1998, where he stated that she "has been instructed not to work until further notice, she has suffered some unusual post-operative complications." The claimant maintained that despite Dr. D's recommendation, she continued to look for work

because she believed she could work. On cross-examination, the claimant asserted that her other physical problems had no impact on her ability to look for work or on her workers' compensation claim. In addition, she stated that she had not returned to Dr. D since September 1998; however, she then produced a document from Dr. D dated January 14, 1999, stating that from a gynecological standpoint she could perform heavy lifting. On November 2, 1998, the claimant was scheduled to undergo a functional capacity evaluation (FCE). The FCE was postponed until she could receive a medical release from Dr. D. In progress notes of December 14, 1998, Dr. A, the claimant's treating doctor, stated that "according to her OB-GYN doctor [claimant] is unable to do an [FCE] at this time." The claimant was not cleared to do the FCE until January 1999 and it was not performed until February 1, 1999. In response to questioning from the hearing officer, the claimant denied that all but two of her applications in the 13th quarter filing period were made at a mall despite the fact that the information listed on attachments to the Statement of Employment Status (TWCC-52) indicate that the employers were located at the mall. In addition, the claimant testified that she believed she only went to the mall on one occasion in the filing period; however, more than one date of contact is listed on the TWCC-52. The claimant's TWCC-52 for the 14th quarter and its attachments indicate that she contacted about 131 employers. Again, she acknowledged that none of those employers had a job for her and that she did not complete a single application. Finally, the claimant testified that she was "very ill" in the filing periods and that she only looked for work on her "good days." She denied that her illness was the result of her gynecological surgeries and the complications that arose thereafter, insisting that her problems were related to the compensable injury.

The hearing officer determined that the claimant did not make a good faith effort to look for work in the relevant filing periods. That question presented a question of fact for the hearing officer. It was the hearing officer's responsibility, as the sole judge of the evidence under Section 410.165(a), to consider the evidence concerning the claimant's job search efforts in the filing periods and to determine if the claimant sustained her burden of proving that she made a good faith job search. In making her good faith determination, the hearing officer was free to consider the number of employment contacts made and the nature of those contacts. To that end, the hearing officer noted that although the claimant made "a considerable amount of job contacts," she was "unconvincing that she made these contacts with the honest intent of actually re-entering employment." The hearing officer also referenced the "inconsistencies" in the claimant's testimony and her "evasiveness." All of those factors were properly considered by the hearing officer in resolving the good faith issue. Our review of the record does not reveal that the hearing officer's determinations that the claimant did not make a good faith effort to seek employment in the filing periods for the 13th and 14th quarters are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse those determinations on appeal. Pool v. Ford Motor Co. 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant also asserts error in the determinations that her unemployment in the filing periods was not a direct result of her impairment. That issue likewise presented an issue of fact for the hearing officer to resolve. The claimant testified that her gynecological surgeries and the complications that followed those surgeries simply did not impact on her

ability to work or her ability to look for work. The hearing officer very clearly was not persuaded by that testimony. Rather, the hearing officer noted that Dr. D specifically instructed the claimant not to work until further notice in his letter of September 4, 1998, that it did not appear that Dr. D released the claimant to return to work until January 14, 1999, and that the claimant was not released to perform the FCE testing until January 1999. The hearing officer stated "[t]he Claimant was not convincing in her testimony that she ignored her doctor's recommendations and could have returned to work." The hearing officer was acting within her province as the fact finder in resolving the conflicts and inconsistencies in the evidence by determining that the claimant did not sustain her burden of proving that her unemployment in the filing periods was a direct result of her impairment from the compensable injury. Our review of the record does not reveal that that determination is so contrary to the great weight of the evidence as to compel its reversal. Pool, supra; Cain, supra.

The hearing officer's decision and order are affirmed.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Robert W. Potts  
Appeals Judge