APPEAL NO. 990485

Following a contested case hearing (CCH) held on January 27, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 15th and 16th compensable quarters. Claimant has appealed, asserting that the great weight of the evidence is contrary to the hearing officer's decision. The respondent (carrier) urges in its response the sufficiency of the evidence to support the challenged determination.

DECISION

Affirmed.

The parties stipulated that on _____ while employed by the (employer), claimant sustained a compensable injury; that claimant reached maximum medical improvement with a 15 % or greater impairment rating; and that claimant has not commuted any impairment income benefits; that the 15th compensable quarter began on June 15 and ended on September 13, 1998, and that the 16th compensable quarter began on September 14 and ended on December 13, 1998. The filing periods were the periods of at least 90 days preceding the compensable quarters. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101.

Claimant testified, through a Spanish language interpreter, that on _____ he injured his low back, right leg, and shoulder while pushing a cart full of pants which got stuck; that he was thereafter treated by several doctors; that during the 15th quarter filing period, which he stated to be March 16 through June 14, 1998, his treating doctor was Dr. P who treated him with medication and home exercises; and that he has since changed treating doctors. Claimant introduced no medical reports written during either of the filing periods. He introduced the January 7 and January 19, 1998, reports of Dr. P stating the diagnosis as chronic residual post-traumatic lumbosacral mechanical low back pain associated with residual mild L-5 irritative radiculitis. The January 7th report states that claimant remains with restrictions against lifting, pulling or pushing heavy objects above 20 pounds. That report also states as follows: "Medically and physically he is engage [sic] in modified light duty occupations. Certainly he is still medically and physically not able to engage in any gainful occupations." The January 19th report states that claimant is "medically and physically unable to engage in any labor occupation any more." The carrier introduced an October 8, 1998, letter from Dr. P stating that he had viewed the recent video tape of claimant's performing mechanical work on a small van; that he could appreciate that claimant was able to bend over and move around freely in fixing the motor; that he can accept that claimant is clinically able to engage in modified clerical type work; and that he would maintain claimant's 20-pound lifting, pushing and pulling restrictions.

Claimant, who indicated that he had an elementary school education in Country and worked for the employer for 10 years before his injury, introduced a Spanish language

Statement of Employment Status (TWCC-52) for the 15th compensable quarter. No English language version or translation accompanied the file. This TWCC-52 listed 28 employment contacts made between March 18 and May 26, 1998, involving 18 days of the 90-day filing period. The type of work claimant listed included working as a mechanic, car washer, driver, salesperson, waiter, and nurseryman. Claimant said that his physical problems include pain in his low back, leg, and shoulder, and that he is also restricted from standing for more than two hours. He acknowledged that some of the jobs for which he applied would involve standing for more than two hours. He also introduced letters dated August 15, 1997, and January 28, 1998, from Intracorp (vocational service) vocational rehabilitation specialists which provided him with jobs leads to contact. Claimant never explained the relevance of these documents to the filing periods in issue.

Claimant further testified that he obtained employment prospects listed on his TWCC-52 from the newspaper and from driving around looking for signs of hiring, and that in addition to those efforts, he received assistance from an agency to whom he was referred by Ms. E of the Texas Rehabilitation Commission (TRC). He said he was not granted any interviews.

Concerning the 16th compensable quarter, claimant acknowledged that he did not file a TWCC-52 for that quarter. He testified that he was given a job through the auspices of the TRC washing dishes at (restaurant); that he commenced this job at 8:00 a.m. on September 10. 1998; that by noon he was having neck pain from washing heavy pots; and that he worked eight hours and was paid $35.00 in cash. He said that after work, he went to an emergency room for his neck pain, that a later MRI revealed that he had a herniated cervical disc, and that he did not return to work at the restaurant.

Mr. V, a field case manager for the vocational service, testified that in late July 1998, he began helping claimant find employment; that he gave claimant five job leads; and that his follow-up check revealed that these businesses had no record of claimant's having contacted them. He said that claimant's attitude was that he had already been there and had not been called back, that claimant was noncompliant, and that claimant was interested in becoming a photographer. Claimant acknowledged having stated at prior CCHs that he wanted to be trained in photography and said he took classes in July 1997.

Ms. E testified that she began working with claimant on April 1, 1998, and closed his file on October 20, 1998; that on April 20, 1998, claimant was referred to an agency for assistance in obtaining employment; and that claimant never got beyond the interviews and failed to follow-up with job contacts. The carrier introduced a letter from Mr. G, the photographer for the local community college, dated September 15, 1998, describing in detail claimant's poor appearance at an interview with him in mid-August 1998. Concerning the restaurant job, Ms. E stated that when claimant indicated the job was too hard for him, it was arranged for him to work only four hours a day at the job but he never returned to it. Ms. E stated that the TRC made no further effort to assist claimant with employment when he failed to show up for work at the restaurant. She also said that

claimant told her on September 15, 1998, that he could not do the work at the restaurant and that the work was "inappropriate."

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 (AWW) 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.

The hearing officer found that during the filing periods at issue, claimant had some ability to work; that he had several work restrictions including no standing for more than two hours; that he made some efforts to look for work but his efforts were outside the restrictions placed on him by his treating doctor; that he failed to make good faith efforts to look for work commensurate with his ability to work during both filing periods; and that he failed to prove that his unemployment during the filing periods was a direct result of his impairment.

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)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them 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). Concerning the 15th quarter filing period, the hearing officer could consider the nature of some of the jobs sought by claimant, such as mechanic and waiter and conclude that he was simply attempting to qualify for SIBS, not actually obtain employment. As for the 16th quarter filing period, claimant's evidence reflected that he worked but one day at a job arranged by the TRC, did not return to that job after his hours were reduced by one-half, and made no other attempts to obtain employment.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Alan C. Ernst
Appeals Judge