

APPEAL NO. 990652

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 March 3, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) is not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter of July 30 to October 28, 1998, and that he is entitled to SIBS for the sixth compensable quarter of October 29, 1998, to January 27, 1999. In its appeal, the appellant (carrier) argues that the determination that the claimant made a good faith job search in the filing period for the sixth compensable quarter and that he is entitled to SIBS in that quarter are against the great weight of the evidence. The carrier did not appeal the determination that the claimant's unemployment in the filing period was a direct result of his impairment. In his response the claimant urges affirmance. The claimant did not appeal the determination that he is not entitled to fifth quarter SIBS.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he was assigned a 17% impairment rating; that the fifth and sixth quarters of SIBS ran from July 30 to October 28, 1998, and October 29, 1998, to January 27, 1999, respectively; and that the claimant earned no wages in the relevant filing periods. The filing period for the sixth quarter is the period from July 30 to October 28, 1998. On June 30, 1998, the claimant underwent a functional capacity evaluation (FCE), with Dr. D, a chiropractor, who was selected by the Texas Workers' Compensation Commission as a required medical examination doctor. Dr. D concluded that the claimant was "able to return to work at light-duty with some restrictions such as no lifting over ten pounds on a regular basis." The FCE further revealed that the claimant could lift or carry up to 10 pounds without restrictions, that he could push/pull continuously, continuously reach above his shoulder or overhead with a maximum weight of 10 pounds, and that he could stand, walk, and repetitively use his hands for five to eight hours per day.

The claimant testified that, during the sixth quarter filing period, he looked for work three to four hours a day, three to five days per week. He stated that he identified potential employers by looking in a weekly Spanish-language newspaper, by looking for help wanted signs in business windows, and by talking to his friends about job openings. He testified that although he filled out many applications in the filing period, he did not receive either an interview or a job offer from any employer. On cross-examination, the claimant acknowledged that on some applications he listed 8:00 a.m. to 4:00 p.m. as the hours he was available to work. He explained that those hours would be best for him but if an employer asked him to work a different shift, he would have been willing to do so. In addition, the claimant acknowledged that on several applications he listed that he wanted to work 25 to 40 hours per week. He noted that some of the jobs he applied for were outside his restrictions because he did not know what the job requirements were until after he had

completed the application and had the opportunity to discuss them with the potential employer. He stated that he listed his injury as the reason he left his last job and that he also indicated on his applications that he was looking for light-duty work within his 10-pound lifting restriction. In response to questioning from the hearing officer, the claimant stated that he listed that he could work five to eight hours per day because the FCE indicated that he could stand/walk, sit, and repetitively use his hands for five to eight hours per day.

Mr. C testified for the carrier. Mr. C stated that he was hired by the carrier to verify the claimant's job search efforts, noting that he contacted 30 to 35 of the 52 potential employers contacted by the claimant in the filing periods for the fifth and sixth quarters. Mr. C testified that the majority of the jobs the claimant applied for were not within his restrictions and that many of the employers contacted were not hiring. Mr. C concluded that in his opinion, the claimant had not made a good faith job search and that he was attempting to qualify for SIBS rather than making a genuine effort to look for work within his abilities.

The carrier asserts that the hearing officer's determination that the claimant made a good faith effort to look for work commensurate with his ability to work in the sixth quarter filing period is against the great weight of the evidence. Good faith is a question of fact for the hearing officer, as the sole judge of the weight and credibility of the evidence under Section 410.165(a), to resolve. In arguing that the hearing officer's good faith determination is against the great weight of the evidence, the carrier notes that the claimant applied for positions outside his restrictions, with employers who were not hiring. The carrier also emphasizes that the claimant indicated on some forms that he was only available from 8:00 a.m. to 4:00 p.m., Monday through Friday, and that he only wanted to work 25 to 40 hours per week. The carrier emphasized the same factors at the hearing and it was solely within the hearing officer's discretion as the fact finder to determine the significance, or lack thereof, of those factors. In this instance, the hearing officer considered the evidence presented by the claimant about his job search efforts and was persuaded that the claimant sustained his burden of proving that those efforts rose to the level of a good faith job search in the filing period, "even disregarding those applications indicating that he was only willing to work from 8 AM to 4 PM Monday through Friday." The hearing officer was acting within his province as the fact finder in so finding. Our review of the record does not reveal that the hearing officer's good faith determination is 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 that determination, or the determination that the claimant is entitled to SIBS for the sixth quarter, 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 hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge