

APPEAL NO. 990759

Following a contested case hearing held on March 31, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by finding that during the filing period for the 12th compensable quarter, the appellant (claimant) did not make a good faith search for employment commensurate with his ability and by concluding that he is not entitled to supplemental income benefits (SIBS) for the 12th compensable quarter. Claimant has appealed, contending that during the filing period he did make a good faith effort to look for work in a light capacity considering his limited education and skills and the fact that he was pending additional surgery. The respondent (carrier) urges the sufficiency of the evidence to support the challenged finding.

DECISION

Affirmed.

Claimant testified that he is 37 years of age; that between November 1, 1998, and January 24, 1999, which was apparently the 12th quarter filing period, he did not work at all; that he has back problems; that his treating doctor, Dr. S, prescribed pain and muscle-relaxing medications which made him drowsy; that additional back surgery, pending since September 1998, was performed on February 24, 1999; and that the surgery took a lot of the numbness out of the backs of his legs and his feet. In evidence is the hearing officer's decision and order dated February 5, 1999, which determined that the carrier is liable for the costs of the spinal surgery and that claimant is not entitled to SIBS for the 11th compensable quarter. Claimant also stated that his doctor told him not to work and gave him restrictions against lifting more than 20 pounds and against sitting or standing for more than 15 minutes at a time. He said he was approved for Social Security benefits disability in February 1999. In evidence is a February 27, 1998, report of a functional capacity evaluation reflecting that claimant demonstrates the ability to perform physical activity at a medium physical demand capacity level. Dr. M November 10, 1998, second opinion on spinal surgery report, which disagrees with Dr. S's recommendation for additional surgery, states that claimant had a discectomy at L5-S1 on September 29, 1994 (following the _____, compensable injury); that he subsequently had a motor vehicle accident and a slip-and-fall accident; that he had a second laminectomy in 1996; that he had an emergency laminectomy at L4-5 and S1 on December 31, 1996; and that he is now said to have severe back and bilateral leg pain.

Claimant further testified that he visited the Texas Workforce Commission (TWC) occasionally; that he received some job leads from the carrier which the person at TWC looked up on the computer; that he looked for work at several convenience stores and at a couple of other places; that he made some telephone inquiries but had no records of such; that he was not capable of doing any of the jobs; and that when he let prospective employers know about his back condition, they said they had no openings. According to his Statement of Employment Status (TWCC-52), claimant contacted the TWC on

"numerous" occasions including January 12, 1999; contacted or was contacted by employer (apparently the carrier's employment search firm) on January 21, 1999; and on January 22, 1999, contacted two motels, a food mart, a filling station, and an inventory business. He said he may have made one contact in November 1998 and that he made no contacts in December 1998. Claimant introduced documents showing he did not complete high school.

Dr. S wrote on December 31, 1998, that the carrier hired an investigator to videotape claimant; that claimant is depicted putting gas into his truck, taking his children into a store, and pulling a small radiator out of a truck; that in his opinion, claimant is nonetheless still not able to perform heavy labor because he has ongoing lumbar instability and requires fusion from L4 to S1; and that the videotape "in no way influences [his] opinion that claimant can return to any type of work." Dr. S said that after the fusion, there is a chance that claimant can return to work after his back has healed. We note that the videotapes of these activities were taken on June 18 and 19, 1998.

The hearing officer's finding that during the filing period claimant's unemployment was a direct result of the impairment from his compensable injury of _____, has not been appealed. The only statutory SIBS entitlement criterion in issue is whether claimant made a good faith attempt during the filing period to obtain employment commensurate with his ability to work. See Section 408.143. After the close of the evidence, claimant argued to the hearing officer that his ability to work during the filing period was limited because additional spinal surgery was pending and therefore that his limited search for employment satisfied the good faith criterion. Despite Dr. S's opinion in his letter about the videotape concerning claimant's ability to work, claimant did not actually argue that he had no ability to work at all. The hearing officer stated in her discussion of the evidence that claimant failed to persuasively demonstrate that he made any job search whatsoever prior to mid-January 1999 despite the fact that he has the ability to perform work of some type.

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 Appeals Panel has specifically held that the requirement to seek employment generally spans the entire filing period and has reversed when a job search was undertaken only during a portion of the filing period. See *e.g.*, Texas Workers' Compensation Commission Appeal No. 971184, decided August 1, 1997; Texas Workers' Compensation Commission Appeal No. 970046, decided February 20, 1997; Texas Workers' Compensation Commission Appeal No. 960964, decided June 26, 1996; and Texas Workers' Compensation Commission Appeal No. 960999, decided July 10, 1996. We have also noted that evidence bearing upon whether a claimant has demonstrated

good faith can encompass the manner in which a job search is undertaken with respect to timing, forethought, and diligence. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and the Appeals Panel, an appellate reviewing tribunal, 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).

The hearing officer's decision and order are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

CONCUR IN THE RESULT:

Judy L. Stephens
Appeals Judge