

APPEAL NO. 990760

Following a contested case hearing (CCH) held on January 25 and March 4, 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 concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 16th compensable quarter and that her bilateral carpal tunnel syndrome (CTS) is not the result of the injury of _____. Claimant has filed an appeal which states, generally, that she appeals all adverse findings of fact and conclusions of law. The file does not contain a response from the respondent (self-insured).

DECISION

Affirmed.

We note at the outset that the statement of the case in the hearing officer's decision and order states that a CCH was held on October 7, 1998, to determine the two disputed issues in this case; it also states that the CCH originally began on January 25, 1999, and, because claimant was then on medication, was rescheduled for March 4, 1999. The tape recorded proceedings reflect that the CCH was commenced on January 25, 1999, at which session stipulations were entered, exhibits were admitted, and claimant commenced her testimony; that in the midst of her testimony, the hearing officer asked her about the medication she had taken and recessed the hearing; and that the hearing resumed and was concluded on March 4, 1999.

The parties stipulated that on _____, claimant sustained a compensable injury in the course and scope of her employment with the self-insured; that she reached maximum medical improvement on May 13, 1993, with an impairment rating (IR) of 24% and has not commuted any impairment income benefits (IIBS); and that the 16th compensable quarter began on June 25 and ended on September 22, 1998.

Claimant testified that on _____, while employed by the self-insured as a buyer in a university bookstore, she pulled on a drawer to open it, the drawer stuck, and she injured her neck, right shoulder and arm, and thoracic and lumbar spine regions in the process; that she felt faint, had bad pain, and was sent to a hospital; and that her eyes, ears, head, neck, thoracic spine, and waist were affected. She indicated that she returned to work sometime after the _____, injury, hurt her right hand again when directed to pick up four boxes of software, and that she worked until November 1, 1993. She also stated that she had wrist pain since 1993 and was eventually diagnosed with bilateral CTS after an EMG was performed. Claimant further stated that while undergoing a functional capacity evaluation (FCE) on May 5, 1998, she was required to lift some trays with varying weights several times which was painful for her and that her wrists were injured in so doing. She also testified that she injured her ribs on the left side during the FCE when at one point she could not support a tray and it struck her in the left ribs.

Claimant further testified on direct exam to her efforts to obtain employment during the period from "on or about December 25, 1997, to March 25, 1998." After the self-insured pointed out that the filing period for the 16th compensable quarter was from March 26 to June 24, 1998, she affirmed that her previous testimony concerning her employment search efforts applied to the later period. As for those efforts, claimant stated on her Statement of Employment Status (TWCC-52) that she made 11 employment contacts between April 1 and June 15, 1998, consisting of seven contacts in April, one contact in May, and three contacts in June, 1998. Two of the potential employers were contacted twice and claimant stated on the TWCC-52 that she sought "office work" at all of the employers except for one which she said involved answering the telephone from 8:00 p.m. until 2:00 a.m. Concerning her seeking office work, claimant maintained that while she can type, she was unsuccessful in completing a typing test of 40 words per minute for the self-insured whose human resources office she twice contacted for jobs and that her computer skills were limited. She could not recall the jobs for which she applied at several of the prospective employers and indicated that she only infrequently obtained the newspaper. A Texas Rehabilitation Commission letter of April 8, 1998, states that claimant is ineligible for that agency's services since she has not been released by her physician for full-time employment.

Dr. ZH, who apparently follows claimant for hypertension, reported on April 14, 1997, that claimant has been under his care since 1993 and is hypertensive; that she has physical manifestations from the _____, work-related injury and experiences paracervical spasms, pain, panic disorder and depression; and that these conditions result in surges of stress hormones which put her at risk for stroke.

Dr. EH report of claimant's April 28, 1998, visit stated that claimant returned to him "as referred by her primary physician, [Dr. ZH]"; that she was diagnosed with bilateral CTS; that he found that she is still unimproved with persistent and painful cervical, scapular and upper extremity symptomatology; and that she is to obtain a new FCE. Dr. EH's work status slip of the same date had checked the statement that she is presently unable to return to work at this time and is to return in three weeks.

A May 5, 1998, FCE report states that claimant, then 67 years old, has been diagnosed with cervical spine disc syndrome, has received conservative treatment with fair results, has been unable to return to work on a full-time basis, and continues to report elevated discomfort. The report also stated that claimant demonstrated minimal decreased right upper extremity strength and within normal limits with the left upper extremity, minimal decreased lower extremity strength, moderate decreased neck range of motion (ROM), and minimal decreased thoracolumbar ROM; that she was able to complete only two of four evaluations due to reported elevated discomfort and fatigue levels; and that her coefficients of variation indicated she did not give maximal effort and therefore her test results were invalid.

Dr. A, who apparently sees claimant in the absence of Dr. EH, reported on June 2, 1998, that he performed an EMG, that the impression is bilateral CTS, left greater than

right, and that he is prescribing splints. A later report of Dr. A states that claimant is 68 years old and left handed. Dr. A reported on August 4, 1998, that regarding claimant's work status from April 28 through June 24, 1998, she was to be off work because a new FCE was then pending; and that from March 26 through April 28, 1996, she was on a light-duty restriction within the capabilities she was able to achieve at her previous FCE.

The hearing officer first found that claimant's testimony was not persuasive. Concerning the extent-of-injury issue, he found that claimant did not prove by a preponderance of the evidence that on May 5, 1998, she performed repetitive lifting in order to develop bilateral CTS and he concluded that her bilateral CTS is not the result of the injury of _____. Concerning the SIBS issue, the hearing officer found that during the filing period for the 16th compensable quarter, claimant had some ability to work more than two hours per day; that she made some efforts to look for work but that those efforts did not rise to the level of a good faith effort; that she did not make a good faith effort to look for work; and that she did not meet her burden to prove that her unemployment was a direct result of her impairment. He concluded that claimant is not entitled to SIBS for the 16th compensable quarter.

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 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 Appeals Panel has cautioned that good faith is not established simply by some minimum number of job contacts but that the hearing officer may also consider "the manner in which the job search is undertaken with respect to timing, forethought and diligence." Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996.

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 and determines what facts have been proved (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 does 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge