

APPEAL NO. 990769

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 5, 1999. He determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 16th quarter. The appellant (carrier) appeals this determination, contending that it is against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____. She reached maximum medical improvement on February 15, 1994, and was assigned an 18% impairment rating.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The 16th quarter was from November 27, 1998, to February 25, 1999, and the filing period for this quarter was from August 28 to November 26, 1998. At issue in this case is whether the claimant made the required good faith job search.

In evidence was a functional capacity evaluation (FCE) completed on March 19, 1996. Validity criteria were not met and the comment appears that the claimant "does not want to return to her job. She does not plan to return to work." Another FCE completed on June 20, 1997, placed the claimant in the medium to heavy work category.

The claimant submitted a Statement of Employment Status (TWCC-52) in which she listed approximately 44 job contacts. The source for these contacts were the newspapers and the carrier's vocational consultant. The claimant could not testify as to the specific dates she made the contacts, but said she went to them all, submitted some applications, but was never offered a job. The focus of the jobs was on fast-food cooking and dish washing, cleaning and sales clerk positions. The claimant said she believed she could work at the medium level.

The carrier introduced the report of its vocational consultant which stated that of the 44 employers listed on the TWCC-52, 10 said the claimant had not applied, five said the claimant had applied, 23 could not say, and six could not be contacted.

The hearing officer considered the evidence and found that the claimant made the required good faith job search. The carrier appeals this determination, contending that this finding is contrary to the evidence based on the FCE report which reflects no intention to work, the failure of the claimant to recall the specific details of her search, the failure of the claimant to apply for more than light-duty work, and the lack of verification of a substantial number of applications claimed to have been submitted. Whether the claimant made the required good faith job search was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. In this case, the fact that a carrier cannot confirm a job contact does not compel a conclusion that the contact was not made. While the job contacts do seem limited to the lighter category of work, they appear to reflect in large measure the very same types of jobs to which the vocational counselor referred the claimant. In any event, the hearing officer could conclude that, given the claimant's work history, educational background, and injury, a simple categorization of jobs into light and medium duty was not determinative or especially helpful in evaluating the good faith of the claimant in seeking employment. The claimant testified, contrary to the report of the first FCE, that she wanted to work. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the finding of the hearing officer that the claimant made the required good faith job search.¹

¹The carrier also suggests that by the time of the 16th quarter filing period, the claimant should have become more efficient and sophisticated in her job search efforts. While this may be true and may reflect on the good faith of the claimant in looking for work, we note that the 1989 Act does not establish different or higher standards for entitlement to later quarter SIBS.

For the foregoing reasons, we affirm the decision and order of the hearing officer that the claimant was entitled to 16th quarter SIBS.

Alan C. Ernst
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge