APPEAL NO. 990794

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 30, 1999. He determined that the respondent (claimant) was not entitled to supplemental income benefits (SIBS) for the 13th quarter, but was entitled to SIBS for the 14th quarter. The appellant (carrier) appeals the award of 14th quarter SIBS, contending that this determination 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. The denial of entitlement to 13th quarter SIBS has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant sustained a compensable right arm, shoulder, and neck injury on _____, for which he received an impairment rating of 15% or more. 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 14th SIBS quarter was from February 22 to May 23, 1999, and the filing period for this quarter was the preceding 90 days.

A functional capacity assessment in May 1996 placed the claimant in a medium to heavy work classification. The claimant, a Vietnam war veteran, testified that he was placed in a Department of Veterans Affairs (VA) convalescent work therapy program in January 1996. He was switched to a VA day program in September 1998. He described this as involving therapy, work counseling, and actual work. The program was three days a week from 8:00 a.m. to 3:15 p.m. and involved two hours work per day for which he was paid on a piecemeal basis. According to his Statement of Employment Status (TWCC-52) for the 14th quarter, he earned $191.64 during the filing period.

Although the claimant denied he was suffering from post-traumatic stress syndrome arising out of his war-time service, there was other evidence of severe psychological problems. In a letter of November 23, 1998, the clinical coordinator for the VA program wrote that the program was "considered 'Sheltered Workshop' meaning [the claimant] was not expected to return to competitive employment." The claimant himself described the work as a "make-work" project that he could continue indefinitely. A vocational evaluation

was completed on July 24, 1998, at the request of the carrier. The counselor concluded that the claimant "demonstrated paranoid and possibly psychotic behaviors." She provided examples of what led her to this conclusion. She also noted a prior history of the claimant having no interest in returning to work and that he "is not able to work at this time, based on his emotional status and psychiatric condition." It was not argued that the compensable injury in this case included a psychiatric or emotional component.

The claimant's TWCC-52 for 14th quarter SIBS reflects, in addition to his job in the VA program, 22 job contacts made over five days in the last month of the filing period. The claimant described his job search as essentially going to potential employers to see if there were job openings. He was unsuccessful in his job search.

The hearing officer considered this evidence and concluded that the claimant made the required good faith job search in the filing period for the 14th quarter and that he established that his underemployment was a direct result of his impairment. In his discussion of the evidence, the hearing officer commented that he based his good faith job search finding on the combination of the actual job contacts and the time spent in the VA program. He explained his direct result finding by noting that the claimant need prove that his underemployment is a direct result of his impairment, and not that impairment is the only cause of his underemployment. The carrier appeals both determinations.

With regard to good faith, the carrier argues that there was no medical evidence to establish a work restriction of six hours per week and that the claimant simply made cold calls on employers with the objective, not of finding a job, but only to satisfy the requirements to be entitled to SIBS. The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993. Good faith is not established simply by some minimum number of job contacts, but a hearing officer may 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. It has also been noted that the requirement for a good faith job search generally spans the filing period where there is a return to light duty for the whole period. *See generally* Texas Workers' Compensation Commission Appeal No. 951832, decided December 15, 1996. We have also commented that part-time work limited essentially by the initiative of the claimant and not his or her physical condition as a result of the compensable injury does not excuse the required job search. Texas Workers' Compensation Commission Appeal No. 961649, decided October 4, 1996. Rather, a good faith job search must be consistent with those restrictions. Texas Workers' Compensation Commission Appeal No. 981684, decided September 8, 1998. Finally, it bears stressing that the statutory requirement is a good faith job search commensurate with the ability to work. A determination of what constitutes good faith in a particular case must take into consideration various factors affecting the claimant, such as education, training, and other medical conditions, not only the restrictions imposed by the compensable injury. Texas Workers' Compensation Commission Appeal No. 972589, decided January 27, 1998, and cases cited therein. In the case we now consider, the only evidence of physical

restrictions resulting from the injury were restrictions to a medium work level construed to be as much as a 75-pound lifting restriction. The basis for the practical limitations on the claimant's ability to work derived from his mental condition, which was commented on both in the VA records and in the report of the carrier-hired job counselor. The carrier argued that the claimant was simply unwilling to look for work and preferred the comfort and security of the VA program. Hence, his job search was limited in days and number of applications to create only the appearance of looking for work with no real intent to find and undertake employment. Whether a claimant made the required good faith job search is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. 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). While this is admittedly a close case, we are unwilling to say that the evidence that the claimant spent over seven hours per day, three days a week, in a VA program, that he has severe psychological problems, and that he did look for work with 22 employers for essentially unskilled labor positions, albeit during only a brief portion of the filing period, was insufficient to support the finding of good faith.

The carrier appeals the direct result finding for essentially similar reasons, that is, that claimant enjoys the time he spends in the VA program and prefers to do that instead of other work. Direct result is also a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. In this case, the evidence supports the existence of a compensable injury with continuing treatment, permanent impairment, and the inability to return to the preinjury employment. At the same time, the only evidence of other causes of the claimant's underemployment is the somewhat speculative notion that he prefers the VA program to productive labor. The hearing officer, as fact finder, could accept or reject this postulate as the reason for the claimant's underemployment. In somewhat of a compromise, he appears to agree to some extent with this characterization of the claimant's motivation as a cause, but not the only cause, of his underemployment. *See* Texas Workers' Compensation Commission Appeal No. 961981, decided November 18, 1996. Given this state of the evidence, with no more specific identification of what may be motivating the claimant in this case, we are again unwilling to say that the evidence fails to adequately support the finding of direct result. *See* Texas Workers' Compensation Commission Appeal No. 962653, decided February 13, 1997, where we reversed the hearing officer's finding and rendered a finding of direct result in the claimant's favor based on the lack of evidence of "other apparent circumstances overshadowing" the impairment and playing some causative role in the underemployment.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge