

APPEAL NO. 990902

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 4, 1999, a hearing on remand was held. She (hearing officer) determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Appellant (carrier) asserts that claimant restricted her job search to part-time work, although she was not restricted to part-time work, so that she was not underemployed as a direct result of the impairment and did not attempt in good faith to find work commensurate with her employment. The appeals file contains no reply from claimant.

DECISION

We reverse and render.

Claimant worked for (employer) on _____, as an account specialist, when she fell down some stairs. See Texas Workers' Compensation Commission Appeal No. 982954, decided February 2, 1999, which remanded for the hearing officer to make findings of fact on, among other things, whether claimant restricted her job search to part-time jobs. Claimant testified at the initial hearing that she made eight job contacts in the filing period (which began on May 7, 1998) for the eighth quarter; of these eight contacts, one was in person and seven were by telephone. There was no testimony that claimant's job search was influenced in any manner similar to that in Texas Workers' Compensation Commission Appeal No. 950471, decided May 10, 1995, in which that claimant's possible 15 contacts (it was not clear whether all contacts were made in the filing period) had all been made by filling out and mailing written forms from a book advertising truck-driving jobs; that claimant had attention deficit syndrome, which could affect his "good faith"; good faith was found in that case and was affirmed.

The original decision, reviewed by Appeal No. 982954, *supra*, only found that claimant made a good faith attempt to find work, found she had worked for 17 days in the quarter in a part-time job, and stated that the unemployment was a direct result of the impairment.

Appeal No. 982954 noted the absence of any finding that the claimant could only work a limited number of hours and, after reviewing the medical evidence of record, including several versions of claimant's treating doctor's releases to return to work provided in April 1998, said the "great weight and preponderance of the evidence in the record shows no limitation on the number of hours per day or per week that claimant could work." The releases all referred to lifting limits of 25 pounds, variously labeling the restrictions as medium or light, but stated no limit on the number of hours to be worked. The hearing officer was also asked to find whether claimant limited her job search to part-time jobs and whether she ever refused to take or consider a particular job because it was full-time work. The hearing officer found that the claimant did not refuse to take or consider a full-time job.

She did find that claimant "did limit her job search to part-time jobs based on her understanding of the work release."

The record of the hearing on remand conducted on March 4, 1999, reflects that the hearing officer asked claimant if she limited her job search to part-time jobs; to which, claimant replied, "yes." Claimant said that it was "her understanding" of what her doctor said that she should only work four to six hours a day. Claimant also said she did not refuse to take a full-time job, with no indication that any had been offered.

Texas Workers' Compensation Commission Appeal No. 961649, decided October 4, 1996, also considered a medical release that did not limit the number of hours worked. It remanded for the hearing officer to make a finding as to why claimant limited his employment to 18 hours a week. It said, "we do not believe that the 1989 Act contemplates 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, can in itself excuse the job search effort." That case did not say that a claimant, with no limitation on the number of hours allowed to work, would forfeit SIBS by taking a part-time job. Certainly, a good faith search may result in only a part-time job. That part-time job may carry with it the promise (express or implied) that the part-time work could expand to full time. Also, a part-time job may be accepted and the claimant then must continue to seek more hours of work up to his or her limitation as set by the medical release. See Texas Workers' Compensation Commission Appeal No. 960480, decided April 24, 1996. Appeal No. 960480 noted that claimant understood when he took the new job that its hours would be as many or more than the 15 hours his doctor allowed him to work; the job actually provided fewer hours, but that claimant did not apply anywhere else for a job that provided hours up to the amount his medical release allowed. The finding of the hearing officer that good faith had been shown was reversed and a new decision rendered that good faith was not shown when that claimant did not attempt to find work commensurate with his ability.

While no case dealt with a claimant's belief concerning part-time restrictions imposed, Texas Workers' Compensation Commission Appeal No. 961202, decided August 5, 1996, said that an inability to work at all must be based on medical evidence, not a claimant's insistence, although sincere, that she could do no work.

Although the hearing officer is the sole judge of the weight and credibility of the evidence (see Section 410.165), the hearing officer made no finding of fact that claimant was limited to a certain number of hours of work. She did find that claimant limited her job search to part-time jobs. While no finding of fact was made that claimant did, or did not, continue to seek work while working a limited number of hours for 17 days, the finding of fact that claimant limited her job search to part-time jobs obviates a need for such a finding. The finding of fact that claimant "made a good faith effort to obtain employment commensurate with her ability to work" is against the great weight and preponderance of the evidence since there was no medical limitation in regard to hours worked and claimant was found to have limited her search to part-time work.

The decision is reversed and a new decision is rendered that claimant is not entitled to SIBS for the eighth quarter.

Joe Sebesta
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge